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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

**Request for leave to appeal the “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016”
(ICC-02/11-01/15-773)**

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. The Defence of Charles Blé Goudé (“the Defence”) hereby seeks leave to appeal the *“Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016”* (“the Impugned Directions”) issued on 9 December 2016.¹

II. Procedural history

2. On 28 January 2016, the Chamber adopted the “Decision on the submission and admission of evidence” (“the Decision of 28 January 2016”).²
3. On 4 May 2016, the Chamber adopted the amended and supplemented directions on the conduct of proceedings (“the Directions”).³
4. On 13 June 2016, on 14 July 2016, on 7 September 2016, on 19 September 2016 and on 27 September 2016, the Prosecution submitted five requests for the introduction of documentary evidence under paragraph 43 of the Directions (together “the Requests”) either orally or in writing.⁴
5. The Defence responded to all of the above mentioned requests, either orally or in writing.⁵

¹ ICC-02/11-01/15-773.

² ICC-02/11-01/15-405.

³ ICC-02/11-01/15-498.

⁴ ICC-02/11-01/15-583-Conf; with confidential Annex A (ICC-02/11-01/15-583-Conf-AnxA); ICC-02/11-01/15-616-Conf; with confidential Annex A (ICC-02/11-01/15-616-Conf-AnxA) (“Request of 14 July 2016”); ICC-02/11-01/15-T-72-CONF-ENG ET, p. 25, lines 12 et seq; ICC-02/11-01/15-T-74-CONF-ENG, p. 4, line 24 et seq; ICC-02/11-01/15-687-Conf ; with confidential Annex A (“Request of 27 September 2016”).

⁵ ICC-02/11-01/15-640-Conf; with Annex A (ICC-02/11-01/15-640-Conf-AnxA). The original time limit was extended pursuant to the parties’ request (see ICC-02/11-01/15-T-51-ENG RT, p. 69, lines 6-11 and ICC-02/1101/15-T-50-CONF-ENG ET, pp. 91-92. Thereafter, a further extension of time limit was granted on 18 July 2016 (see e-mail of Trial Chamber I Communications at 10:16), pursuant to the request of the Defence of Mr Blé Goudé (see e-mail from the Defence of Mr Blé Goudé to Trial

6. On 19 December 2016, the Chamber issued the Impugned Decision,⁶ for which Judge Henderson filed a separate opinion (“the Dissent”).⁷

III. Submissions

7. Article 82(1)(a), (b) and (c) of the Rome Statute (“the Statute”) provide a list of decisions that may be appealed whereas paragraph (d), as a residual provision, sets forth the legal criteria a decision must meet in order for the parties to seek leave to appeal.
8. The Defence hereby submits that the Impugned Decision meets all the following legal criteria as set forth in article 82(1)(d):
 - a. The Impugned Decision involve two appealable issues,
 - b. Which would significantly affect the fair and expeditious conduct of the proceedings,
 - c. And for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
- a. The Impugned Decision raises four appealable issues
9. In a fundamental decision of 13 July 2006,⁸ the Appeals Chamber delivered a definition of the “issue” according to article 82(1)(d):

Chamber I communications of 15 July 2016 at 17:53); ICC-02/11-01/15-665-Conf; ICC-02/11-01/15-717-Conf.

⁶ ICC-02/11-01/15-773, the Impugned Decision.

⁷ ICC-02/11-01/15-773-AmxI, the Dissent.

⁸ Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9-13

“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, i.e. not merely a question over which there is a disagreement or conflicting opinion.”⁹

10. In the instant case, the Impugned Directions raise the following appealable issues:

- (i) Whether the Chamber erred in law in finding that the Defence submissions in response to the Requests merely sought reconsideration of the Decision of 28 January 2016 whereas the Defence submissions were legitimate applications of the provisions of Rule 64(1) of the Rules of Procedure and Evidence (“the Rules”) and of paragraph 17 of the Decision of 28 January 2016.

11. As a principal reason to dismiss the Defence’s arguments seeking rejection of the introduction of the items of evidence, the Decision expressly refers to the fact that ‘it will not entertain general submissions made by the parties seemingly seeking reconsideration of its previous decision’.¹⁰

12. The Chamber by making this determination clearly contradicts its own previous decision. Indeed, as stated by Judge Henderson in the Dissent, the Chamber in its Decision of 28 January 2016 deliberately recognised the possibility of derogations from its general policy of deferring the question of admissibility to the end of trial when it said at paragraph 17 that:

This general principle is without prejudice to admissibility objections being considered by the Chamber upon submission of the relevant item whenever required by the Statute or Rules (such as motions made under Article 69(7) of the Statute). Furthermore, the Chamber, in the exercise of its discretion, may rule on admissibility

⁹ *Ibid.* para 9.

¹⁰ ICC-02/11-01/15-773 para 33.

of certain items whenever this may be necessary or appropriate in order to preserve the expeditiousness and fairness of the proceedings, including upon a request of the parties relating to a specific item of evidence, or categories of evidence. The continuous consideration of the submitted evidence by the Chamber throughout the trial will allow it to promptly determine the need, or the desirability, to advance a particular evidentiary determination to an earlier stage of the proceedings.¹¹

13. Moreover, as mentioned in *Katanga*, the use of a bar table motion is ‘especially appropriate for tendering documentary evidence concerning issues that must be proved, but without which there is relatively little controversy between the parties’.¹² It appears thus highly logical, in light of the Chamber’s obligation under article 64(2) to ensure ‘that a trial is fair and expeditious and is conducted with full respects of the rights of the accused’ that the Chamber would have made available to the parties the opportunity for them to make admissibility objections and to seek admissibility rulings on what they consider highly contentious documents.
14. Furthermore, paragraph 17 of the Decision of 28 January 2016 is consistent with Rule 64(1) of the Rules, which states that regardless of the Chamber’s decision as to which stage it will assess admissibility of evidence, ‘an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber’.¹³
15. As a result, the Defence would like to emphasise that the present debate is not a mere disagreement with the Chamber’s decision on the arguments raised by the Defence. On the contrary, the present debate concerns the possibility of

¹¹ ICC-02/11-01/15-405 para. 17. Emphasis added.

¹² *Katanga et al* Corrigendum to the Directions for the conduct of the proceedings and testimony in accordance with rule 140(T), 1 December 2009 (Eng), ICC-01/04-01/07-1665-Corr, para. 98.

¹³ Emphasis added.

the Defence to avail themselves of ‘an option which the Chamber had explicitly left open’¹⁴ and which the rules expressly recognise.

- (ii) Whether the Chamber contradicted itself in encouraging the parties to introduce documentary evidence in the view that such introduction of evidence may reduce the amount of time devoted to hearing evidence in court while by postponing any rulings on the relevance or admissibility of evidence until the end of the trial, it could not possibly reach such goal.

16. In the Impugned Decision, the Chamber reaffirmed the Decision of 28 January 2016 to postpone making any rulings on the relevance or admissibility of evidence submitted by the parties until the end of the trial.¹⁵ It also reminded the parties that in the Directions, it unambiguously encouraged the parties to introduce documentary evidence whenever feasible and indicated they may do so without producing it by or through a witness.¹⁶

17. The Chamber explained that it had encouraged such introduction of documentary evidence with a view to “expedite the proceedings [...] bearing in mind that the introduction of evidence other than oral testimony may ultimately reduce the amount of time devoted to hearing evidence in court”.¹⁷

¹⁴ ICC-02/11-01/15-773, para. 4.

¹⁵ ICC-02/11-01/15-773, para. 33.

¹⁶ ICC-02/11-01/15-773, para. 34.

¹⁷ *Ibid.*

18. The Defence is of the view that, by doing so, the Chamber contradicted the goal it wishes to achieve by the means employed to reach such goal. The fact that the introduction of documentary evidence may in itself expedite the proceedings is not challenged by the Defence which understands the Chamber's reasoning as an intent to balance the evidence given in court by the witnesses and the evidence introduced through the bar table, without prejudgment of their respective relevance and probative value. By doing so, the documentary evidence submitted to the case may limit the amount of time devoted to hearing evidence in court.
19. However, the Defence considers that such goal is rendered materially impossible to achieve when the assessment of the evidence admissibility and relevance is postponed to the end of the trial, i.e. after every witness of the case has been called.
20. The Defence does not conceive how the introduction of documentary evidence could contribute to expedite the proceedings if the admissibility and relevance of such evidence is to be assessed at the end of the trial.¹⁸

¹⁸ See also, ICC-02/11-01/15-773-AnxI, para. 9.

- (iii) Whether the Chamber erred in law in finding that the evidence could not be assessed at this stage of the proceedings while considering at the same time that pursuant to Rule 64(1) of the Rules, the Defence has the obligation to raise any issue of relevance or admissibility of evidence at the time when the evidence is submitted to the Chamber.

21. As already mentioned, the Chamber recalled its previous ruling that it would not assess the evidence admissibility and relevance until the end of the trial. The Chamber considered that “[e]vidence must not be evaluated in isolation, but as a whole, in the system of evidence presented in the case”.¹⁹ However, in the Impugned Decision, it also recalled the obligation made to the parties by Rule 64(1) of the Rules:

“[a]n issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber”.²⁰

22. Therefore, the Defence is now put in a situation where it cannot efficiently respond to the introduction of evidence filed by the Prosecution as it is not provided with the necessary level of information on the evidence to do so. As expressed by Judge Henderson in the Dissent, “[...] it would mean that it is also impossible for the Defence to make fully informed submissions on relevance or admissibility until the end of the trial”.²¹ If the Defence is to respond to a request for introduction of documentary evidence, it should do so in the full knowledge of the submitted items of evidence through the information specifically provided for by the party seeking the introduction

¹⁹ ICC-02/11-01/15-773, para. 33.

²⁰ ICC-02/11-01/15-773, para. 38. Emphasis added.

²¹ ICC-02/11-01/15-773-AnxI, para. 11.

and through the other evidence in the case record. As explained by the Chamber in the Impugned Decision, “[a]lthough some items of evidence may currently not clearly appear relevant or lack prima facie probative value, the situation may change as other evidence is presented to the Chamber”.²²

23. However, this standard of assessment of evidence as conceived by the Chamber is inconsistent with the provisions of Rule 64(1) of the Rules which oblige the Defence to raise any issue relating to relevance or admissibility when the evidence is submitted to the Chamber. To make an efficient submission on the admissibility and relevance of evidence, the Defence needs to appreciate the evidence in light of the whole evidence of the case as this is the methodology that will govern the assessment of evidence by the Chamber. Hence, the Defence finds itself in a situation where any efficient response to a request for introduction of documentary evidence, according to the methodology set by the Chamber, is materially impossible.

(iv) Whether the Chamber put an unfair burden on the Defence by obliging them to devote their scarce resources and attention in responding to any document submitted to the case record regardless of the actual relevance of such document.

24. Following the Chamber’s methodology of assessing evidence, any item of evidence for which submission to the case record is sought through a bar table motion is automatically submitted until the end of the trial when its admissibility, relevance and probative value will be assessed. The concrete result is for the Defence to make submissions on admissibility, relevance and

²² ICC-02/11-01/15-773, para. 35.

probative value at the time of submission pursuant to Rule 64(1) of the Rules without knowing whether or not the challenged items of evidence will be ruled as inadmissible.

25. The Defence is thus obliged to research and analyse every document tendered into evidence. It could be argued that the Defence does not have any obligation to challenge the admission of every document. However, to make the decision to challenge or not to challenge the admission of a document, the Defence has to put time and resources in the analysis and verification of such document.

26. As underlined by Judge Henderson in the Dissent, “ruling an item inadmissible for lack of relevance or probative value [...] allows the Defence to know which evidence should focus their limited time and resources on”.²³ Instead, in a situation where by principle every introduced item is submitted to the case record, the Defence has to take them all into account regardless of their actual relevance and probative value.

27. As the Defence may not know at the time of its submissions how the Chamber will approach the evidence, it is compelled to make systematic research, verifications and assessments even though the documents at hand will ultimately be ruled as inadmissible or irrelevant. This obligation to focus resources on every document that could possibly be introduced to the case record without any filter as to their admissibility constitutes an unnecessary and unfair burden on the Defence.²⁴

²³ ICC-02/11-01/15-773-AnxI, para. 9

²⁴ ICC-02/11-01/15-773-AnxI, para. 12.

- b. The resolution of the issue would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial

28. The Defence holds that all the issues raised by the Impugned Decision may significantly affect the outcome of the trial as they relate to the core of the case: its evidence and the way it is assessed by the Chamber.

29. Moreover, while the Chamber intended to contribute to the expeditiousness of the proceedings, the Defence has raised, through its second Issue, that this contribution was materially unworkable. Thus, the second Issue significantly and directly affect the expeditiousness of the proceedings.

30. Besides, as raised by Judge Henderson in the Dissent:

“the failure of the Chamber to make admissibility rulings on the evidence sought to be submitted by the Prosecution via the bar table, affects the expeditiousness and fairness of proceedings and imposes an unnecessary and unfair burden on the parties, in particular on the defences for Mr. Gbagbo and Mr. Blé Goudé ('Defence').”²⁵

31. It is also the view of the Defence. By considering that the Defence made general submissions “seemingly seeking reconsideration of [the Chamber’s] previous decision”,²⁶ the Chamber raised in the Impugned Decision issues directly affecting the fair and expeditious conduct of the proceedings.

32. When the Defence only exercised a right expressly recognized by the Chamber to consider specifically and on an exceptional basis objections upon submission of evidence, it did not seek any reconsideration of any prior decision.

²⁵ ICC-02/11-01/15-773-AnxI, para. 3.

²⁶ ICC-02/11-01/15-773, para. 33.

33. However, the Chamber did not rule on the admissibility of the material introduced by the Prosecution whereas, at the same time, it expressed concerns that the “succinct information” required by paragraph 44 of the Directions has not been provided for. The fact that the Chamber did not draw any conclusion from this finding of seemingly non-compliance with paragraph 44 of the Directions results in a situation of legal uncertainty for the Defence, which is unfair *per se*.²⁷

c. The issue requires an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

34. The Appeals Chamber’s immediate resolution of the four above issues would materially advance the proceedings.

35. The Defence draws the Chamber’s attention to the definition given by the Appeals Chamber of the terms “immediate” which means avoiding errors by referring the issue to the Appeals Chamber; “advance” which means to move forward by ensuring that the proceedings follow the right course; and “proceedings” which means the proceedings in their entirety.²⁸ In this regard, the Appeals Chamber stated that:

“A wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back.”²⁹

36. The Defence submits that the Impugned Decision has created legal uncertainty as to whether the opposing parties are refrained or not from making admissibility objections when the submitting party seeks to introduce

²⁷ ICC-02/11-01/15-773, paras. 37-38.

²⁸ ICC-01/04-168, paras. 14-19.

²⁹ *Ibid.*, para. 16.

documents through 'bar table' motions. As a result, it has created the risk of a precedent according to which all request for an admissibility decision regarding 'bar table' motions could be dismissed on the ground that they automatically amount to seeking reconsideration of the Chamber's 28 January decision.

37. Moreover, paragraph 44 of the Directions specifically requires that 'the introduction of any item of documentary evidence shall be accompanied by succinct information indicating (i) the item's relevance, its probative value (including authenticity)'.³⁰ As expressed by Judge Henderson, paragraph 44 aims to 'place a level of rigour and discipline on the submitting party that ensures that what is submitted for the Chamber's consideration, meets a minimum threshold of relevance and reliability'.³¹ Thus by highlighting yet failing to address the Prosecution's non-compliance to the directions of paragraph 44 of the Directions, the Impugned Decision has created legal uncertainty whereby the aforementioned threshold has become blurred.

38. Furthermore, as expressed by Judge Henderson, 'the direction is intended to provide a safeguard for the party opposing the submission of evidence through a bar table motion, as it allows the party to be better placed to make informed responses on admissibility.' The Impugned Decision thus creates a dangerous precedent whereby the Prosecution could avail itself of this precedent to submit less information when making 'bar table' motions. Such a decision thus places the Defence in an untenable position whereby it is prevented from discharging its obligation under rule 64(1) to make submissions on evidence *at the moment they are sent*, and as such, resolution of this issue is essential for the good management of the trial.

³⁰ ICC-02/11-01/15-498-AnxA, para 44.

³¹ ICC-02/11-01/15-773, para. 5.

39. Finally, by reacting to the Prosecution's seemingly non-compliance with one of the Chamber's direction through the issuance of 'some guidance to the parties with respect to submission of documentary evidence',³² the Decision left the Defence totally in the dark as to the authoritativeness of any guidance issued by the Chamber and the consequences of potential violations. Immediate resolution of this issue would allow lifting the veil of legal uncertainty and would provide a clear guidance for the parties to follow.

40. Therefore, the Defence respectfully submits that resolution of these issues by the Appeals Chamber would materially advance the proceedings by providing legal certainty as to the correctness of the Decision and give concrete guidance for any future application in regards to admissibility objections.

RELIEF SOUGHT

For the fore going reasons, the Defence respectfully requests the Chamber to:

- GRANT leave to appeal the Impugned Decision.

Respectfully submitted,



³² ICC-02/11-01/15-773 para 36.

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

Dated this

19 December 2016

At The Hague, the Netherlands