

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **30 July 2015**

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Prosecution response to Laurent Gbagbo's application for leave to appeal "the Second Decision on objections concerning access to confidential material on the case record"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'Dry

Legal Representatives of Victims

Ms Paolina Massidda

States Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. The Defence for Laurent Gbagbo's request for leave to appeal the Single Judge's "Second Decision on objections concerning access to confidential material on the case record",¹ should be dismissed. The Application fails to meet the article 82(1)(d) test for leave to appeal. Far from demonstrating that the alleged issue² is appealable, the Application misreads the Decision and disagrees with it. Several aspects of the Issue do not even arise from this Decision. Moreover, the Application fails to show any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Nor is the Appeals Chamber's intervention necessary.

2. The Application is the Defence's third attempt in the past six months to re-litigate the same issue of the Legal Representatives of Victims'³ access to the confidential material on the case record through an article 82(1)d application.⁴ It is no more than an avenue to express the Defence's continuing disagreement with the Single Judge's earlier decisions granting such access.

Submissions

3. The Issue—whether the Single Judge failed to provide a reasoned opinion⁵—is not appealable.⁶ The Issue merely disagrees with the Single Judge's findings in the Decision and in prior decisions. Further, and to the extent that certain aspects of the Issue challenge matters previously decided, they are outside the scope of the Decision and do not arise from it.

¹ ICC-02/11-01/15-163 ("Application"); ICC-02/11-01/15-150 ("Decision").

² Here, "Issue".

³ LRV.

⁴ ICC-02/11-01/11-809 ("Decision of 11 March 2015") rejecting the Defence's first application for leave to appeal; ICC-02/11-01/15-132 ("Decision of 10 July 2015") rejecting the Defence's second application for leave to appeal.

⁵ Application, paras.29-41.

⁶ See 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 (Partly Dissenting Opinion of 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." See also ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.25; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

4. First, the Application merely disagrees with the Single Judge's reasoning. Although the Defence argues that the Single Judge failed to consider any of its arguments,⁷ it devotes several paragraphs of its Application⁸ to contesting the Single Judge's findings on those same arguments.⁹ This is contradictory. Moreover, and as the Appeals Chamber has stated, a reasoned decision does not necessarily require a Chamber to recite and summarise each and every factor before it; rather a Chamber must identify the facts relevant to its conclusion. Although a Chamber must sufficiently clarify the basis of its decisions, the extent of the reasoning will depend on the circumstances of each case.¹⁰ The Decision is properly reasoned in keeping with this appellate standard: the Single Judge's reasons for *inter alia* transferring all Annex C documents to the confidential joint case record are unambiguous. The Single Judge also considered the Defence submissions.¹¹ Indeed, notwithstanding the further opportunity provided to it to object to access to Annex C documents,¹² the Defence submissions remained unpersuasive. Therefore, the Application fails to show why the Single Judge's detailed reasoning, also noting several of the Defence submissions, would imply that "*il apparaît que le Juge unique n'explique à aucun moment pourquoi il ne considère pas les arguments de la Défense[...]*."¹³

5. Further, the Defence submits that the Single Judge, in dismissing its arguments, did not give a "*réelle explication*".¹⁴ To the contrary, the Decision provided a clear explanation. The Single Judge noted that the Defence's submissions were not properly substantiated.¹⁵ As the Application concedes,¹⁶ the Single Judge found that

⁷ Application, para.31.

⁸ See *e.g.* Application, paras.32-38.

⁹ Application, paras.29-41.

¹⁰ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

¹¹ Decision, paras.12-19. Although the Single Judge was not obliged to list each and every Defence submission, the Decision notes many of them. See *e.g.* Decision, paras.11,13,14,15,16, 17,18.

¹² ICC-02/11-01/15-101 ("Decision of 24 June 2015"), para.18, where the Single Judge noted the "contradictory submissions" made by the Gbagbo Defence, and gave them a further opportunity to object to access to documents identified in Annex C.

¹³ Application, para.31.

¹⁴ Application, paras.33-36.

¹⁵ Decision, para.14.

¹⁶ Application, para.34.

the Defence had failed “to demonstrate the existence of any objectively justifiable risk to any individual person or to the conduct of its investigations.” The relevant Annex C documents did not include identifying information of the relevant persons. Moreover, the Single Judge further found that the Defence’s submissions on the limitations on access mandated by certain sources “[did] not specify any details which would allow the Single Judge to assess them.”¹⁷ The Single Judge also found that merely arguing that a request should be “confidential, *ex parte*” because it was previously resolved or concerned a person whose statement was never filed on the case record was insufficient.¹⁸ The Defence should have adequately supported its previous submissions. An application for leave to appeal is not the appropriate channel to remedy past failures.

6. Neither does the Defence explain what further definition of the term “objectively justifiable risk” was needed in this context.¹⁹ Equally, the Application speculates on a “*rupture de l’équilibre entre parties et participants*”,²⁰ but fails to show its relevance to the Issue.

7. Second, the Application misstates the scope of the Decision. As with previous Defence submissions, it fails to acknowledge that the question of the LRV’s general right of access to the case record (including confidential filings) has been litigated and decided. These aspects of the Issue do not arise from this Decision. Indeed—as the Single Judge has previously underscored while rejecting two similar requests for leave to appeal²¹— that matter was decided on 4 November 2014.²² An application for

¹⁷ Decision, para.14.

¹⁸ Decision, para.14.

¹⁹ Application, para.36.

²⁰ Application, para.35.

²¹ Decision of 11 March 2015, para.22, stating “[a]s to the Second Issue, it does not arise from the Decision as the decision granting the LRV access to the confidential record of the case derives from the oral ruling made during the first status conference, an order repeated in the Order of 20 November 2014.”; Decision of 10 July 2015, para.4, noting “[t]he Chamber and Single Judge have repeatedly affirmed—as provided in the Court’s regulatory framework, as initially ordered at the first status conferences held in the *Gbagbo* and *Blé Goudé* cases and as most recently recalled in the Impugned Decision—that all parties and participants have a right to access the entire case record (including evidentiary material), unless ‘confidential, *ex parte* classification’ is justified. Thus, insofar as the Issue challenges this general right of access, it does not arise from the Impugned Decision.”

leave to appeal brought eight months later cannot re-open the issue. To the extent therefore that the Application now challenges the Chamber's earlier findings on "the general practice of other Chambers relating to notification", "the status of the LRV [...] and right of access to 'confidential' material", and "notification to the LRV[...]",²³ it does not persuade.

8. Moreover, the Application does not acknowledge that access to Annex C documents is confidential, and limited to the Parties and participants.²⁴ In these circumstances, the Application fails to sufficiently explain why the alleged "*risques sécuritaires*" or the Defence's complaint of "*un travail considérable*" would render the Issue appealable.²⁵ Further, because these arguments wrongly assume that the Decision—and not prior decisions—granted the LRV access to the confidential case record,²⁶ they must fail.

9. Therefore, the Application simply fails to show that the Issue is appealable. As the Single Judge has found, when the Issue "challenges findings reached in other decisions other than the Impugned Decision and is founded on a misrepresentation", it cannot satisfy the article 82(1)(d) criteria. In these circumstances, the remaining leave to appeal criteria need not be addressed.²⁷

²² ICC-02/11-01/11-T-25-Red-ENG ("Transcript of 4 November 2014"), p.4, ln.22-p.5, ln.7. The Trial Chamber issued an equivalent order in the *Blé Goudé* case: ICC-02/11-02/11-T-9-Red-ENG ("Transcript of 13 February 2015"), p.6, lns.6-13; ICC-02/11-01/11-724("Order of 20 November 2014"), para.4; ICC-02/11-01/11-749 ("Decision of 19 January 2015"), paras.1,3, 15; Decision of 11 March 2015, paras.18-19; ICC-02/11-01/15-30 ("Decision of 13 April 2015"), para.8; Decision of 24 June 2015, para.13; Decision of 10 July 2015, paras.1,4; Decision, para.12. *See also* ICC-02/11-01/15-119 ("Prosecution's response to Laurent Gbagbo's application for leave to appeal the Decision on objections concerning access to confidential material on the case record"), paras.2-6.

²³ Decision, para.11; Application, para.32.

²⁴ Decision, para.16, Disposition. The Decision of 24 June 2015 (Disposition) also directed the Registry to transfer all other "confidential" documents on the *Gbagbo and Blé Goudé* case records (other than those identified in Annexes A, B and C) to the *Gbagbo and Blé Goudé* case record as "confidential". The documents in Annexes A and B are "confidential, *ex parte*" (only those Parties and participants that currently have access).

²⁵ Application, paras.37-38.

²⁶ Application, paras.37-40.

²⁷ Decision of 10 July 2015, para.5; ICC-02/11-01/15-117, para.26. *See also* ICC-01/05-01/08-3273, para.8, stating that the article 82(1)(d) criteria is cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

10. Notwithstanding, the Application equally fails to show any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Nor will the Appeals Chamber's immediate resolution of the matter materially advance the proceedings. The Appeals Chamber's intervention is not needed to correct the Application's misunderstanding of the Decision. Significantly, the Defence's arguments misunderstand the Decision's scope and continue to contest the LRV's general right to access the confidential record (including evidentiary material).²⁸ Moreover, as the Decision concerned the transfer of Annex C documents to the joint case record and that too on a confidential basis, the Application's claims of any adverse impact on its investigations or witnesses continue to be unsupported and speculative.²⁹ The LRV, like the Parties, remains bound by the Code of Professional Conduct for counsel *vis-à-vis* confidential information.³⁰

11. Further, the Defence has had two opportunities to justify a more restricted classification for Annex C documents, but the Single Judge found—on both occasions—that it had failed to support its requests. The Defence's failure cannot impact the fairness and expedition in any manner. The same applies to the purported "*refus systématique d'une Chambre de première instance d'autoriser une partie à interjeter appel*."³¹ It remains the Defence's responsibility to meet the statutory criteria for leave to appeal. A repeated failure to do so cannot seriously be attributed to the Chamber. The Defence's failure to meet the requirements of article 82 (1)(d), yet again, can only lead to the dismissal of this Application as well.

²⁸ Application, paras.42-52.

²⁹ Application, paras.42-43,46-47,51-52.

³⁰ Code of Professional Conduct for counsel, articles 1,8.

³¹ *Contra* Application, para.49.

Conclusion

12. As shown above, the Issue is not appealable and fails to meet the article 82(1)(d) test for leave to appeal. The Application should, therefore, be dismissed.



Fatou Bensouda, Prosecutor

Dated this 30th day of July 2015

At The Hague, The Netherlands