



Original: English

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

Date: 22 April 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
v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Prosecution Response to Defence « *Demande de clarification concernant ce que recouvre la notion de 'pièce versée au dossier'* » (ICC-02/11-01/15-485)

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
Mr James Stewart
Mr Eric Macdonald

Counsel for the Defence

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 Prosecution of Public Counsel for
Victims**

Ms Paolina Massidda

**The Prosecution 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**

Other

Introduction

1. The Defence requests (“the Request”) that the Chamber clarify what is meant by the expression an “item is submitted into the record of the case” (*“élément versé au dossier”*),¹ submitting that a distinction should be drawn between, on the one hand, an “item submitted into the record” and, on the other, an “item of evidence” (*“élément de preuve”*).² The Request argues that an “item submitted into evidence” should be interpreted restrictively and that the Chamber should be prohibited from relying on portions of an “item submitted into the record of the case” that were not expressly intended to be used as an “item of evidence” by the Parties since those portions of the item of evidence were not expressly discussed during the proceedings.³

2. The Request should be rejected. As detailed below, the Chamber has ruled and re-emphasized that once an item is submitted by a Party, that item is considered to be before the Chamber in its entirety. Consequently, no clarification - in particular, by the artificial creation of a distinction between “an item submitted into the record of the case” and “an item of evidence” - is necessary.

Prosecution’s submissions

On the distinction between an “item submitted into evidence” and an “item submitted into the record of the case”

3. The Chamber has used the term “item of evidence submitted throughout the proceedings” unequivocally. In its Decision on the submission and admission of evidence⁴ and the Directions on the conduct of the proceedings⁵ (“the Conduct

¹ ICC-02/11-01/15-485, para. 9.

² ICC-02/11-01/15-485, para. 8.

³ ICC-02/11-01/15-485, para. 8, (*“la partie d’un document non expressement visée comme élément de preuve”*)

⁴ ICC-02/11-01/15-405.

Directions”), the Chamber adopted general rules governing the submission and evaluation of evidence, deciding that it will defer its assessment of the admissibility, relevance and probative value of evidence to the conclusion of the case.⁶ The Chamber provided further guidance and clarifications in subsequent written and oral decisions, re-emphasizing that once an item is submitted by a Party, that item is considered to be before the Chamber in its entirety.⁷

4. Furthermore, the Chamber ruled that “deferring the Chamber's determination of all of the issues concerning a given piece of evidence at the time of the judgment will prevent multiple determinations on one and the same item of evidence at different stages of the trial, including as a result of the need to resolve pending litigation.”⁸ The Chamber also noted that “[i]t is not indeed exceptional that the relevance of a particular item only emerges in light of material submitted at a later stage.”⁹ The Chamber emphasized that the above general principle of admission of evidence is “without prejudice to admissibility objections being considered by the Chamber upon submission of the relevant item”.¹⁰
5. The Conduct Directions, in combination with the subsequent written and oral decisions issued by the Chamber, are clear; they provide the necessary guidance and safeguards with respect to any type or category of evidence, and adequately address the issues raised in the Request.¹¹ Drawing an artificial distinction between the terms “item submitted into evidence” and “item submitted into the record of the case”, and the proposal to afford them different legal consequences - as contended for by the Defence - is unwarranted.

⁵ ICC-02/11-01/15-205. However, that Chamber announced that it will issue “some amendments to the directions previously given by the Chamber in filing number 205.” See ICC-02/11-01/15-T-13-Red-ENG, page 1, lines 17-21.

⁶ ICC-02/11-01/15-405, para. 12

⁷ ICC-02/11-01/15-467, para. 10; ICC-02/11-01/15-T-31-ENG, page 4, lines 13-21; ICC-02/11-01/15-T-33-ENG, page 5, lines 2-13.

⁸ ICC-02/11-01/15-405, para. 14.

⁹ ICC-02/11-01/15-405, para. 14.

¹⁰ ICC-02/11-01/15-405, para. 17.

¹¹ ICC-02/11-01/15-485, paras. 13, 15, 17-20.

6. The Prosecution addresses, in the paragraphs below, some of the issues raised in the Request, related to the use of (i) prior statements of a witness who testifies viva voce before the Court, and (ii) other types of documents (i.e., written documents, audio/video material).

(i) Prior recorded testimony

7. The current procedure adopted by the Chamber regarding the use of prior recorded testimonies is clear and fully respects the principle of orality. Only those limited portions of the statement that were used with the witness in court will be considered as submitted into the record of the case.¹² The Chamber has ruled that “[...] what is submitted is what is on the record. That's why I urge parties to make quotations out of that [statement] so only that part is submitted”, and further added that “obviously we consider submitted only that part [of the statement] which is controversial which wasn't (*sic*) somehow discussed, and not the rest if it's not discussed.”¹³

(ii) Other categories of documents, including audio/video material

8. The Request seeks clarification with regards to the use of excerpts taken from a written document or a larger audio/video file.¹⁴ The Request argues that there is a difference between an excerpt used by a Party (an “item of evidence”) and the document from which it is extracted, giving the example of an excerpt from a media article versus the rest of that article. The Defence submits that the Chamber can only rely upon an excerpt which has been used by a Party. In this scenario, it is argued, even if the entirety of the document is considered to be submitted, the Chamber should only be permitted to rely on the excerpt presented by the Party

¹² ICC-02/11-01/15-485, para. 20.

¹³ ICC-02/11-01/15-T-22-ENG WT, p. 32, l. 22 to p. 33, l. 15.

¹⁴ ICC-02/11-01/15-485, paras. 13-15.

and not the entirety of the document (which the Chamber could only consider to put the excerpt used into a broader context).¹⁵

9. The Prosecution disagrees. In the above example, the entire article should be considered as submitted into evidence, so that the Chamber has the discretionary power to rely on the entirety of the article when assessing the reliability, probative value or weight of the item of evidence. The Prosecution recalls the Chamber's ruling that "[...] [the parties] choose what to submit, but then the document is submitted as such and we obviously we are not limited, the Chamber [...] is not limited to show a piece which the parties wants (*sic*) us to see and not the rest."¹⁶

10. The Prosecution submits that when Parties intend to rely on extracts taken from a larger document (for example, a news bulletin, a newspaper or a lengthy documentary), a preliminary decision must be made as to what constitutes a fair and reasonably complete extract from an item. In some cases, that extract may only be a portion of a document (for example, an article from a newspaper). In other cases, several extracts may have to be considered together in order to obtain a complete "picture" (for example, in the case of a document containing a chain of emails). In other cases, it may not be reasonable to create an excerpt without compromising the ability of the Chamber to fully exercise its truth-seeking functions.

11. The Chamber recognized that it had the power to determine, on a case-by-case basis, what constitutes a fair and reasonably complete excerpt of an item. In its Fourth decision on matters related to disclosure and amendments to the List of Evidence,¹⁷ the Chamber stated that "once an item is submitted by a party, that item is to be considered as being before the Chamber in its entirety, irrespective of

¹⁵ ICC-02/11-01/15-485, para. 13.

¹⁶ ICC-02/11-01/15-T-33-ENG ET, p. 56, l. 7-11.

¹⁷ ICC-02/11-01/15-467

the fact that only limited portions of the item might have been used or referred to in the courtroom.”¹⁸ It accepted as submitted into the record the entirety of a recorded interview of Mr Gbagbo, despite the fact that only a portion (or excerpt) was presented in Court.¹⁹

12. In the specific example of a news bulletin containing several news reports on unrelated events,²⁰ or a news article from a newspaper,²¹ the Prosecution agrees that only the specific news report within the news bulletin(s) or individual article(s) relied upon by the Parties should be considered as submitted. In such a scenario it is incumbent upon the Parties to identify the portions of the item of evidence which is relied upon, and explain if and how additional excerpts would place the evidence in context.

13. The Conduct Directions set out in clear terms that in the case of material intended to be used during the examination of a witness, the “calling party shall also indicate any portions or passages intended to be used within this material”.²² The Chamber further stated that “[i]t is for the submitting party to demonstrate the admissibility of the evidence and proffer reasons why it is relevant to and probative of the facts in issue.”²³ It is therefore incumbent upon the Party submitting an item to indicate which part of a document (or a document collection) it intends to submit into evidence.

¹⁸ ICC-02/11-01/15-467, para. 10.

¹⁹ ICC-02/11-01/15-467, paras. 4, 10.

²⁰ ICC-02/11-01/15-485, para. 18.

²¹ ICC-02/11-01/15-485, para. 19.

²² ICC-02/11-01/15-205, para. 42.

²³ ICC-02/11-01/15-205, para. 51.

*On the extent to which the Chamber can rely on an item submitted into the record of the case when globally evaluating the evidence, at the time of drafting the final Judgment*²⁴

14. The Prosecution submits that the instructions and the rationale of the Chamber on this issue are unambiguous and do not require further clarifications.

15. Rule 64 provides that issues relating to the admissibility of evidence “must be raised at the time when the evidence is submitted”. Moreover, the Chamber has put the Parties on notice that the submissions in relation to an item of evidence, including objections thereto, will be recorded in the metadata of that item of evidence.²⁵ This approach adequately safeguards the rights of the Accused,²⁶ and it is consistent with the practice adopted by other Chambers of this Court.²⁷

16. In its Decision on the submission and admission of evidence, the Chamber set out in detail the principles and the criteria it will apply when assessing the admissibility, reliability and probative value of each item of evidence submitted during the trial.²⁸ In deferring its assessment of the evidence until the moment of its deliberation,²⁹ the Chamber reasoned that it is only “once the submission of the evidence will have been completed that the Chamber will be in the best position to meaningfully assess each item of evidence submitted throughout the course of the proceedings.”³⁰

²⁴ ICC-02/11-01/15-485, para. 9.

²⁵ ICC-02/11-01/15-405, p. 10.

²⁶ The Trial Chamber in *Katanga* stipulated that: “Afin de déterminer si une allégation du Procureur a été prouvée, la Chambre n’a pas limité son analyse aux preuves qu’ont expressément visées les parties et les participants dans leurs plaidoiries. Elle a examiné, au cas par cas, si elle pouvait se fonder sur des éléments de preuve figurant au dossier et non expressément visés pour établir une allégation factuelle en tenant compte des prescriptions énoncées aux articles 64-2 et 74-2 du Statut. Elle s’est, en particulier, assurée que la Défense avait eu la possibilité de s’exprimer sur les éléments de preuve en question.” (*Katanga Judgment*, ICC-01/04-02/12-3, para. 47). Thus, the requirement is that the Defence has had the chance to express its position in relation to the item of evidence in question.

²⁷ See the *Katanga Judgment*, ICC-01/04-02/12-3, paras. 47, 58-59.

²⁸ See ICC-02/11-01/15-405, paras. 12-19.

²⁹ ICC-02/11-01/15-405, para. 12.

³⁰ ICC-02/11-01/15-405, para. 13.

17. The Chamber also stated that this approach would allow the exercise of its discretion to request the submission of all evidence it considers necessary for the determination of the truth.³¹ This reminder is also relevant to the resolution of the issue discussed above at paragraph 6, of whether the Chamber can rely on excerpts or portions of an item of evidence submitted into the record that have not been read out or played in their entirety in Court.

On the use of excerpts / portions of documents taken out of context

18. The Prosecution takes this opportunity to note with concern the Defence's comment that the Chamber's interpretation of what constitutes an "*élément de preuve versé au dossier*" will determine the selection of items the Parties will submit into evidence.³² The Defence has previously alluded to the fact that, should the Chamber adopt a broad interpretation of what is considered "submitted", it will consider creating excerpts of documents (notably, video excerpts) that would contain only those portions that are not incriminating the Accused or that help advance their case.³³

19. The Prosecution submits that an item of evidence (notably news reports, speeches of a person) cannot be edited to "fit" one's theory of the case. This would be wholly misleading and contrary to any Code of Conduct of Counsels, starting with the basic duty of candor towards the Chamber. Surely, this cannot be the Defence's position.

20. Therefore, when a Party makes use of a portion or excerpt of a document in such a way that it may lead to a misunderstanding or distortion of that item, then the remainder of the item should be considered *ipso facto* as submitted. The Chamber

³¹ ICC-02/11-01/15-405, para. 1. This approach is consistent with the terms of article 69(2) and (3), which grants the Chamber the discretion to admit all evidence it deems necessary for the determination of the truth.

³² ICC-02/11-01/15-485, paras. 10-11.

³³ See ICC-02/11-01/15-T-32-FRA, p. 68 lns. 1-3 : "[d]ans le cas, ça forcera les parties à (sic) tirer des extraits, à (sic) faire des screen shots, ou vous voyez?".

should not be prohibited from relying on the full item of evidence in order to exercise its truth-seeking functions.

On the admission by the Parties

21. The Defence also raises in its Request, once again, the legal effect of an admission made by the Parties. It argues that an “admission” as to an item of evidence does not preclude a Party making an admission from raising, at a later stage in the proceedings, an objection as to the credibility and admissibility of that same item of evidence.³⁴

22. This same issue was already raised and addressed during the testimony of Witness P-625. The Defence stated, in the context of an interview of Mr Gbagbo to the television channel Canal +, that it “understands the concept of admission as the admission that there was indeed an interview [...]. This is the limit of the admission of the exhibit and this is how the Defence understands the idea. It is not an admission to the veracity of the content as the Prosecution seems to be indicating.”³⁵

23. In that context, the Chamber ruled that:

“I don't know how often this has to be said, the Chamber considers that once a piece of evidence is submitted somehow, the parties agreed to -- or, it is submitted, or the parties agreed to submit, in this case a video, it is considered to be submitted before the Chamber. The rest of the discussion is irrelevant. The video was used -- the video was used in the questioning. This video is now before the Chamber and the Chamber will consider this video in its future assessment. That's it.”³⁶

³⁴ “[...] une partie qui fait une admission n'est pas pour autant empêchée de questionner la crédibilité du contenu de la pièce, ni d'en contester la recevabilité éventuellement”, ICC-02/11-01/15-485, para. 21

³⁵ See T-31-CONF-ENG p. 1, l. 24 to p. 2, l. 5.

³⁶ T-31-CONF-ENG, p. 4, l. 1-7.

24. This issue is therefore moot and should not be addressed by the Chamber any further.

25. The Prosecution nevertheless reiterates its position that an admission as to the submission of an item of evidence includes aspects of admissibility (agreement that the document itself is authentic, that it was produced on a particular date, etc). As to the content of the document, it is for the Parties to argue - in their closing briefs/arguments - the probative value or weight to be given to the item that was the subject of an admission, and it will ultimately be for the Chamber to decide.³⁷ An admission therefore only precludes a Party from subsequently challenging its authenticity or admissibility, unless of course a new fact would come to light that would have had an impact on the Party making the admission.

Conclusion

26. For the above reasons, the Request should be rejected since no clarifications are warranted.



Fatou Bensouda, Prosecutor

Dated this 22nd day of April 2016

At The Hague, The Netherlands

³⁷ T-31-CONF-ENG, p. 3, l. 12-18.