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Court

Original: **English**

No.**: ICC-02/11-01/15**
Date: **29 March 2016**

TRIAL CHAMBER I

Before: **Judge Cuno Tarfusser, Presiding Judge**
Judge Geoffrey Henderson
Judge Olga Herrera-Carbuccia

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Confidential
Application for leave to appeal the "Fourth decision on matters related to disclosure and amendments to the List of Evidence" (ICC-02/11-01/15-467)

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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Detention Section

Victims Participation and Reparations Section

Other

Classification of the response:

1. The present response is filed as confidential pursuant to regulation 23 *bis*(2) of the RoC, since it refers to confidential documents, including the "Prosecution's request for an extension of time to re-disclose and use at trial a Forensic Expert Report and related material pursuant to regulation 35 of the Regulations of the Court"[1] filed as confidential.

I. Procedural history

2. On 7 May 2015, the Chamber ordered completion of disclosure of material in the Prosecution's possession to the Defence "on a rolling basis and no later than 30 June 2015,"[2] setting trial to commence on 10 November 2015 and the presentation of Prosecution evidence to start in January 2016, and taking the view that:

> […] as a result, the Defence will have more than four months between the date of full disclosure by the Prosecution and the opening statements. Thereafter, it will have two additional months before the commencement of the presentation of evidence, which in the view of the Chamber, will afford the Defence sufficient time to carry out all necessary preparations.[3]

3. On 30 June 2015, the Prosecution disclosed or disclosed again (in less redacted form) 575 items of evidence to the Defence and filed its List of Evidence containing 4,790 items[4] and a list of 138 witnesses whom it intends to call at trial.[5]

4. On 30 June,[6] 2 July,[7] 27 July,[8] 2 September,[9] 7 September[10] and 22 September 2015,[11] the Prosecution sought further time in which to disclose evidence or disclose it again in a different evidentiary category.

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[1] ICC-02/11-01/15-449-Conf.
[2] ICC-02/11-01/15-58, para. 22.
[3] ICC-02/11-01/15-58, para. 16.
[4] ICC-02/11-01/15-114-Conf-AnxC.
[5] ICC-02/11-01/15-114-Conf-Anx A-Corr.
[6] ICC-02/11-01/15-115-Conf.
[7] ICC-02/11-01/15-118.
[8] ICC-02/11-01/15-164.

5. At a status conference on 25 September 2015, the Prosecution made known that it would be making only a limited number of new requests to disclose fresh evidence.[12]

6. On 1 October 2015, the Prosecution filed an "omnibus request for an extension of time pursuant to regulation 35 of the Regulations of the Court",[13] in which it stated that it had undertaken a review of whether it had disclosed all of the material necessary to the presentation of its case.[14]

7. Since 25 September 2015, the Prosecution has filed four further applications for an extension of time.[15]

8. Between 30 June 2015 and the commencement of trial, the Prosecution made eight applications for an extension of time, entailing 662 items in total – amounting to 8,552 pages and 5 hours and 15 minutes of audio and video material; all eight were granted.

9. On 22 February 2016, the Prosecution submitted another request for an extension of time, the "Prosecution's request for an extension of time to re-disclose and use at trial a Forensic Expert Report and related material pursuant to regulation 35 of the Regulations of the Court".[16]

10. On 2 March 2016, the Defence responded by objecting to the Prosecution's request.[17]

11. On 22 March 2016, in the impugned decision, the Chamber accorded the Prosecution leave to disclose, out of time, a fresh expert report and to add a witness to its list of witnesses.[18]

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[9] ICC-02/11-01/15-203.
[10] ICC-02/11-01/15-207-Conf.
[11] ICC-02/11-01/15-234-Conf.
[12] ICC-02/11-01/15-T-4-ENG, pp. 16-17, lines 19-4.
[13] ICC-02/11-01/15-262-Conf.
[14] ICC-02/11-01/15-262-Conf, para. 1.
[15] ICC-02/11-01/15-262-Conf; ICC-02/11-01/15-312-Conf; ICC-02/11-01/15-448; ICC-02/11-01/15-449-Conf.
[16] ICC-02/11-01/15-449-Conf.
[17] ICC-02/11-01/15-454-Conf.

II. Applicable law

12. The Rome Statute recognises the right of a party to seek leave to appeal, where the party regards immediate resolution of a matter necessary to the preservation of the integrity and fairness of the proceedings.

13. To seek such leave where the fairness of the trial is in question is not only a right of the Accused, but also a professional duty of Counsel.

14. To do so is all the more necessary in that a bench may take the opportunity to construe a party's refraining to seek leave to appeal as acquiescence to its ruling, allowing it to dismiss the party's submissions on a related matter in subsequent proceedings. Yet, failure to seek leave to appeal does not entail any agreement whatsoever by the party as to the merits of the ruling, but denotes only that it considered that immediate review need not be sought at that juncture.

15. The Presiding Judge of the Pre-Trial Chamber set out the requirements for appeal on 31 July 2013:[19]

> [...] the provisions of article 82(1)(d) of the Statute define the requirements to which not only the parties but also the Chambers must adhere. In light of the nature of these requirements, it can be said that the Chambers are accorded a large margin of appreciation, but they have not been entrusted with an unfettered discretion to decide whether or not to grant an appeal. A decision under article 82(1)(d) of the Statute is not a policy decision but a legal one that needs to be taken on the basis of an impartial and objective assessment of whether the issues raised meet the requirements of the Statute. Therefore, and taking into account that the Chamber concerned will be dealing with a challenge to its own product, it is essential that it makes, and is seen to be making, an impartial and objective assessment of whether the issues proposed for appeal by the parties meet the criteria set forth in the Statute. In particular, the determination of an "issue" within the meaning of article 82(1)(d) of the Statute appears to require a rather simple and straightforward assessment by the Chamber of whether the question identified by the party arises from what is actually said in the impugned decision.[20]

16. Otherwise put, a bench which issued an impugned decision cannot avail itself of the opportunity of a party's application for leave to appeal the decision to flesh out, clarify, interpret or supplement the decision. Nor may a bench dismiss an application for leave to appeal by embarking on a discussion with the appellant so as

[18] ICC-02/11-01/15-467.
[19] ICC-02/11-01/11-464-Anx.
[20] ICC-02/11-01/11-464-Anx, paras. 5 and 6.

to give precedence to its viewpoint. For example, where a party seeking leave to appeal considers that the Chamber erred in law, it would not be for the Chamber to seek to show that it had duly applied the law. The bench must confine itself to ascertaining that the point as construed by the appellant may constitute an error of law. On no account must the bench determine whether an error of law exists, but rather whether it might exist from the appellant's standpoint. Otherwise, the bench would be both arbiter and party. That same reasoning must apply irrespective of the basis for seeking leave to appeal. For instance, where the appellant raises lack of legal basis, it is not for the bench to discuss the appellant's argument, much less state that its ruling had a legal basis; it rests with it only to ascertain whether, from the appellant's point of view, the absence of legal basis was duly raised.

17. The Single Judge went on to say that where "fairness of proceedings is at the core of the issue proposed for appeal by the Defence, it is in my view self-evident that the issue affects the fair conduct of the proceedings."[21]

18. Turning to the manner in which an application is framed, it stated: "the Defence Application should not be rejected for lack of proper identification of an appealable issue, but should be considered further in light of the substance of the arguments that are advanced therein".[22]

19. In this respect, the Presiding Judge concurs with the Pre-Trial Chamber, which in the case at bar has consistently held – and specifically did so on 31 July 2013 – that an "issue" ill-framed by a movant may be reformulated "with a view to receiving meaningful guidance by the Appeals Chamber."[23]

20. Accordingly, leave to appeal must be granted where the issue of the fairness of proceedings arises explicitly or implicitly further to a decision of the Pre-Trial Chamber or the Single Judge. Furthermore, according to the Presiding Judge of the Pre-Trial Chamber, it is the duty of the bench to identify such issues in an

[21] ICC-02/11-01/11-464-Anx, para. 71.
[22] ICC-02/11-01/11-464-Anx, para. 63.
[23] ICC-02/11-01/11-464-Anx, para. 36.

application for leave to appeal, and even to recast them so that they may be laid before the Appeals Chamber.

III. Discussion

Introduction

21. The request adjudged by the Chamber was the tenth in a series of requests for an extension of time for disclosing additional material to the Defence submitted by the Prosecution since 30 June 2015, the date by which it was required to have disclosed the body of its evidence.

22. Nearly eight months after 30 June 2015, the Prosecution has yet to complete disclosure of its evidence. Nearly eight months after 30 June 2015, the Defence remains in the dark as to the content of the Prosecution's evidence and, as a result, cannot undertake a definitive analysis of the evidence imparted to it or carry out its investigations.

23. As matters stand, the framework put in place by the Bench to afford the Defence around six months' preparation between 30 June 2015 and the start of the presentation of the Prosecution's case, scheduled for late January 2016, has been destroyed: several weeks after it began tendering its evidence, on 3 February 2016, the Prosecution continues to disclose incriminating evidence, despite having investigated for over four and a half years.[24]

24. To afford the Defence preparation time, however, pre-supposes that it is privy to all the necessary material before trial commences: it stands to reason that the Prosecution should not be allowed to add to its incriminating material once trial starts. Otherwise, it would be free to perpetuate the uncertainty surrounding its incriminating evidence, forcing the Defence to constantly revisit matters disposed of and preventing it from preparing effectively. Such a state of affairs would be inconsistent with a fair trial.

[24] ICC-02/11-1-Anx; ICC-02/11-3; ICC-02/11-14.

1. Appealable points

1.1 <u>The Chamber failed to set out the grounds for its decision by taking at face value, without any scrutiny, the Prosecution's claim to have exercised due diligence in seeking an expert opinion on the video</u>

25. In the impugned decision, the Chamber notes that:

> […] once the necessity of conducting additional analysis on the video became clear to the Prosecutor in June 2015, she promptly took adequate steps, including the acquisition of necessary software to conduct the analysis. Accordingly, the Chamber considers that the Prosecutor's failure to disclose the material referred to in the Second Request prior to the Disclosure Deadline was not the result of negligence on her part but rather of factors outside her control.[25]

26. The Chamber does not explain what satisfied it of the Prosecution's diligence, whereas everything points to the contrary.

27. Although the expert report was commissioned on 29 October 2015, doubt had been cast by the Defence as early as 2013[26] on the authenticity and relevance of the video of the women's demonstration – as the Prosecution itself concedes. This raises the question as to why it did not seek a comprehensive expert opinion on the video at the time.

28. Worse still, even taking into consideration the Prosecution's highly dubious argument that the expert opinion could not be provided until it had obtained the high-definition version of the video on 5 March 2015, there would still be no justification for it to have waited until 29 October 2015 to seek the opinion, that is almost seven and a half months later and almost four months after the date by which it was duty-bound to disclose all of its evidence.

29. The Prosecution's claim to have been, for reasons outside its control, unable to file an application for late disclosure until after 30 June 2015, whereas the expert report was commissioned on 29 October 2015, strains credibility. It is, therefore, the Prosecution's lack of due diligence – failure to do the necessary throughout the four years of investigation until 30 June 2015 – which accounts for the present state of affairs. The Prosecution cannot now capitalise on its lack of due of diligence.

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[25] ICC-02/11-01/15-467, par. 11.

[26] ICC-02/11-01/15-449-Conf, para. 10.

30. Above all, in its request the Prosecution did not provide any information to account for the lateness. By taking the Prosecution's unsubstantiated assertions at face value, the Chamber therefore failed to ground and, as a consequence, provide a legal basis for its decision.

1.2 When taking at face value and failing to scrutinise the Prosecution's claims that the expert report would merely corroborate other evidence disclosed to the Defence, the Chamber failed to ground its decision

31. In the impugned decision, the Chamber only notes the "Prosecutor's submission that the Expert Report does not constitute a novel element but merely corroborates other previously disclosed material".[27]

32. Firstly, the Defence takes the view that in doing so the Chamber contradicted the Prosecution's own acknowledgement, in its initial request, that the novelty of material disclosed does have some bearing on the granting of an extension of time ("whether the new evidence brings to light a previously unknown fact that has a significant bearing on the case"[28]).

33. Secondly, it should be noted that recourse here to the concept of corroboration is nonsensical. Each item of evidence holds intrinsic meaning and intrinsic importance, while forming a whole with the remainder of the evidence. So to isolate an individual item from the body of Prosecution evidence may alter perception of the whole and, *inter alia*, destroy the coherence of an intellectual construct. Put otherwise, no item is inherently less important than another.

34. Thirdly, the content of the expert opinion does not corroborate any information to which the Defence is already privy, since the Prosecution has yet to disclose to it any information on the shots allegedly fired during the demonstration.

[27] ICC-02/11-01/15-467, para. 12.
[28] ICC-02/11-01/15-449-Conf, para. 8.

The report does, therefore, constitute new evidence, contrary to the Prosecution's claim.

35. Fourthly, contrary to the Prosecution's claim, the expert report is not one item of evidence among others on the women's demonstration. By her own admission, the Prosecution commissioned the expert report specifically to lessen the impact of the claims of one of the Prosecution witnesses, P-0607, whose statements are inconsistent with the thread of the Prosecution narrative. Far from corroborating other Prosecution evidence, the expert report contradicts what was imparted to the Defence.

36. Despite such considerations, which the Defence brought to the Chamber's attention, there is no indication in the impugned decision that the Chamber undertook any scrutiny whatsoever of the Prosecution's claims that the report was not new evidence but merely corroborative of other evidence. Specifically, the Chamber should have required the Prosecution to substantiate its claims and identify which evidence, in its view, was identical in purport to the expert report.

37. By not doing so, the Chamber failed to state the grounds for its decision, which is unfounded in law as a result.

1.3 The Chamber erred in law in its assessment of the prejudice to the Defence ensuing from late disclosure

38. In the impugned decision, the Chamber considered that granting the Prosecution's request "does not unduly prejudice the Defence."[29]

39. The Chamber explained that it had "given due regard to the specific circumstances of the case: in particular, the fact that the volume of material sought to be disclosed after the Disclosure Deadline, if compared to the total volume of evidence timely disclosed, remains limited and the fact that the trial is still in its early stages, which amply allows the parties to adequately prepare in light of new developments."[30]

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[29] ICC-02/11-01/15-467, para. 13.
[30] ICC-02/11-01/15-467, para. 14.

40. The Chamber further noted that "by the same token, and mindful of the need to avoid that no prejudice, however limited, be caused to the Defence, the Chamber orders that witnesses P-0583 and P-0626 shall not be called to testify before the summer judicial recess. This shall ensure that the Defence has sufficient time to adequately prepare before the Expert Report is used at trial and the witnesses questioned thereon."[31]

41. It is apparent from the Chamber's reasoning that it took account of three criteria in considering that no prejudice would be caused to the Defence: (1) the fact that the number of items of evidence disclosed late was small by comparison with the evidence disclosed as a whole; (2) the fact that the trial was still at an early stage; and (3) the fact that the authors of the expert report would not be called to testify until after the summer at the earliest.

42. All three criteria are irrelevant.

43. The comparison the Chamber made between the volume of evidence disclosed late and that of the total evidence disclosed to the Defence cannot be considered a relevant criterion in the assessment of prejudice. Prejudice must be assessed against the use of the individual item of evidence and not by mere perfunctory comparison with the remainder of Prosecution evidence. A single item could undermine the Defence's preparation and prompt it to review a considerable part of the case, resulting in a significant increase in its workload. What is more, from the Chamber's reasoning ensues the bizarre conclusion that the greater the Defence's workload, the more entitled the Prosecution would be to disclose further evidence. Yet, the opposite should hold true.

44. The criterion of timing of disclosure − according to which the Chamber viewed disclosure as possible as the trial was still at an early stage − cannot be applied since it rests on the idea that the run-up to trial and the preliminary stages of trial are inherently identical as regards the capacity of the Defence to prepare. Yet

[31] ICC-02/11-01/15-467, para. 15.

the Defence must be ready for the first day of trial, i.e. it must be apprised of the body of Prosecution evidence in order to be able to address all of the live evidence. Such preparation is in fact undermined if the Prosecution has leave to disclose new evidence any time after trial has started. The work of the Defence is further affected by the fact that, once trial has commenced, the whole team is occupied with examination and cross-examination and no longer has the necessary time to revisit the body of Prosecution evidence. The Prosecution should, therefore, simply be barred from disclosing new evidence.

45. In other words, the proceedings can run smoothly only if the various phases of trial follow a clearly circumscribed time frame and form part of a real process, with each party acting in sequence to the other's endeavours: investigation necessarily precedes the Defence's preparation, which necessarily precedes the phase of presentation of Prosecution evidence, which itself precedes the phase of presentation of Defence evidence. To consider that the Prosecution may continue to investigate once the presentation of its evidence has commenced and that the Defence must adjust accordingly and accept continued uncertainty as to the real content of Prosecution evidence – allowing late disclosure, leaves the Prosecution free to alter its case at will and the Defence never certain of having all of the incriminating evidence at its disposal – amounts to disregard for the sequence of the proceedings and jeopardises the fairness of the trial by preventing the Defence from preparing in proper conditions. To so proceed affords the Prosecution the unreasonable advantage of being allowed to investigate at this phase of the trial, close to five years after the investigation started.

46. In a similar vein, to accept the Chamber's reasoning as regards the late calling of the experts would leave the Defence at the mercy of the Prosecution, who, under the pretext that a witness might be called only six months later, would be at liberty to disclose new evidence even though trial had already commenced.

47. To grant the Prosecution's request would prevent the Defence from "hav[ing] adequate time and facilities for the preparation of the defence". Such circumstances wholly preclude a fair trial.

48. The Chamber has erred in law in assessing prejudice and so the Impugned Decision is unfounded in law.

2. The appeal is necessary at this stage

2.1 The resolution of the matter at bar may affect in a material way the fair and expeditious conduct of the proceedings or the outcome of the trial

49. To grant the Prosecution leave to disclose evidence in the course of trial prevents the Defence from preparing and, moreover, leaves it in the dark as to the true nature of the Prosecution evidence. The fairness of the trial is, therefore, at issue and all the more so in that the burden of proof rests with the Prosecution, which is duty-bound – necessarily before trial commences – to set out its arguments and evidence in coherent, clear and detailed terms. If not, the Accused will be unable to know the particulars of the accusations brought against him. It matters not whether the Prosecution is allowed to disclose fresh evidence at the start of trial or mid-trial: irrespective of its timing, disclosure will violate the fairness of the trial.

50. It is paramount, therefore, that the Appeals Chamber dispose of the issue, since, as matters stand, the Trial Chamber's ruling (1) violates that principle; (2) perpetuates confusion between the various phases of trial; (3) fails to lay down clear criteria for setting objective parameters for disclosure once trial has started.

2.2 Importance of the Appeals Chamber entertaining the matter

51. Whereas the Statute does not provide for appeal by right in respect of all Trial Chamber decisions, a trial chamber's systematic denial of leave to appeal to a party, even in matters which go to procedural fairness or the fundamental rights of the

accused, could of itself constitute a violation of the fairness of the trial. Of import is that not only the letter but also the spirit of the Statute be heeded and that a door be left open for the accused to appeal an important decision. All modern and democratic judicial systems make provision for the right to appeal and to address the court above so that the accused is not at the mercy of one trier of fact where a matter of fundamental importance is at issue.

2.3 Immediate resolution of the matter at bar is necessary to materially advance the proceedings

52. "[A]dvance" has been consistently construed as "removing doubts about the correctness of a decision or mapping a course of action along the right lines" and "immediate" has been defined as that which permits the "avoiding [of] errors […] by the prompt reference of the issue to the court of appeal".[32]

53. Were the matter not before the Appeals Chamber for consideration, the Defence might have to contend with the disclosure of fresh evidence throughout trial and thus be deprived of sufficient time in which to analyse the Prosecution evidence and to duly investigate so as to mount a proper defence. It is critical, therefore, that the Appeals Chamber immediately resolve the points raised on appeal.

54. Immediate resolution by the Appeals Chamber of outstanding matters would, moreover, purge the judicial process of any error which might taint the fairness of proceedings or compromise the outcome of the trial.[33] Were the impugned decision to be adjudged unfounded in law and groundless, only a prompt ruling of the Appeals Chamber would prevent the trial from proceeding in violation of the fundamental rights of the Accused.

[32] ICC-01/05-01/08-7, para. 20.
[33] ICC-02/04-177.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I TO:

Having regard to article 82(1)(d), rule 155(1) and regulation 65;

- **Grant** the Defence leave to appeal the impugned decision.

[signed]

Emmanuel Altit
Lead Counsel for Laurent Gbagbo

Dated this 29 March 2016

At The Hague, the Netherlands