

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 22 May 2017

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 10 May 2017 oral decision refusing to submit the identity card of Witness P-
0109**

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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I. Introduction

1. The Defence's Application seeking leave to appeal¹ the Decision² refusing its request for Witness P-0109's identity card to be produced and submitted onto the case record³ should be dismissed because none of the three Issues meet the criteria for leave to appeal under article 82(1)(d) of the Rome Statute.

2. The First Issue⁴ and the Second Issue⁵ do not amount to an "issue" within the meaning of article 82(1)(d). The Third Issue⁶ is nothing more than a disagreement with the Decision. In any event, none of the three Issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In addition, their immediate resolution by the Appeals Chamber will not materially advance the proceedings.

II. Classification

3. 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, and because the Decision was delivered in private session.

III. Submissions

i. The First Issue does not amount to an "issue" and does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

4. The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one."⁷

¹ ICC-02/11-01/15-923-Conf ("Application").

² ICC-02/11-01/15-T-155-CONF-ENG, p.26, l. 10-12 and 16-18; and p. 27, l. 3 and 5-6 ("Decision").

³ ICC-02/11-01/15-T-155-CONF-ENG, p. 26, l. 3-5 and 19-25 ("Request").

⁴ Application, p. 5, Heading 1.1, paras. 16-18.

⁵ Application, p. 6, Heading 1.2, paras. 19-25.

⁶ Application, p. 7, Heading 1.3, paras. 26-30.

⁷ ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-367, para. 22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. *See also*, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of

5. The Defence has failed to identify any subject the resolution of which is essential for judicial determination of matters in the present case. Indeed, there is no issue in dispute. The Prosecution does not contest the proposition put by the Defence in examination of Witness P-0109,⁸ and with which the Witness agreed,⁹ that the Witness's identity card does not expressly state his ethnicity. No representation was ever made by the Prosecution – through questioning of the Witness or otherwise – that the Witness's identity card stated his ethnicity.

6. Even assuming, *arguendo*, that the First Issue amounts to an “issue” that arises from the Decision, the Defence has failed to meet the other requirements under article 82(1)(d). The Defence has failed to articulate how the production of documentary corroboration for the Witness's account of his identity card has a bearing on its rights at trial or the other criteria under article 82(1)(d). Because the Defence does not contest the Witness's account and the Prosecution does not contest the Defence's proposition that the identity card does not expressly state the Witness' ethnicity, the admission of the card does not have any impact on the fair and expeditious conduct of the proceedings or the outcome of the trial. For the same reason, immediate resolution of the First Issue by the Appeals Chamber will not materially advance the proceedings.

ii. The Second Issue does not amount to an “issue” and does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

7. The Defence has similarly failed to identify any subject requiring resolution. Apart from submissions made as part of the Request,¹⁰ at no point did the Defence put Witness P-0109's identity in issue. The Witness identified himself at the

Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

⁸ ICC-02/11-01/15-T-155-CONF-ENG, p. 25, l. 25.

⁹ ICC-02/11-01/15-T-155-CONF-ENG, p. 26, l. 1.

¹⁰ ICC-02/11-01/15-T-155-CONF-ENG, p. 26, l. 21-25: “... our request was based on the reasons set out by Ms Naouri and because we have absolutely nothing relating to the witness's identity. And it is quite difficult for us to believe that the OTP investigators did not even trouble themselves to ask for identity. And we have absolutely nothing, nothing by way of evidence as to the actual identity of this witness.”

beginning of his testimony by providing his name, date and place of birth, nationality, ethnicity, faith and occupation.¹¹ The Defence did not challenge this evidence in its examination of the Witness.

8. Even assuming, *arguendo*, that the Second Issue amounts to an “issue” that arises from the Decision, the Defence has failed to meet the other requirements under article 82(1)(d). The Defence has failed to articulate how deprivation of the Witness’s identity card hindered its ability to investigate. In addition to the Witness’s identification in Court, the same details of the Witness’s identity were also disclosed to the Defence as part of the Witness’s statement, as early as 7 May 2012.¹² Because the Second Issue has no impact whatsoever on the Defence’s investigative rights, it does not materially affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Immediate resolution of the Second Issue will also not materially advance the proceedings.

iii. The Third Issue constitutes a mere disagreement with the Decision and does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

9. The Defence wrongly argues that the Chamber did not give reasons for the Decision. In support of this argument, the Application selectively cites a portion of the Decision in which the Presiding Judge states his refusal to submit the identity card onto the case record.¹³ This portion followed initial submissions by Defence Counsel that the identity card should be submitted “... so that it is quite clear that his ethnicity is not shown on the identity...”.¹⁴ However, reasons are given in the portion of the transcript directly preceding the portion cited in the Application, being: “I

¹¹ ICC-02/11-01/15-T-154-CONF-ENG, p. 3, l. 9-23.

¹² CIV-OTP-0020-0335, first disclosed in Pre-confirmation INCRIM package 9, 7 May 2012 (*Gbagbo*).

¹³ Application, para. 27, citing the French equivalent of ICC-02/11-01/15-T-155-CONF-ENG, p. 26, l. 11-17, from “No, we will not do this.”

¹⁴ ICC-02/11-01/15-T-155-CONF-ENG, p. 26, l. 4-5.

don't think it's necessary at all. I mean, why should we have his ID card on the record of the case?"¹⁵

10. Following further submissions by Defence Counsel about the need to verify the Witness's identity,¹⁶ the Presiding Judge provided as his reasoning: "No. This is not an issue. The witness has given his identity to the Court, and that's it."¹⁷

11. In response to both arguments, the Presiding Judge correctly rejected the Request for the stated reason that the matters raised were not necessary to resolve. There can therefore be no effect upon the fair and expeditious conduct of the proceedings or the outcome of the trial. In addition, immediate resolution of this issue will not materially advance the proceedings.

IV. Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 22nd day of May 2017

At The Hague, The Netherlands

¹⁵ ICC-02/11-01/15-T-155-CONF-ENG, p. 26, l. 10-11.

¹⁶ ICC-02/11-01/15-T-155-CONF-ENG, p. 26, l. 21-25.

¹⁷ ICC-02/11-01/15-T-155-CONF-ENG, p. 27, l. 5-6.