

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **2 March 2017**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Kuniko Ozaki
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chang-ho Chung

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
THE PROSECUTOR *v.* LAURENT GBAGBO and
CHARLES BLÉ GOUDÉ**

Confidential

Application for leave to reply to the "Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 november 2016" filed by the Legal Representative of Victims on 24 February 2017 (ICC-02/11-01/15-827-Conf)

Source: Defence team for Laurent Gbagbo

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart

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Gbagbo**

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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Preliminary comment on the classification of the application:

1. The present application is filed as confidential pursuant to regulation 23 *bis*(2), as reference is made to confidential documents, including the “Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 november 2016”,¹ filed as confidential by the Legal Representative of Victims. The Defence will file a public redacted version of the application.

I. Procedural background:

2. On 25 November 2016, the Defence for Laurent Gbagbo sent an e-mail to the Prosecutor, which set in train an *inter partes* discussion – held at the behest of the Chamber – to request that she lift a redaction made by the Prosecution to point 24 of Witness P-0350's application for participation.²

3. On 27 November 2016, the Prosecutor replied by e-mail, stating that she took no objection to the lifting of the redaction but that the Legal Representative of Victims (“the LRV”) did.³

4. On 28 November 2016, the Defence made an oral motion to the Chamber for the redaction to be lifted.⁴

5. On 29 November 2016, the Chamber issued an oral decision (the impugned decision), rejecting the Defence motion.⁵

6. On 5 December 2016, the Defence for Laurent Gbagbo sought leave to appeal the decision.⁶

¹ ICC-02/11-01/15-827-Conf.

² ICC-02/11-01/15-822-Conf-Anx.

³ ICC-02/11-01/15-819-Conf-AnxA and ICC-02/11-01/15-819-Conf-AnxB.

⁴ ICC-02/11-01/15-T-106-CONF-FRA ET, p. 3, line 4 to p. 6, line 18.

⁵ ICC-02/11-01/15-T-107-CONF-FRA ET, p. 1, line 13 to p. 3, line 2.

⁶ ICC-02/11-01/15-768-Conf.

7. On 2 February 2017, the Trial Chamber issued a decision, whereby it granted the Defence leave to appeal the impugned decision.⁷

8. On 13 February 2017, the Defence for Laurent Gbagbo filed a document in support of the appeal.⁸

9. On 24 February 2017, the LRV filed her “Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 November 2016”,⁹ wherein she moved the Appeals Chamber, *inter alia*, to “dismiss *in limine* the first two grounds of appeal as they do not constitute appealable issues in the sense of article 82(1)(d) of the Rome Statute”¹⁰ and to “[dismiss] *in limine* [the Third ground of appeal] because the issue was not certified as such by the Chamber and therefore falls outside of the scope of the appeal”.¹¹

II. Applicable law.

10. Regulation 24(5) of the Regulations of the Court provides:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

11. The Court's previous decisions make clear that leave to reply may be accorded for various reasons, which include where good cause has been shown,¹² the reply may have an impact on the subsequent proceedings¹³ and the issue raised is of importance.¹⁴

III. Analysis.

12. The Defence seeks to reply to the LRV on two critical points.

⁷ ICC-02/11-01/15-790-Conf.

⁸ ICC-02/11-01/15-809-Conf.

⁹ ICC-02/11-01/15-827-Conf.

¹⁰ ICC-02/11-01/15-827-Conf, para. 3.

¹¹ ICC-02/11-01/15-827-Conf, para. 21.

¹² ICC-01/05-01/08-294, para. 3.

¹³ ICC-01/04-01/06-236.

¹⁴ ICC-01/04-01/07-1004-tENG.

1. The Legal Representative of Victims’ request for the dismissal *in limine* of the first two grounds of appeal raised by the Defence.

13. The LRV submits that the Appeals Chamber should dismiss *in limine* the first two grounds of appeal raised by the Defence.

14. The LRV contends that the decision lacks reasoning.¹⁵ She is of the opinion that the Chamber confined itself to considering that the first two appellate issues arose from the decision and purports that it failed to explain why they constitute “issues” within the meaning of article 82(1)(d).¹⁶

15. Moreover, not only does the LRV set forth arguments on the alleged lack of reasoning in the decision granting leave to appeal, but also disputes the arguments adopted by the Chamber, taking the view that the decision to deny the lifting of the redaction was sound and should not have been amenable to appeal.¹⁷

16. These arguments, which do not strictly amount to a response to the Defence’s arguments raised on appeal and so constitute new arguments, entitle the Defence to reply.

17. What is more, the LRV’s *modus operandi* merits a reply. By taking the view that “the Appeals Chamber enjoys discretion in accepting the Pre-Trial or Trial Chamber’s determination of what is an appealable issue”,¹⁸ the LRV misapprehends how the Appeals Chamber is required to adjudicate issues on appeal. In so doing, the LRV espouses a position antithetical to the settled view of the Appeals Chamber, inasmuch as said Bench has, for example, ruled that “it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent”.¹⁹

¹⁵ ICC-02/11-01/15-827-Conf, para. 17.

¹⁶ ICC-02/11-01/15-827-Conf, para. 17.

¹⁷ ICC-02/11-01/15-827-Conf, paras. 17 and 18.

¹⁸ ICC-02/11-01/15-827-Conf, para. 21.

¹⁹ ICC-02/11-01/11-572, para. 63; ICC-02/11-01/15-744, para. 13.

18. Specifically in its “Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled ‘Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court’” of 18 December 2015,²⁰ the Appeals Chamber noted that:

article 82 (1) (d) of the Statute clearly vests power solely in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings. The Appeals Chamber concurs with Mr Gbagbo that the Prosecutor has not identified any legal basis for the Appeals Chamber to conduct its own assessment of the criteria of article 82 (1) (d) of the Statute. The Appeals Chamber also considers that, in making this submission, the Prosecutor appears to be attempting to directly appeal the Decision Granting Leave to Appeal, which is not permissible under the Statute.²¹

19. Therefore, the apparent basis of the LRV’s reasoning for seeking the dismissal *in limine* of two Defence grounds of appeal – that the Appeals Chamber may determine what constitutes an “issue” – is contradicted by the Court’s decisions and gives rise to a right to reply.

20. In fact, in her “response” the LRV appears to engage in a dissimulated appeal of the Trial Chamber’s decision granting the Defence leave to appeal. This is a blatant circumvention of procedure, which the Appeals Chamber will not countenance. This is particularly so in that in her endeavour to have the Defence appeal submissions dismissed *in limine*, the LRV is attempting to bar any discussion on appeal of material issues, such as disclosure of the identity of intermediaries to the Defence, the canvassing of which is conducive to the proper administration of justice.

2. The Legal Representative of Victims’ request for the dismissal *in limine* of the third ground of appeal raised by the Defence.

21. The LRV submits that the Appeals Chamber should dismiss *in limine* the third ground of appeal raised by the Defence concerning the alleged error of fact made by the Trial Chamber when it declined to consider the issue of intermediaries to be a “live issue”.

²⁰ ICC-02/11-01/15-369.

²¹ ICC-02/11-01/15-369, para. 18; see also ICC-02/11-01/15-744, para. 13.

22. The LRV takes the view that since the Trial Chamber regarded the third ground of appeal as “subsumed in the first issue”, “it should also be dismissed *in limine* for lack of certification as such”.²²

23. The Defence sees some confusion between what constitutes an “issue” and a ground of appeal. Irrespective of whether an “issue” arises from a pre-existing “issue”, the matter at hand is one of ascertaining whether the Trial Chamber recognized the existence of a ground of appeal which had to be canvassed before the Appeals Chamber.

24. Of further note is that although the Trial Chamber found that there was a nexus between the Defence’s third ground of appeal and the first “issue”, it did not dismiss the ground *per se*.

25. Thus by seeking the dismissal *in limine* of the third ground of appeal raised by the Defence, the LRV fails to respond to the arguments of the Defence but seeks annulment of the Trial Chamber’s decision granting the appeal and so advances new arguments which entitle the Defence to reply.

26. As the regards the logical connection which may exist between various grounds of appeal, it is worth recalling that the Appeals Chamber has consistently held that it “may consider arguments that are ‘intrinsically linked to the issue on appeal as certified by the [relevant] Chamber’”.²³

27. In this specific instance, the arguments set forth by the Defence on the need for it to be privy to the identity of an intermediary – so as to understand the circumstances in which a prior statement was taken and the extent of the leeway the witness had vis-à-vis the intermediary – for the purposes of preparation, specifically to prepare for cross-examination of the witness (third ground of appeal), are inextricably connected to the arguments it put forward on the reversal of the burden of proof as regards redactions (first ground of appeal).

²² ICC-02/11-01/15-827-Conf, para. 4.

²³ ICC-02/11-01/15-744, para. 13; ICC-02/11-01/15-369, para. 25.

Conclusion:

28. All of these considerations must be expounded upon so as to respond in detail to the LRV. Accordingly, the Defence respectfully requests the Appeals Chamber for leave to reply to the LRV on the two points aforementioned.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

Having regard to regulation 24(5) of the Regulations of the Court,

- **Grant leave** to the Defence to reply to the “Response to Mr Gbagbo's document in support of the appeal against the oral decision of 29 november 2016” filed by the Legal Representative of Victims on 24 February 2017 (ICC-02/11-01/15-827-Conf).

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Done this 2 March 2017

At The Hague, Netherlands