

**Cour
Pénale
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**International
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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Geoffrey Henderson
Judge Olga Herrera Carbuccion

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGO AND CHARLES BLÉ GOUDÉ***

Public

Request for clarification as to what is meant by the concept of “item submitted into the record of the case”

Source: Defence team for Laurent Gbagbo

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

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I. Procedural history

1. On 29 January 2016, the Trial Chamber issued a “Decision on the submission and admission of evidence”.¹ In that decision, the Chamber ruled, *inter alia*, that

only items presented and relied upon by the parties and, if applicable, the participants, for the purposes of the final judgment must be transmitted to the Chamber. Items disclosed *inter partes* or not submitted in trial proceedings are not to be transmitted to the Chamber. Consistently with the approach taken in the confirmation proceedings in this case, the Chamber considers it unnecessary to assign an “EVD” number to submitted exhibits. These items will continue to be referenced by their pre-existing unique identification number (“ERN”) which is stamped on each page of each item and which they will retain throughout the course of the proceedings. However, the Registry is to ensure that the e-court metadata clearly reflects which items have been formally submitted to the Chamber as the trial advances and whether an oral objection has been made. The Registry is also to ensure that any and all issues raised under rule 64(1), as well as any decision rendered by the Chamber, will be duly and promptly annotated in the e-court metadata pertaining to the piece of evidence to which they relate.²

2. During the hearing of 12 February 2016, the Presiding Judge noted that

There is a submittal for Witness 547 which was considered submitted, then was clarified that it is not submitted as such because what is submitted is what is on the record. That’s why **I urge parties to make quotations out of that [...]. So only that part is submitted.** [...] because the documents which were shown to her [...] are also submitted in that way.³

3. During the status conference held on 17 February 2016, the issue of what could be submitted into the record of the case was broached by the parties but no ruling was made by the Judge on that point during the hearing.

4. During the hearing of 7 March 2016, the Presiding Judge said:

[T]he Chamber simply recalls that **any exhibit used in the course of a witness’s testimony succinctly explained in its significance is deemed submitted into the record of the case** and this will be reflected in its metadata, reflected in the metadata of the said item of evidence. The official record of the entirety of the trial proceedings will be the eCourt system, which will reflect in the annotations made in its metadata, all information relevant to submission of each and every exhibit submitted in trial, including any objections raised.⁴

5. During the hearing of 17 March 2016, the Presiding Judge indicated, in respect of evidence submitted through a witness:

¹ ICC-02/11-01/15-405.

² ICC-02/04-01/15-405, para. 19.

³ ICC-02/11-01/15-T-22-CONF-ENG ET, p. 32, lines 22-25, p. 33, lines 2 and 4-6.

⁴ ICC-02/11-01/15-T-25-CONF-ENG ET, p. 2, lines 20-25, p. 3, lines 1-2.

[T]he document is submitted as such and we – obviously we are not limited, the Chamber I must say, the Chamber is not limited to show a piece which the parties wants us to see and not the rest. So once a document is submitted, it is submitted.⁵

6. During the hearing of 18 March 2016, the Presiding Judge said:

As I said yesterday, **the document, the item submitted is submitted as a whole, although only the parts are shown**, but it is submitted as a whole. Of course if now one or the other party of that document which is submitted wants to play, wants to show another piece, I mean, there's no question about it, but the document is submitted as such. Obviously the time stamps is what we can use in relation to the question which was given or question which was put and the answer was given. This is one thing. But the document when it is submitted is submitted as a whole. **Otherwise, I mean, you can't limit also the Chamber just to – not to see the full evidence which is submitted.**⁶

7. On 22 March 2016, the Chamber delivered a "Fourth decision on matters related to disclosure and amendments to the List of Evidence",⁷ which, *inter alia*, indicated:

The Chamber further notes its oral rulings to the effect 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 the fact that only limited portions of the item might have been used or referred to in the courtroom.⁸

II. Discussion

8. The Defence seeks clarification as to what is meant by "item submitted into the record of the case," it being understood that the parties themselves clearly define what they submit as evidence and that the question concerns the portion of the document that is not explicitly defined as evidence. It is important to distinguish between these two aspects of a document as they have different legal consequences. In view of the many decisions delivered by the Chamber and the Presiding Judge in this connection since the beginning of the trial, the Defence considers such a clarification necessary.

9. This clarification is essential if the parties are to discharge their duties properly. They have to know: (1) what is supposed to be submitted from a formal point of view; and (2) what use the Chamber might make of this in its overall evaluation of the evidence when drafting the Judgment.

⁵ ICC-02/11-01/15-T-32-ENG ET, p. 56, lines 9-12.

⁶ ICC-02/11-01/15-T-33-ENG ET, p. 4, lines 12-20.

⁷ ICC-02/11-01/15-467.

⁸ ICC-02/11-01/15-467, para. 10.

10. The manner in which parties select items to be submitted into the record will depend on the Chamber's response to this question.

11. Furthermore, an understanding of what is meant by the concepts of "item submitted into the record" and "item of evidence" and how the two concepts differ has a bearing on the accused's capacity to defend him or herself. For example, a broad understanding of the concept of "item submitted into the record" would require the accused to change his or her approach to documents so as to avoid self-incrimination. Should the Chamber consider that when drafting the Judgment it is authorized to use not only information contained in items – which are often excerpts of documents – expressly submitted by the parties but also in the remainder of the documents used, that would have a significant impact on the selection, nature and number of items submitted into the record by the Defence.

12. The various exchanges between the parties, and between the parties and the Bench, as well as the explanations furnished by the Presiding Judge over the course of the proceedings, have led the Defence to understand the rules on the submission of evidence by the parties as follows:

13. Firstly, there is a difference between an item of evidence and the document from which it is taken, for example, between a clip of a video report and the report, or between an excerpt from an article and the rest of the article. Only the extracts selected by the parties as evidence and presented to a witness are submitted into the record as formal evidence since it is on these extracts that the parties will rely to support their case. The remainder of the document is submitted into the record not as evidence, but as a document that helps to contextualize the evidence extracted from it. The Judges may therefore find the remainder of the document useful, but it cannot be considered as evidence *per se* since it has not been used as such by the parties. This interpretation emerges from the following statement by the Presiding Judge: "That's why **I urge parties to make quotations out of that [...]. So only that part is**

submitted.”⁹ Consequently, when the Presiding Judge said “**you can’t limit also the Chamber just to – not to see the full evidence which is submitted**”,¹⁰ the Defence took this to mean that Judges may inspect the entire document containing the evidence submitted, but solely to enable them to form an idea of the context from which the evidence was drawn as the basis for any decision during discussions, in particular in respect of credibility or admissibility. Otherwise put, anything that has not been used by the parties as evidence cannot be used by the Judges as a basis for findings of fact or holdings of law in their final Judgment.

14. Secondly, the Judges’ right under the Statute to take cognizance of evidence *proprio motu* (“The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth”)¹¹ is another matter. In such a situation, the Judges must explicitly inform the parties thereof and allow for adversarial debate before they reach their decision.

15. Thirdly, the question remains as to what the “remainder of the document” means. If, for example, the Judges can inspect the rest of the article from which the extract presented to a witness (the item of evidence itself) is drawn, can they inspect articles on the same page? Or, if they can inspect the rest of a video recorded interview from which a clip was presented to the witness, can they also inspect the rest of the report, for example, if it is a 52-minute documentary? This issue does not seem to have been resolved, as the Chamber merely said that, “once an **item** is submitted by a party, that item is to be considered as being before the Chamber **in its entirety**”.¹² What should be understood by the expression “an item [...] in its entirety”?

16. Given the variety of material used by the parties, it is undeniably problematic to lay down a general rule that is excessively binding and the Judges can after all always make discretionary rulings on a case-by-case basis. However, the Defence

⁹ ICC-02/11-01/15-T-22-CONF-ENG ET, p. 32, lines 22-25.

¹⁰ ICC-02/11-01/15-T-33-ENG ET, p. 4, lines 9-20.

¹¹ Article 69(3), Rome Statute.

¹² ICC-02/11-01/15-467, para. 10.

feels that it is important for the Judges to lay down a guideline for the parties to comply with so as to ensure legal certainty.

17. The following guideline could be applied: the document submitted into the record shall be the document from which the extract is drawn and that gives the extract its meaning. For example, an interview used in a documentary from which the excerpt is taken, but not the rest of the documentary.

18. As another example, the Prosecution uses clips from RTI television news bulletins. These extracts are transmitted to the Defence in blocks of documents containing the entire news bulletin from which the clip was taken and other television news bulletins, all covered by one ERN. It would not be acceptable, should a party show a clip of a television news bulletin that was broadcast at such-and-such a time on such-and-such a date, for the item submitted into the record to be considered to include, for example, news bulletins for the following days simply because the clip had been transmitted as part of a document with a single ERN that covered a large number of items broadcast over the course of several news bulletins. What is submitted into the record, and which the Judges may inspect, cannot depend on the fact that a party has grouped a number of very different documents under a single ERN. In such a scenario, the Defence suggests that only the report from which the video clip (the item of evidence) is taken should be submitted "in its entirety" and that the Judges may inspect only that report.

19. As a further example, if an extract from a newspaper article were used, the full article would be submitted in its entirety, but not the whole newspaper. The same would be true of a snatch from a song.

20. Lastly, the issue of using a witness's previous statements merits separate attention. According to the principle of the orality of testimony, it is the testimony given by the witness in court that must be taken into account and not his or her previous statements. Consequently, a reference made by a party to an extract of a previous statement with a view to refreshing a witness's memory or testing his or her

credibility would give rise to the submission into the record of all previous statements. Such is the conclusion, furthermore, that can be drawn from the Presiding Judge's ruling on the use of extracts of previous statements given by Witness P-0547.¹³

21. Fourthly, should a party propose that a document be admitted in its entirety and that admission is accepted by the other parties, this means that the parties agree to the document being submitted into the record as evidence in its entirety, given that the admission covers the document itself and does not in any way prejudice the parties' acceptance of what is said or shown in that document. A party accepting admission is not prevented from questioning the credibility of the item or even from disputing its admissibility.

22. For these reasons, the Defence respectfully requests that the Chamber clarify what it meant by the term "item submitted into the record of the case".

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 14 April 2016

at The Hague, Netherlands

¹³ ICC-02/11-01/15-T-22-CONF-ENG ET, p. 32, lines 22-25, p. 33, lines 2 and 4-6.