

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/11-01/15
Date: 10 November 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 the "*Demande d'autorisation d'interjeter appel de la décision orale
rendue par la Chambre de première instance le 5 octobre 2017*"**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Eric MacDonald

Counsel for Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Geert-Jan Alexander Knoops
Claver N'dry

Legal Representatives of Victims

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 of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to articles 82(1)(d) of the Rome Statute; Rule 155 of the Rules of Procedure and Evidence and Regulation 65 of the Regulations of the Court, issues, by Majority, Judge Henderson dissenting, this decision on the “*Demande d’autorisation d’interjeter appel de la décision orale rendue par la Chambre de première instance le 5 octobre 2017*”, filed by the Defence for Mr Gbagbo on 6 October 2017 (“Request”).¹

1. On 28 August 2017, the Chamber requested both Defence teams and the LRV to file, no later than 29 September 2017, submissions as to the subsequent stages of the proceedings.²
2. On 2 October 2017, the Defence for Mr Gbagbo filed its “*Observations de la Défense en réponse à l’ordonnance orale de la Chambre du 28 août 2017*”, (“Observations”),³ as a confidential *ex parte* filing, only available to the Chamber. A public redacted version was filed on the same day.
3. On 3 October 2017, the Prosecutor asked the Chamber to review the amount of redactions *vis-à-vis* the other parties applied to the Observations.⁴ The Defence for Mr Gbagbo responded that the redactions were necessary, with a view to preserving the confidentiality of its strategy.⁵
4. On 5 October 2017, the Chamber issued an oral ruling ordering the Registry to reclassify the Observations as “*confidential*” (“Decision”).⁶ The Defence for Mr. Gbagbo announced its intention to request leave to appeal.⁷ Accordingly, the

¹ ICC-02/11-01/15-1049-Red.

² ICC-02/11-01/15-T-181-ENG ET, page 2, lines 7 to 20.

³ ICC-02/11-01/15-1041-Red.

⁴ ICC-02/11-01/15-T-198-ENG ET, page 32, lines 4 to 15.

⁵ *Ibid.*, page 33 line 10 to 22.

⁶ ICC-02/11-01/15-T-200-CONF-ENG ET, page 66, line 11 to page 67, line 25. The oral ruling was read in open session.

⁷ *Ibid.*, page 68, line 2 to 7.

Chamber ordered the Registry to provisionally suspend the implementation of the reclassification, with a view to allowing the Defence to file its request and the Chamber to decide upon it.

5. On 6 October 2017, the Defence for Mr Gbagbo filed the Request.
6. The provision applicable for the resolution of the Request is Article 82(1)(d) of the Statute. In brief, an interlocutory appeal can be allowed in respect of issues arising out the impugned decision, meaning issues essential for the disposition of the matter. In addition, appeal can only be certified in respect of issues which 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 Chamber, immediate appellate resolution may materially advance the proceedings.
7. The Defence of Mr. Laurent Gbagbo seeks leave to appeal in respect of the following four issues:
 - a. whether the Chamber erred in law in finding that information relating to scenarios of possible cooperation between the Defence and other actors can be disclosed to the other parties and participant in the proceedings (“First Issue”);
 - b. whether the Chamber erred in law in affirming that the other parties and participants in the proceedings have the right to receive information on the strategy of the Defence (“Second Issue”);
 - c. whether the Chamber erred in affirming that “now it is time to execute that strategy” (“Third Issue”);
 - d. whether the Chamber erred in fact in holding that disclosure of the Observations in their entirety to the other parties would not have any bearing on the effectiveness of the strategy of the Defence of Mr Gbagbo, or otherwise adversely affect Mr Gbagbo’s fair trial rights (“Fourth Issue”).

First Issue

8. The Defence submits that any information relating to cooperation matters is strictly linked to investigative activities and that, accordingly, their confidentiality *vis-à-vis* the other parties and participants must be preserved. The Defence also submits that the Decision would reverse the Chamber's previous practice.
9. The Chamber believes that the First Issue mischaracterises the Decision. The Decision does not result in requesting from the Defence to provide the other parties and participants with detailed information on either the merit or the outcome of its investigative activities. No such detailed information is contained in the portions of the Observations originally redacted from the Defence; the Defence itself acknowledges that only after it will have analysed the Prosecutor's evidence in its entirety "*elle aura une idée plus précise de ses besoins*"⁸. Accordingly, no issue of consistency *vis-à-vis* the fact that in this case cooperation requests have so far been filed on a confidential *ex parte* basis arises, either.
10. For these reasons, the First Issue does not arise out of the Decision and is therefore not appealable under Article 82(1)(d) of the Statute.

Second Issue

11. The Defence submits that there is no reason, at this stage of the proceedings, to provide the other parties and participants information on its strategy, in particular in light of the fact that the Prosecutor has not yet completed the presentation of her case. The Defence maintains that the Decision, by providing the Prosecutor with "*un droit de regard sur la façon dont la Défense compte choisir ses témoins*", violates the principle of equality of arms, since at no stage was the

⁸ Observations, paragraph 38.

Defence in a position to comment upon monitor the Prosecutor's strategy, her list of evidence and her list of witnesses.

12. The Chamber believes that also the Second Issue does not arise out of the Decision. Far from vesting in the Prosecutor any kind of right *vis-à-vis* the Defence strategy, or the way in which the Defence identifies the witnesses to be called, the Decision only stated that the specific information contained in the redacted portions of the Observations was not of such a nature and content as to result in possibly prejudicing the effectiveness of the Defence's strategy if disclosed to the other parties and participants. Furthermore, neither in the Observations nor in the Request does the Defence for Mr Gbagbo go beyond general statements to the effect that preserving the confidentiality of the Observations *vis-à-vis* the Other parties is necessary, or provide specific examples of the way in which reclassifying as confidential the portions originally redacted by the Defence would jeopardise or otherwise adversely affect their strategy.
13. Accordingly, the Chamber finds that the Second Issue amounts to a mere disagreement by the Defence for Mr Gbagbo with the Chamber's assessment, and, as such, is not an appealable issue within the meaning of article 82(1)(d) of the Statute.

Third Issue

14. In its Third Issue, the Defence submits that the Chamber erred in affirming that, at this stage of the proceedings, "it is time for the Defence to execute its strategy". The Defence stresses its impossibility to determine its strategy until the end of the presentation of both the Prosecutor's and the LRV's evidence and its analysis by the Defence of all the evidence, and maintains that only at that

stage it will be under an obligation to disclose its list of witnesses and of evidence to the other parties and participants.

15. The Chamber finds that, similarly to the First and the Second Issues, the Third Issue is premised upon a mischaracterisation of the Decision and reveals the Defence's disagreement with the Chamber's assessment. More specifically, the wording to the effect that it is now time for the defence to execute its strategy was only meant to highlight that the proceedings are no longer in their early stages and, accordingly, there is now a need for the Chamber, as well as for the parties and participants, to receive information as to the subsequent stages. The sentence, which has no specific bearing on the outcome of the Decision, was itself premised on the Chamber's assessment underlying the Decision as a whole: namely that, also in light of the stage reached by the proceedings, the kind of information included in the portions of the Observations the Defence for Mr Gbagbo seeks to redact were generic enough so as to make it possible for them to be disclosed to the other parties without any adverse effect.
16. Accordingly, the Third Issue is not an appealable issue pursuant to article 82(1)(d) of the Statute.

Fourth Issue

17. In its Fourth Issue, the Defence submits that the Chamber erred in stating that the reclassification of the Observations would not have any consequence on the effectiveness of the Defence strategy. The Defence submits that this reclassification would result in an "undue advantage" for both the Prosecutor and the LRV, who could still modify and adapt their strategy in light of the information contained in the portions of the Observations the Defence seeks to redact.

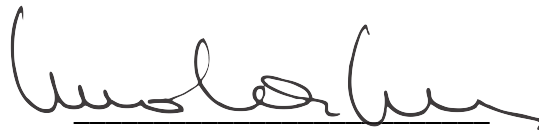
18. The Chamber notes that the Fourth Issue is premised on a scenario which, at this stage, is hypothetical and speculative. Furthermore, the procedural steps being envisaged by the Defence as part of their strategy (and referred to in the portions of the Observations the Defence seeks to redact) are statutorily provided in the Court's texts as a matter of law. As such, it cannot be said that the mere indication that the Defence envisages taking such steps amounts to a strategy not to be disclosed to the other party before its execution, lest its effectiveness be impaired. In particular, as indicated by the Defence for Mr Gbagbo, the possibility for the other party to contact witnesses whose statements have been admitted pursuant to Article 68(2)(b) of the Statute has been referred to by the Chamber in its decision granting said admission⁹.
19. As such, the Fourth Issue does not arise from the Decision and cannot substantiate an issue susceptible to be appealed pursuant to article 82(1)(d) of the Statute.
20. In light of the above, none of the Issues identified in the Request can be considered as arising from the Decision. Furthermore, and critically, the Chamber notes that, even assuming that any of these issues were considered as arising from the Decision, none of them can be regarded as affecting the fair conduct of the proceedings within the meaning of article 82(1)(d), or as issues for which the resolution by the Appeals Chamber at this stage would materially advance the proceedings.

⁹ ICC-02-11-01/15-Red, para 21.

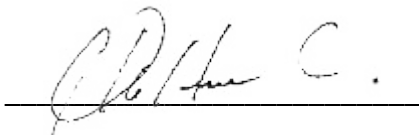
FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, JUDGE HENDERSON DISSENTING¹⁰, HEREBY

REJECTS the Request;

ORDERS the Registry to reclassify filing ICC-02/11-01/15-1041-Conf-Exp as “confidential”.



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 10 November 2017

At The Hague, The Netherlands

¹⁰ The Majority notes that this decision was ready to be filed yesterday, 9 November 2017. After reading Judge Henderson’s dissent, where he states that he “cannot agree with either the Impugned or the present decision”, the Majority noted that the dissent addresses the merits of the Decision, rather than the issues as identified by the Defence for Mr Gbagbo for the purposes of article 82(1)(d) of the Statute. The Majority alerted Judge Henderson to the point and reminded him that, prior to its issuance, he had expressed in writing his lack of objection to the Decision, which was accordingly read as a unanimous one. Judge Henderson confirmed the terms of his dissent. The Majority regrets that Judge Henderson waited until this stage to express his views on the issue adjudicated by the Chamber in the Decision.