

Partly dissenting opinion of Judge Cuno Tarfusser

1. I dissent from today's decision to grant leave to appeal to the Defence of Laurent Gbagbo and the Defence of Charles Blé Goudé. I dissent, first, because I am of the view that the Majority trespasses the limits of its function under article 82(1)(d) of the Statute by changing in substance the issues proposed for appeal by the Defence teams. Second, I dissent because I do not share the view of the Majority that the issue as ultimately certified (nor any of the original issues before reformulation) satisfies the requirements of article 82(1)(d) of the Statute. I write this opinion in order to briefly provide my reasons for each of these conclusions.
2. Article 82(1)(d) of the Statute provides that an interlocutory decision may be appealed if it "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".
3. Rule 155(1) of the Rules states that the party seeking to appeal an interlocutory decision "shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal". Regulation 65 of the Regulations of the Court then regulates the matter in further detail, and provides how the other participants in the proceedings can be heard.
4. It should go without saying, but circumstances nevertheless compel me to spell out that it follows from the above-cited provisions of the Statute and the Rules that the decision whether and what to appeal is exclusively in the hands of the parties, and not of the Chamber which made the impugned ruling. The parties have to identify an appealable issue and submit it to the Chamber for consideration. Then, the Chamber's role is to verify whether the requirements of article 82(1)(d) of the Statute are met with respect to the proposed issue.

5. At the same time, the provisions cited above show that the identification of the appealable issue is crucial for the interlocutory appeal as it sets the parameters of the jurisdiction of the Appeals Chamber. As put by the Appeals Chamber itself, “it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent.”¹ Indeed, the Appeals Chamber has previously declined to consider arguments going beyond the issue in relation to which leave to appeal had been granted.²
6. On the basis of these considerations I am of the view that the Pre-Trial or Trial Chamber does not have the power to reformulate in substance the issue identified for appeal by the party seeking leave to appeal. If it does so reformulate, the Pre-Trial or Trial Chamber interferes with the parameters of the interlocutory appeal without the prospective appellant or the other parties being heard. This is in the final instance incompatible with the object and purpose of article 82(1)(d) of the Statute, which is to give the parties, in the specified circumstances, the right to appeal judicial decisions. As an illustration of how this practice does not guarantee the right to appeal it may be mentioned that it has already occurred before this Court that an appeal was withdrawn after an issue was certified for appeal only after reformulation by the Chamber.³
7. To be clear, I am not opposed to terminological corrections to the wording of issues identified for appeal, or to reformulations that are warranted by partial rejections of requests for leave to appeal, or to other reformulations which do not interfere with the substance of the proposed appeal. I am, however, strongly opposed in principle

¹ *The Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 16 December 2013, ICC-02/11-01/11-572, para. 63.

² *Ibid*, paras 63-64, see in particular footnote 142.

³ See ICC-02/05-03/09-435.

to substantive reformulations of the issues proposed for appeal under article 82(1)(d) of the Statute.

8. Turning from the abstract to the concrete, it is my conclusion that the issue as reformulated by the Majority differs substantially from the issues proposed by the Defence teams, and therefore should not be certified under article 82(1)(d) of the Statute.
9. A simple visual representation can serve to make my argument:

Issues identified by the Defence teams

La Chambre a erré en droit en ne rejetant pas les demandes du Procureur visant à déposer au dossier de très nombreux documents sans passer par le truchement d'un témoin alors que ces demandes n'étaient pas suffisamment étayées, contrairement aux exigences des paragraphes 43 et 44 (Gbagbo Third Issue).

La Chambre a erré en droit en estimant qu'elle ne pouvait se prononcer sur l'admissibilité des pièces présentées ici par l'Accusation – et plus particulièrement sur leur authenticité – qu'à la fin du procès (Gbagbo Fourth Issue).

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 (Blé Goudé Third Issue).

Issue certified for appeal

Whether the Chamber erred by (a) not ruling on the admissibility of certain documents, despite finding that the tendering party did not provide sufficient information to establish their authenticity at the time of submission, and (b) by giving the tendering party an unrestricted opportunity to submit further evidence in this regard (Majority Issue).

10. It should be evident at first sight that the changes are not cosmetic, and that a substantial reformulation was made by the Majority. The Majority Issue concerns the (supposed) failure of the Chamber to make a ruling on the admissibility of certain evidence submitted by the Prosecutor and the attendant (supposed) risks to the fairness of the trial. The Gbagbo Third Issue deals with the (supposed) violation in the impugned decision of the Chamber's own directions with respect to the procedure of submission of documentary evidence. The Gbagbo Fourth Issue relates

to the Chamber's (supposed) legally erroneous declaration that it could not rule on the admissibility of evidence, and in particular on its authenticity, until the end of the trial. The Blé Goudé Third Issue focuses on the (supposed) incompatibility of the Chamber's approach to the submission of documentary evidence with the fair trial rights of the Defence. Now, all of these issues do relate, broadly, to the impugned decision and to the subject-matter of submission of documentary evidence. But identification of the issue for appeal, and thereby the setting out of parameters of appellate jurisdiction, requires precision and it is in my view impossible to see the Majority Issue as a consolidation and restatement of the three issues proposed by the Defence teams. On the contrary, all the four issues are substantively distinct from each other.

11. As I am of the view, as explained above, that such reformulation is not within the powers of the Chamber, I cannot agree to the Chamber certifying the reformulated issue for appeal. Had any party wished for an appeal to take place on these terms, it could have requested (and should have duly applied for) leave to appeal on this particular issue.
12. I turn now to my second point, which is that the Majority Issue is in any case not suitable for certification under the criteria of article 82(1)(d) of the Statute. *In abstracto*, these criteria are uncontroversial and reiterated at paragraph 11 of today's decision. I will therefore not repeat them here.
13. Specifically, I am of the view that the Majority Issue is not an issue arising from the impugned decision within the meaning of article 82(1)(d) of the Statute. To begin with, I find in the language used by the Majority a hyperbolic interpretation of certain non-operative passages of the impugned decision, which then forms the basis for the Majority Issue. In particular, contrary to the factual premise underlying the certified issue as reformulated by the Majority, the impugned decision does not contain a finding that "the tendering party did not provide sufficient information to

establish [the authenticity of certain documents submitted] at the time of submission". Nor is there in the impugned decision any language that can be summarised as "giving the tendering party an unrestricted opportunity to submit further evidence in this regard". Given the extremely short reasoning of the Majority it is impossible to identify with certainty the part of the decision which is now understood, by the Majority, to contain these findings. The only thing I am able to point to is a sentence in the impugned decision stating: "Without going into further detail, the Chamber observes that further evidence may be necessary to determine the authenticity of some of the documents submitted" (para. 39).

14. Indeed, I note that the appeal as certified will not take place against a decision, but effectively against the absence of a decision declaring certain evidence inadmissible. In this respect, the interpretation of the impugned decision is not disputed, but I nevertheless feel it necessary to emphasise that, on the other hand, the impugned decision did not make a finding that any evidence submitted was admissible either. The operative part of the decision only goes as far as "recognis[ing] as submitted the items of evidence listed in Annex A" (p. 15).

15. The impugned decision followed and implemented the general regime for submission of documentary evidence in this trial, as established by a decision of 29 January 2016, whereby this Chamber decided that "any decision on the admissibility and relevance of the evidence submitted will be deferred to the final judgment, except when an intermediate ruling is required under the Statute or otherwise appropriate".⁴ For the choice of this approach, the decision of 29 January 2016 provided comprehensive reasoning.

16. Leave to appeal the decision of 29 January 2016 was not requested by any party. Therefore, that decision is *res judicata* and in force, and interlocutory appeal against a

⁴ "Decision on the submission and admission of evidence", ICC-02/11-01/15-405, p. 10.

subsequent decision, even if it is related in substance, cannot result in its reversal or amendment. Under the Statute and the Rules, the Appeals Chamber does not have such power when deciding interlocutory appeals.

17. It appears, on the basis of what it says with respect to another issue at paragraph 19 of the decision, that the Majority accepts that an interlocutory appeal against the impugned decision cannot serve as a loophole to now surreptitiously appeal the decision of 29 January 2016. I hold the same view. Where I disagree with the Majority is that I believe that this same logic applies to its own reformulated issue. The Majority Issue in fact does not arise out of the impugned decision, but from the decision of 29 January 2016, in exactly the same way as the issue addressed at paragraph 19 of today's decision.
18. As to the original three issues which form the point of departure for the Majority's exercise of reformulation, I find the following. The Gbagbo Third Issue centres on the alleged incompliance with the directions on the conduct of proceedings (ICC-02/11-01/15-498-AnxA). The Defence of Laurent Gbagbo wishes to argue on appeal that incompliance with, specifically, the formal requirements of paragraph 44 of the directions should lead to an immediate rejection of the evidence. However, because any such rejection could not prevent the Prosecutor from re-submitting the same evidence and this resulting in effectively the same outcome, this issue cannot be said to have any impact on the present proceedings.
19. The Gbagbo Fourth Issue is, in my view, a plain and obvious attempt to litigate on appeal the decision of 29 January 2016, and therefore, as explained above, does not arise from the impugned decision.
20. The Blé Goudé Third issue, in turn, focuses on an alleged contradiction between the Chamber's pronouncement that it would not ordinarily assess the evidence at the time of submission, and its own obligation to raise any issue of relevance or admissibility at the time of submission. In addition to this issue being in fact, as

above, an attempt to appeal the conclusions reached by the Chamber in the decision of 29 January 2016, it is also premised on an exceedingly rigid interpretation of rule 64(1) of the Rules. The relevant part of the rule in full reads:

An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after the issue has become known.

21. In my view, the effect of rule 64(1) of the Rules is that it prevents the parties from keeping their cards under the table by not revealing their arguments until late in the trial. This is also the interpretation compatible with the essence of trial, which is an evidentiary debate. If arguments are made sufficiently early, investigations can take place, debate can unfold, and everything needed for the decision of the Chamber can properly be put before it. Accordingly, the Defence, while obliged to make at the time of submission of evidence any arguments that it is in a position to make at that point in time, will not be precluded from making additional arguments in the future, responding to the developments in the trial. Therefore, the Defence is not limited in the way that it alleges to be, and the issue of the legality of this limitation cannot be said to arise out of the impugned decision.

22. Considering the above, neither the Majority Issue nor any of the three issues that precede it are suitable for interlocutory appeal. I dispense, therefore, with further analysis under article 82(1)(d) of the Statute and limit myself to just one final consideration.

23. Trial in this case is ongoing and documentary evidence is submitted on a daily basis in line with the decision of 29 January 2016. Decisions analogous to the impugned decision were taken in this trial even before the impugned decision itself.⁵ Even more

⁵ See "Decision on the 'Prosecution's application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550'", 19 July 2016, ICC-02/11-01/15-629-Conf and -Red; Oral decision of 7 December 2016, ICC-02/11-01/15-T-113-Red-ENG, p. 11, lines 7-8, 22-23.

often, submission of evidence is recorded in Ecourt metadata by the Registry pursuant to a general instruction,⁶ without a formal decision by the Chamber in each case of submission. I recognise without reservation the importance of the parties having the possibility to have the conclusions of the Chamber, including those related to this particular subject-matter, reviewed on appeal. This possibility will inevitably come at the latest under article 81(1) of the Statute. Before that, however, I consider that there is a risk that interlocutory appeal against discrete procedural decisions which have no other effect than to acknowledge the submission of specific evidence could result in an incoherent record and would not materially advance the proceedings within the meaning of article 82(1)(d) of the Statute.

24. It would be wiser and more efficient to have the Chamber's evidentiary rulings reviewed as part of any final appeal against the judgment under article 74 of the Statute. At that time, the Chamber will have considered all the evidence submitted, made all necessary evidentiary rulings, and drawn its factual conclusions from the evidence. It is also at that time that it will be possible to conclusively determine the significance of specific evidentiary findings, and therefore the impact of any errors in their regard.

25. As I concur with the Majority's rejection of leave to appeal with respect to all other issues raised by the Defence of Laurent Gbagbo and the Defence of Charles Blé Goudé, I would thus have rejected both applications for leave to appeal in their entirety.



Judge Cuno Tarfusser
Presiding Judge

⁶ ICC-02/11-01/15-405, p. 10.

Dated this 4 May 2017

The Hague, The Netherlands