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

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TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

**Prosecution's response to Laurent Gbagbo's application for leave to appeal
the "Decision concerning the Prosecutor's submission of documentary evidence
on 28 April, 31 July, 15 and 22 December 2017, and 23 March and 21 May 2018"
(ICC-02/11-01/15-1172)**

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 Mr Laurent Gbagbo

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 Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Chamber should reject the Gbagbo Defence's Application seeking leave to appeal¹ the Decision² of 1 June 2018 recognising the submission of the Prosecution's documentary evidence. The Application, once more,³ largely challenges the 29 January 2016 Decision setting out the evidentiary regime of the case,⁴ where the majority of the Chamber decided, as a general rule, to defer the assessment of the relevance, probative value and potential prejudice of the evidence until its article 74 decision. In several aspects, this Application is no more than a belated attempt to reconsider the 29 January 2016 Decision. Moreover, the Application further makes new arguments relating to the closing of the Prosecution's case and to the upcoming "no case to answer" submissions—both of which are beyond the scope of the Decision.⁵

2. As a result, none of the five alleged issues⁶ raised in the Application are appealable, as they either do not arise from the Decision or they constitute a mere disagreement with the Decision. They also do not meet the remaining criteria for leave to appeal under article 82(1)(d) of the Statute. The Application fails to show that the fairness and expeditiousness of the proceedings, or the outcome of the trial, is significantly affected, or that immediate resolution by the Appeals Chamber is necessary.

II. Submissions

3. An "issue" is a subject the resolution of which is "essential for the determination of matters arising in the judicial cause under examination".⁷ The correctness of a decision is irrelevant to an application for leave to appeal under

¹ ICC-02/11-01/15-1181 ("Application").

² ICC-02/11-01/15-1172 ("Decision").

³ See also ICC-02/11-01/15-776.

⁴ ICC-02/11-01/15-405 ("29 January 2016 Decision").

⁵ See ICC-02/11-01/15-1028-Conf; ICC-02/11-01/15-1029-Conf; ICC-02/11-01/15-1098; ICC-02/11-01/15-1099-Conf; ICC-02/11-01/15-1126-Conf; ICC-02/11-01/15-1127-Conf; ICC-02/11-01/15-1161-Conf; and ICC-02/11-01/15-1162-Conf.

⁶ Together, the "Proposed Issues".

⁷ ICC-01/04-168, para. 9.

article 82(1)(d) of the Rome Statute. The sole question is whether an issue meets the criteria for leave to appeal.⁸ As set out below, none of the Proposed Issues arise from the Decision. They are not appealable.

The First, Second, Third and Fourth Issues amount to a request for reconsideration

First and Second Issues

4. Under its First and Second Issues, the Gbagbo Defence alleges that the Chamber committed an error of law by not deciding on the admissibility of items submitted by the Prosecution, where i) the Prosecution's case is closed;⁹ and ii) the Defence teams have been permitted to file "no case to answer" submissions.¹⁰ The First and Second Issues do not arise out of the Decision, as they amount to yet another attempt to re-litigate the Chamber's evidentiary regime set out in its 29 January 2016 Decision. Not only has the Chamber already deferred its decision on the admissibility of submitted evidence in its 9 December 2016 Decision concerning the submission of documentary evidence,¹¹ the Appeals Chamber has since ruled that it did not, in so doing, err in the exercise of its discretion.¹²

5. Further, the Gbagbo Defence's arguments regarding the new circumstances of the closing of the Prosecution case and the filing of "no case to answer" submissions are beyond the scope of the Decision. Moreover, it still amounts to a request to reconsider that Decision, in the guise of an application for leave to appeal. Likewise, the Gbagbo Defence's reference to the 4 June 2018 Decision in this Application is inapposite.¹³ In any case, irrespective of the procedural phase of the case, the Defence's obligation to analyse the Prosecution's evidence submitted in the record remains the same.

⁸ ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-5), para. 22.

⁹ See Application, paras. 23-26.

¹⁰ See Application, paras. 27-32.

¹¹ ICC-02/11-01/15-773.

¹² ICC-02/11-01/15-995, para. 65.

¹³ Application, para. 27.

Third Issue

6. Under its Third Issue, the Gbagbo Defence alleges that the Chamber erred by not deciding on the admissibility of certain categories of items submitted by the Prosecution.¹⁴ This amounts to the same attempt at re-litigating the 29 January 2016 Decision as under the First and Second Issues, although confined to specific categories of documents, such as collections received from the Ivorian authorities, from the morgues of Abidjan and from the United Nations. The Third Issue therefore does not arise from the Decision.

7. Further, the Third Issue misstates the exercise undertaken by the Chamber in its Decision. While the Chamber declined to rule on the admissibility of the collections referred to by the Defence, it did not employ a blanket approach in declining to make an assessment on all documents. The Chamber did make an assessment and provide a ruling on the admissibility of two identified documents, which it found to be manifestly irrelevant.¹⁵

Fourth Issue

8. Under its Fourth Issue, the Gbagbo Defence alleges that the Chamber erred by deferring its consideration of the Defence's objection to the admission of items until its eventual determination of the facts of the case.¹⁶ This Issue is subsumed within the Gbagbo Defence's attempt to re-litigate the Chamber's evidentiary regime set out in its 29 January 2016 Decision, and therefore does not arise from the Decision.

9. Further, it is not the case that the Chamber is refusing to adjudicate upon the Defence's objections.¹⁷ In advancing this argument, the Gbagbo Defence conflates two separate matters: the first is the Parties' right and obligation—according to rule 64(1) of the Rules of Procedure and Evidence and the 29 January 2016 Decision—to

¹⁴ See Application, paras. 33-35.

¹⁵ Decision, para. 62 and p. 20.

¹⁶ See Application, paras. 36-42.

¹⁷ *Contra* Application, para. 38.

raise issues relating to relevance or admissibility at the time the evidence is submitted; the second is the Chamber's prerogative and preference in this case to defer evidentiary assessments (and consider the issues raised by the Parties) until the end of the case. The Appeals Chamber has also confirmed that this is so.¹⁸

The Fifth Issue misunderstands the Decision

10. Under its Fifth Issue, the Gbagbo Defence alleges that the Chamber erred in law by proceeding to a notification under paragraph 47 of the Directions on the Conduct of Proceedings,¹⁹ without following the proper procedure. Referring to paragraph 65 of the Decision, the Application asserts that "the notification with which the Chamber proceeded did not conform to the requirements of the Statute and the spirit of paragraph 47 of [the Directions]."²⁰

11. This assertion misapprehends the Chamber's Decision, which states nothing more than the Chamber's understanding that paragraph 47 of the Directions applies to the video evidence submitted by the Prosecution.²¹ The Decision contains no reference to any intention of the Chamber "to rely on other portions of the item for the purpose of supporting any findings relating to the charges", an event which would require notice under paragraph 47. The arguments raised under the Fifth Issue are therefore premature, and do not arise from the Decision.

The Proposed Issues do not meet the requirement of article 82(1)(d)

The Proposed Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

12. As the Gbagbo Defence's arguments are premised on already litigated aspects of the evidentiary regime and issues that do not otherwise arise from the Decision, they fail to show how the Proposed Issues would significantly affect the fairness of the proceedings. Nor does the Application address how the Proposed

¹⁸ ICC-02/11-01/15-995, para. 55.

¹⁹ ICC-02/11-01/15-498-AnxA ("Directions").

²⁰ Application, para. 46.

²¹ Decision, para. 65.

Issues affect the outcome of the trial. The Chamber's evidentiary regime has been approved by the Appeals Chamber,²² such that re-litigation is not only impermissible, but would also be pointless.

13. Further, there is no uncertainty for the Defence about which documents make up the Prosecution's evidence in the case ("*dossier*") and therefore could be relied upon by the Chamber in its article 74 decision.²³ Rather, the Decision was consistent with this Chamber's evidentiary regime where the Majority generally defers the assessment of the evidentiary criteria to its article 74 deliberations. The evidence submitted is plainly part of the record.

14. Consequently, the Chamber may rely on it in its article 74 decision and both Parties are expected to "conduct their investigations and prepare their [...] cases in light of all evidence submitted".²⁴ There is neither ambiguity nor unfairness. And the only "uncertainty" relates to the Chamber's final evidentiary assessment and weight to be given to the evidence—one that is inherent to all trial proceedings, where evidence is assessed as a whole and not in isolation at the end of the trial, and does not result from the Decision. The Parties would be placed in the same position (and cannot know with certainty the Chamber's final evidentiary assessment) even if the evidence had been assessed for admissibility on a rolling basis.

The immediate resolution of the Proposed Issues by the Appeals Chamber will not materially advance the proceedings.

15. Finally, the Application fails to show how an immediate resolution by the Appeals Chamber of any of the purported Issues would materially advance the proceedings. To the contrary, the Appeals Chamber has already—on three previous occasions—provided guidance on the submission regime, including specifically in this case. Because the "submission" of the evidence does not require an assessment of the standard evidentiary criteria and, at this stage, it is unknown whether the

²² In addition to the Appeals Chamber's decision ICC-02/11-01/15-995 in the present case, see also ICC-01/05-01/08-1386 OA5 OA6, para. 37 and ICC-01/05-01/13-2275-Red, paras. 598-599.

²³ *Contra* Application, para. 50. See also paras. 19, 21, 30 and 32.

²⁴ 29 January 2016 Decision, para. 18.

Chamber would rely on—and what weight it would give to—the evidence submitted by the Prosecution, the Appeals Chamber’s intervention is premature and unwarranted.²⁵ In fact immediate intervention by the Appeals Chamber would not “materially advance the proceedings” at this stage. Rather, it would only cause unnecessary delay.

Conclusion

16. For the above reasons, the Prosecution requests the Chamber to dismiss the Application.



Fatou Bensouda, Prosecutor

Dated this 14th day of June 2018

At The Hague, The Netherlands

²⁵ *Contra* Blé Goudé Application, paras. 37 and 39.