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

Date: 4 May 2017

TRIAL CHAMBER I

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

**Decision on request for leave to appeal the Decision concerning the Prosecutor's
submission of documentary evidence on 13 June, 14 July, 7 September and 19
September 2016**

Decision 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 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 Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The 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**

Others

Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Article 82(1)(d) of the Rome Statute (“Statute”) and Rule 155 of the Rules of Procedure and Evidence (“Rules”), issues the following decision by majority.

I. PROCEDURAL BACKGROUND

1. On 9 December 2016, the Chamber decided by Majority to recognise as submitted 161 items of evidence (“Impugned Decision”).¹
2. On 19 December 2016, the Defence for Mr Laurent Gbagbo (“Gbagbo Defence”) filed a request for leave to appeal the Impugned Decision.² The Gbagbo Defence raised 7 appealable issues.
3. Also on 19 December 2016, the Defence for Mr Charles Blé Goudé (“Blé Goudé Defence”) filed a request for leave to appeal the Impugned Decision.³ The Blé Goudé Defence raised 4 appealable issues.
4. On 22 December 2016, the Office of the Prosecutor (“Prosecutor”) filed its consolidated response to the two abovementioned requests for leave to appeal.⁴

¹ ICC-02/11-01/15-773 + AnxA.

² “Demande d’autorisation d’interjeter appel de la ‘Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016’”, ICC-02/11-01/15-776-Conf.

³ “Request for leave to appeal the ‘Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016’”, ICC-02/11-01/15-777.

⁴ “Prosecution’s Consolidated Response to the Defence for Mr Blé Goudé and the Defence for Mr Gbagbo’s applications for leave to appeal the ‘Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016’”, 22 December 2016, ICC-02/11-01/15-780 (Consolidated Response).

II. SUBMISSIONS

Gbagbo Defence Request

8. The Gbagbo Defence identifies the following appealable issues:

- a. *Mr Gbagbo's First Issue*: Error of law by refusing to consider the Defence's arguments on the erroneous ground that these arguments constitute a veiled request for reconsideration of the Chamber's decision of 25 January 2015 on the submission and admission of evidence.⁵
- b. *Mr Gbagbo's Second Issue*: Error of law by considering that the introduction of elements of proof other than through a witness should be regarded as the common practice of the Chamber.⁶
- c. *Mr Gbagbo's Third Issue*: Error of law by failing to reject the Prosecutor's request to submit certain documents, even though this request was insufficiently substantiated in violation of paragraphs 43 and 44 of the Chamber's Directions on the Conduct of Proceedings.⁷
- d. *Mr Gbagbo's Fourth Issue*: Error of law by considering that the Chamber cannot decide on admissibility, in particular authenticity, until the end of the trial.
- e. *Mr Gbagbo's Fifth Issue*: Error of law by considering that the Defence bears the burden of establishing that documents provided by the Ivorian authorities lack authenticity.

⁵ ICC-02/11-01/15-405.

⁶ Impugned Decision, para. 34.

⁷ ICC-02/11-01/15-498-AnxA.

- f. *Mr Gbagbo's Sixth Issue*: Error of law by considering that an item of evidence is relevant as soon as it relates to any issue that was mentioned by a witness during testimony.
 - g. *Mr Gbagbo's Seventh Issue*: Error of fact by affirming that the Defence did not raise objections concerning the authenticity of documents in relation to witness P-0048.
9. The Blé Goudé Defence identifies the following appealable issues:
- a. *Mr Blé Goudé's First Issue*: Whether the Chamber erred in law in finding that the Defence submissions in response to the Requests merely sought reconsideration of the Decision of 28 January 2016 whereas the Defence submissions were legitimate applications of the provisions of Rule 64(1) of the Rules and of paragraph 17 of the Decision of 28 January 2016.
 - b. *Mr Blé Goudé's Second Issue*: Whether the Chamber contradicted itself in encouraging the parties to introduce documentary evidence in the view that such introduction of evidence may reduce the amount of time devoted to hearing evidence in court while by postponing any rulings on the relevance or admissibility of evidence until the end of the trial, it could not possibly reach such goal.
 - c. *Mr Blé Goudé's Third 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.
 - d. *Mr Blé Goudé's Fourth Issue*: Whether the Chamber put an unfair burden on the Defence by obliging them to devote their scarce

resources and attention in responding to any document submitted to the case record regardless of the actual relevance of such document.

10. The Prosecutor rejected the Defence's arguments and asked the Chamber to deny the requests for leave to appeal in their entirety. As part of her argumentation, the Prosecutor makes the rather astonishing comment that the Chamber "never conditioned the formal submission of the evidence on the Parties' compliance with paragraph 44 of the Amended Directions."⁸ The Chamber notes that the Prosecutor refers to the alleged practice before Trial Chambers VII and IX in this regard. Regardless of what these Chambers may have adopted as their practice, it should go without saying that this Chamber expects the parties in this case to comply with its instructions, as reiterated in the Impugned Decision.

III. ANALYSIS

11. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute, as set out in previous decisions.⁹ In order to make a valid request for leave to appeal, the appealing party must identify one or more 'issues' – i.e. alleged legal or factual errors, which arise directly from the impugned decision¹⁰ and which have a measurable impact on the operative part of the decision. The Chamber further notes the Appeals Chamber's definition of an issue as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting

⁸ Prosecutor's Consolidated Response, para. 32

⁹ See, e.g., "Decision on request for leave to appeal the 'Fourth decision on matters related to disclosure and amendments to the List of Evidence' and other issues related to the presentation of evidence by the Office of the Prosecutor", 13 May 2016, ICC-02/11-01/15-524.

¹⁰ See, e.g., "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", 2 July 2015, ICC-02/11-01/15-117.

opinion.”¹¹ Pursuant to Article 82(1)(d) of the Statute, the Chamber must determine whether the issue has a significant impact on “the fair and expeditious conduct of the proceedings or the outcome of the trial”. Finally, leave to appeal will only be granted if, in the Chamber's opinion, an immediate resolution by the Appeals Chamber may materially advance the proceedings

12. The Chamber will now analyse each of the appealable issues raised by both Defence teams.

Mr Gbagbo's and Mr Blé Goudé's First Issues

13. In their First Issues, the Gbagbo and Blé Goudé Defence appear to take issue with the Chamber's statement in paragraph 33 of the Impugned Decision that it would “not entertain *general* submissions made by parties seemingly seeking reconsideration of its previous decision” [emphasis added]. The Chamber's statement should not be interpreted as suggesting that it failed to consider the Defences' arguments insofar as the admissibility of the items of evidence in question is concerned. To the extent that the Defence are dissatisfied with the Chamber's decision not to exercise its discretion to rule on admissibility before the end of the trial – a possibility which the Chamber did indeed leave open in its Decision on the Submission and Admission of Evidence¹² - the grounds of appeal as formulated by the Defence do not allege that the Chamber has abused its discretion in this regard. Under these circumstances, the Issues do not raise any points of law (or fact) which the Appeals Chamber could meaningfully review.

Mr Gbagbo's Second Issue

¹¹ Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, at para. 9.

¹² ICC-02/11-01/15-405, para. 17.

14. Under its Second Issue, the Gbagbo Defence challenges the Chamber's *obiter* statement that "the introduction of evidence other than through witnesses must not be regarded as extraordinary, but as common practice that this Chamber has urged the parties to use in order to expedite proceedings, insofar as this is not prejudicial to the rights of the accused."¹³ Aside from expressing disagreement with this general principle and its foundations, the Defence does not identify any concrete and specific prejudice the accused is alleged to have suffered as a result of the Chamber's approach.

Mr Gbagbo's Fifth Issue

15. Mr Gbagbo's Fifth Issue takes aim at paragraph 40 of the Impugned Decision. However, it seems to be premised on a misunderstanding of this part of the decision. The Chamber simply wished to clarify that the mere fact that certain documents were provided by the current Ivorian authorities is not, of itself, a sufficient reason not to apply the presumption that official documents from public authorities benefit from a presumption of authenticity when they are properly signed by an agent of the organisation and bear the relevant stamps, etc. To the extent that the Gbagbo Defence has raised valid concerns about the chain of custody of certain documents, these will be taken into consideration by the Chamber when it makes its final admissibility assessment at the end of the trial. Therefore, this issue does not arise from the Impugned Decision and, in any event, causes no prejudice to the Defence.

Mr Gbagbo's Sixth Issue

16. Mr Gbagbo's Sixth Issue relates to paragraphs 42 and 43 of the Impugned Decision. It rests on a misunderstanding of these paragraphs.. The Chamber merely considered that the items in question might be relevant to assessing

¹³ Paragraph 34 of the Impugned Decision.

the trustworthiness of the witnesses in question. This Issue therefore does not arise from the Impugned Decision.

Mr Gbagbo's Seventh Issue

17. The Gbagbo Defence correctly points out that it had indeed raised concerns in relation to the authenticity of a number of items of evidence in relation to P-0048's testimony. The Seventh Issue therefore does arise from the Impugned Decision. However, the Chamber is of the view that this does not warrant leave to appeal, as the Chamber has not yet ruled on the admissibility of the items of evidence in question. To the extent that the Chamber may have erred, this has not caused any irreparable prejudice to the accused, as the Chamber can still fully take into account the Defence's objections.

Mr Blé Goudé's Second Issue

18. Mr Blé Goudé's Second Issue amounts to a mere disagreement with the Chamber's assessment of the most efficient way to conduct this trial. This factual disagreement is not substantiated in any way and therefore largely speculative. As such, it does not constitute an appealable issue.

Mr Blé Goudé's Fourth Issue

19. Mr Blé Goudé's Fourth Issue is an effort to appeal the Chamber's approach to evidence, as outlined in the Chamber's earlier Decision on the Submission and Admissibility of Evidence.¹⁴ The Impugned Decision is merely an application of this decision. The Chamber already took the Defence's arguments on the timing of admissibility rulings into consideration and decided that its approach does not result in the imposition of an undue burden upon the Defence. Accordingly, the Chamber is of the view that Mr Blé Goudé's Fourth Issue is merely an effort to re-litigate the issue of the Chamber's general

¹⁴ ICC-02/11-01/15-405.

approach towards the submission and admissibility of evidence and, as such, does not arise from the Impugned Decision.

Mr Gbagbo's Third and Fourth Issues and Mr Blé Goudé's Third Issue

20. Under the Third Issue, the Gbagbo Defence challenges the Chamber's decision not to rule on the admissibility of concrete items of evidence even when it expressly finds that the Prosecutor has not provided sufficient information to establish their authenticity. Mr Gbagbo's Fourth Issue challenges the Chamber's argument that it cannot rule on admissibility until the end of the trial. Under his Third Issue, Mr Blé Goudé argues that the Chamber erred in law by obliging the Defence to raise all issues of relevance and admissibility of evidence when it is first submitted, while claiming to be unable to rule on these points until the end of the trial.
21. The Chamber, whilst emphasising that it did not categorically state that it can never under any circumstance rule on admissibility before the end of the trial, agrees that these issues arise from the Impugned Decision. Indeed, even though the Impugned Decision identified specific concerns with regard to their authenticity of certain items of evidence, the Chamber nevertheless declined to rule on their admissibility. In so doing, the Chamber implicitly left open the possibility that the Prosecutor might submit further evidence in relation to authenticity at a later stage of the proceedings. This could give rise to additional arguments on behalf of the Prosecutor, and consequently to the need for the Defence to submit further responses. Summarising and integrating the Third and Fourth issues of Mr Gbagbo as well as Mr Blé Goudé's Third Issue, the ground of appeal could be formulated as follows:

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.

22. If left unresolved, this issue has the potential to affect the fairness as well as the efficiency of the proceedings,. Given that this problem is likely to arise in this case, especially in light of the Prosecutor's comments in her Consolidated Response, an immediate resolution of this issue by the Appeals Chamber is desirable at this stage. The Chamber therefore grants leave to appeal for Mr Gbagbo's Third and Fourth Issues as well as Mr Blé Goudé's Third Issue, as summarised above.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

GRANTS leave to appeal Mr Gbagbo's Third and Fourth Issues as well as Mr Blé Goudé's Third Issue.

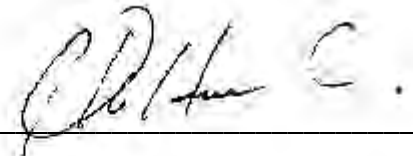
REJECTS the remaining requests for leave to appeal.

Done in both English and French, the English version being authoritative

Judge Cuno Tarfusser appends a Partly Dissenting Opinion



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 4 May 2017

At The Hague, The Netherlands