

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/11-01/15
Date: 8 December 2016

TRIAL CHAMBER I

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

**Decision on 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*"**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Eric MacDonald

Counsel for Mr Laurent Gbagbo

Emmanuel Altit
Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Geert-Jan Alexander Knoops
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Legal Representatives of Victims

Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I (“Chamber”) of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 82(1)(d) of the Rome Statute (“Statute”), Rule 155 of the Rules of Procedure and Evidence (“Rules”), and Regulation 65 of the Regulations of the Court issues this decision on 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*” (“Request”).¹

1. On 22 November 2016, the Chamber, orally, issued a decision according protective and special measures, *inter alia*, in respect of Witnesses P-0117, P-0350 and P-0513. In the relevant part, the oral decision reads as follows:

The Chamber, having 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 takes the view that it 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 might still be filed today.

This also in light of the fact that several of these witnesses share similar profiles, 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.

[...]

As to Witness 117, 513, and 350, the Chamber grants the request, the requested in-court protective measures. The Chamber considers that due to the traumatic events they suffered, they are vulnerable and may indeed be exposed to retraumatisations if they were to testify publicly, also in light of their family and residence circumstances.

As stated by the VWU, in respect of Witness 513, the risk both for their security and their dignity, privacy, physical and psychological well-being might effectively be at least mitigated by the adoption of the in-court protective measures by preventing their public exposure as a witness.

Bearing in mind the need to prevent that the purpose of these measures be defeated, even if inadvertently, the difficulty to determine in advance whether it is necessary or appropriate to call a private or closed session and the desirability to avoid disruptive litigation as to such need or appropriateness arises, the Chamber finds it preferable that the entire testimony be heard in closed session and that, as appropriate, decisions as to the reclassification of part of the testimony be deferred to a later stage.

[...]

¹ ICC-02/11-01/15-760-Conf.

Finally, the Chamber is satisfied that Witness 350's family circumstances would make it disruptive for her and her young family to travel to The Hague. Therefore, the Prosecutor's request that Witness 350 testify via video link from Abidjan is granted.

As already stated, video link testimony can be equated to viva voce testimony and can be instrumental in preserving the witness's safety, physical and psychological well-being.²

2. On 28 November 2016, the Defence of Laurent Gbagbo filed the Request, seeking leave to appeal the oral decision of 22 November 2016 with respect to the following to issues:
 - (i) whether the Chamber erred in law in deciding before the expiration of the time limit for the Defence to respond to the request of the Prosecutor to accord to Witness P-0350 protective measures and to allow said witness to testify via videolink ("First Issue"); and
 - (ii) whether the Chamber erred in law in according protective measures to witnesses considered vulnerable without explaining in what the witnesses were considered vulnerable and which creates an automatic right to the benefit of witnesses considered by a party to be vulnerable to obtain protective measures, which is contrary to the Rome Statute ("Second Issue").³
3. The Prosecutor responded to the Request on 1 December 2016, objecting to the granting of leave to appeal.⁴ The Defence of Charles Blé Goudé responded on the same day, supporting the Request as concerns the First Issue and not making any submissions related to the Second Issue.⁵ The common legal representative of the participating victims responded on 2 December 2016, objecting to the Request.⁶
4. The provision applicable for the resolution of the Request is Article 82(1)(d) of the Statute. In brief, an interlocutory appeal can be allowed in respect of issues arising

² ICC-02/11-01/15-T-103-Red-ENG, page 78, line 18, to page 19, line 3; page 80, lines 11-24; page 82, lines 2-6.

³ Request, pp. 4-5.

⁴ ICC-02/11-01/15-762-Conf.

⁵ ICC-02/11-01/15-763-Conf.

⁶ ICC-02/11-01/15-764-Conf.

out of the impugned decision, meaning issues essential for the disposition of the matter. In addition, appeal can only be certified in respect of issues which would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Chamber, immediate appellate resolution may materially advance the proceedings.

First Issue

5. It is true and indeed acknowledged by the Chamber on the record that the oral decision according protective measures to Witness P-0350 and granting the Prosecutor's request that the witness testify via videolink was issued while the time limit for the Defence response to the Prosecutor's request was still pending. This was a conscious decision of the Chamber, for which reasoning was given.⁷ In addition, the Chamber held that the decision was "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 the decision".⁸ The Chamber explicitly left open the possibility for the Defence to give its input, and did not subject the Defence to any stringent requirements of reconsideration. This means that the allegation of the Defence that it did not have an opportunity to be heard finds no basis in the decision. The question whether the Chamber erred in law in not allowing the Defence to be heard does not arise from the decision for the simple reason that the Defence had a real opportunity to make submissions.
6. Moreover, without the Defence having availed itself of the opportunity to bring to the attention of the Chamber specific information and requested on that basis a review of the relevant decision with respect to Witness P-0350, the Request is with respect to the First Issue abstract and speculative.

⁷ ICC-02/11-01/15-T-103-Red-ENG, page 78, line 18, to page 79, line 3.

⁸ *Id.*

7. In conclusion on this point, the Chamber holds that leave to appeal with respect to the First Issue must not be granted.

Second Issue

8. In essence, the Defence of Laurent Gbagbo proposes to test by way of interlocutory appeal the lawfulness of the Chamber: (i) having found without reasoning that Witnesses P-0117, P-0350 and P-0513 were vulnerable; and (ii) having put in place an automatism by way of which any witness deemed vulnerable by a party would obtain protective measures.
9. However, a plain reading of the transcript of the hearing of 22 November 2016 does not support the interpretation given by the Defence to the relevant decision of the Chamber.
10. On the first point, the Chamber stated that it “considers that due to the traumatic events [Witnesses P-0117, P-0350 and P-0513] suffered, they are vulnerable and may indeed be exposed to retraumatisations if they were to testify publicly, also in light of their family and residence circumstances”.⁹ The Chamber notes that the decision was issued in open session, in line with the principle of publicity, and that the participants were in possession of the witnesses’ prior written statements and could therefore understand what was referred to by the Chamber as “traumatic events”. It is therefore impossible to state that the decision was as such unreasoned and unwarranted to proceed to question before the Appeals Chamber the lawfulness of such lack of reasoning.
11. Moreover, the Chamber notes that the Defence does not appear to seek to argue on appeal that the witnesses are not vulnerable and that they should have testified without protective measures. In these circumstances, the issue raised by the Defence,

⁹ ICC-02/11-01/15-T-103-Red-ENG, page 80, lines 12-14.

presented as an issue of proper procedure, is in fact an abstract rehearsal of otherwise uncontestable principles, without link to the impugned decision.

12. As concerns the argument that by finding certain witnesses vulnerable the Chamber prejudged the veracity of their testimonies, the Chamber notes that the matter was considered for the specific purpose of deciding whether protective or other measures were appropriate, under Article 68 of the Statute and Rules 87 and 88 of the Rules. There is no basis to state that by making, in advance of the testimony of the witnesses, the finding that the three witnesses were vulnerable the Chamber precluded or anyhow affected its ultimate determination of the evidence given by the witnesses at the trial (and, in the case of Witness P-0117, also in the statement introduced pursuant to Rule 68(3) of the Rules). Moreover, the Chamber notes that the effect of the Defence argument is to deprive Article 68 of the Statute, in particular paragraph 2, of its object and purpose. Indeed, the Chamber is only able to properly protect a witness who is “a victim of sexual violence or a child” if it has the power to identify them as such on the basis of the available information. Insofar as the Defence contests Article 68 of the Statute itself, no interlocutory appeal is sensible.
13. On the second point, *i.e.* the allegation that the impugned decision creates an automatism with respect to witnesses which may testify in the future, the Chamber notes that the impugned decision concerned only Witnesses P-0117, P-0350 and P-0513 and did not contain any language that can reasonably be interpreted to put in place any kind of directions for the future. The Defence argument is therefore without basis. The need for protective measures has been and shall continue to be assessed by the Chamber taking into account the particular circumstances of individual witnesses.
14. It follows from the above that the Second Issue does not arise out of the oral decision of 22 November 2016 and that leave to appeal must be rejected.

Level of classification of the submissions

15. The oral decision of 22 November 2016, which is impugned by way of the Request, was issued in open session. Nevertheless, the Defence of Laurent Gbagbo has not filed a public redacted version of the Request, and the responses of the other participants have equally been filed only confidentially. In the interest of the publicity of the proceedings, the Chamber considers it appropriate to set a time limit for the parties and participants to either file public redacted versions of their submissions, or inform the Chamber that they can be reclassified as “public”.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

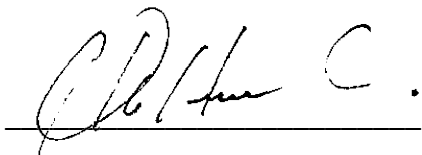
REJECTS the Request; and

ORDERS the parties and participants to file public redacted versions of their submissions, or inform the Chamber that they can be reclassified as “public”, by 13 December 2016.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 8 December 2016

At The Hague, The Netherlands