

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **12 July 2018**

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

Decision on the “*Demande d’autorisation d’interjeter appel de la « Decision concerning the Prosecutor’s submission of documentary evidence on 28 April, 31 July and 22 December 2017, and 23 March and 21 May 2018 » (ICC-02/11-01/15-1172)*”

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

Peter Lewis

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 Article 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, acting by majority, issues this decision on the “*Demande d’autorisation d’interjeter appel de la « Decision concerning the Prosecutor’s submission of documentary evidence on 28 April, 31 July and 22 December 2017, and 23 March and 21 May 2018 » (ICC-02/11-01/15-1172)*”, filed by the Defence for Mr Gbagbo on 11 June 2018 (“Request”).¹

Procedural history and background

1. On 29 January 2016, the Chamber, by majority, Judge Henderson dissenting,² adopted the “Decision on the submission and admission of evidence” (“29 January 2016 Decision”).³
2. On 9 December 2016, the Chamber rendered by majority, Judge Henderson dissenting, the “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016”⁴. This decision was confirmed by the Appeals Chamber on 24 July 2017⁵.
3. On 1 June 2018, the Chamber adopted by majority, Judge Henderson dissenting,⁶ 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” (“1 June 2018 Decision” or “Decision”).⁷

¹ ICC-02/11-01/15-1181.

² ICC-02/11-01/15-405-Anx.

³ ICC-02/11-01/15-405.

⁴ Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016, ICC-02/11-01/15-773.

⁵ Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I’s decision on the submission of documentary evidence, ICC-02/11-01/15-995.

⁶ ICC-02/11-01/15-1172-Anx.

⁷ ICC-02/11-01/15-1172.

4. On 11 June 2018, the Defence for Mr Laurent Gbagbo filed its Request, seeking leave to appeal the 1 June 2018 Decision.
5. On 14 June 2018, the Prosecutor filed the “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)”, submitting that the Request fails to meet the requirements under Article 82(1)(d) of the Statute and should be rejected.⁸
6. The Defence for Mr Blé Goudé and the LRV did not file a response.

Determinations by the Chamber

7. 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.
8. The Defence of Mr. Laurent Gbagbo seeks leave to appeal in respect of the following issues:
 - a. The Chamber erred in law by failing to determine whether the evidentiary items submitted by the Prosecutor are admissible, even if the Prosecutor’s case is closed (“First Issue”);
 - b. The Chamber erred in law by failing to determine the admission of the evidentiary items submitted by the Prosecutor, at a stage where the Defence is requested to make submissions related to the Prosecutor’s

⁸ ICC-02/11-01/15-1186.

evidence which might result in the acquittal of the Accused (“Second Issue”);

- c. Even if one were to agree that the admissibility of the evidentiary documents submitted by the Prosecutor must be deferred to the end of the trial, the Chamber erred in failing to exercise its discretionary powers in order to analyse the admissibility of those « categories of documents » for which the Prosecutor did not submit information in respect of their authenticity (“Third Issue”);
- d. The Chamber erred in law in deciding that it would only address the objections submitted by the Defence vis-à-vis the admission of evidentiary items submitted by the Prosecutor as part of its eventual determination of the facts of the case (“Fourth Issue”).

9. At the outset, the Chamber notes that the 1 June 2018 Decision implements the system for the assessment of the evidence adopted by the Chamber by way of its 29 January 2016 Decision. As already noted by the Chamber, and correctly pointed out by the Prosecutor, neither the Defence for Mr Gbagbo, nor the Defence for Mr Blé Goudé sought leave to appeal the 29 January 2016 Decision at the relevant time. As also noted by the Chamber⁹ when partially denying leave to appeal an earlier decision, similarly implementing the Chamber’s evidentiary approach,¹⁰ leave to appeal subsequent decisions implementing that approach cannot be used as a means to surreptitiously attack the 29 January 2018 Decision. The wording of all the four issues identified by the Defence in its Request echoes to a large extent the wording of issues in respect of which the Defence (either for Mr Gbagbo¹¹ or for Mr Blé Goudé¹²) has previously sought leave to appeal an

⁹ ICC-02/11-01/15-901.

¹⁰ ICC-02/11-01/15-773.

¹¹ ICC-02/11-01/15-776.

analogous decision, bar minor adjustments to make them adapted to the stage since reached by the proceedings.

The First, Second and Fourth Issues

10. The First, Second and Fourth Issue are all centred on the Chamber's decision to postpone its determinations on the admissibility of all evidentiary material to the end of the trial and it is therefore appropriate to address them jointly. The Chamber notes that neither the closure of the presentation of the Prosecutor's evidence, nor the forthcoming Defence submissions in support of their position that that evidence is not adequate to convict either of the Accused constitute or can be assimilated to "the end of the trial"; accordingly, those issues constitute a mere expression of disagreement not only with the 1 June 2018 Decision but, more fundamentally, with the 29 January 2016 Decision.
11. Furthermore, as regards specifically the Fourth Issue, the Appeals Chamber has already had the opportunity (following the partial granting¹³ of leave to appeal by the Defence for Mr Gbagbo) to clarify that the authenticity of a given document may be further elucidated by other evidence¹⁴ and that Defence is not precluded from making submissions on the relevance or admissibility of documents in addition to those made at the time of their submission, in the event that additional relevant information becomes available at a subsequent stage.¹⁵ Accordingly, each of these three issues constitutes an attempt to reopen a debate which has already taken place both before this Chamber and before the Appeals Chamber and neither of them qualifies as an issue arising from the 1 June 2018 Decision. Furthermore, the 1 June 2018 Decision does not by any

¹² ICC-02/11-01/15-777.

¹³ ICC-02/11-01/15-901.

¹⁴ ICC-02/11-01/15-995, para 52.

¹⁵ ICC-02/11-01/15-995, paras 55-56.

means contain, or otherwise imply, “a refusal” to decide on the objections raised by the Defence; this statement amounts to a mischaracterisation of the Decision, and cannot constitute the basis for an appealable issue.

The Third Issue

12. With its Third Issue, the Defence for Mr Gbagbo submits that the Chamber erred in deciding to apply the evidentiary regime set forth in the 29 January 2016 Decision to specific categories of documents, for which – in the Defence’s view - no information has been provided by the Prosecutor in respect of their authenticity.
13. The Chamber recalls that the first instance in which it decided to defer the decision on the admissibility and the relevance of documents in spite of the lack of specific information on their authenticity, in accordance with the general evidentiary regime adopted by the 29 January 2016 Decision, was the “Decision concerning the Prosecutor’s submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016”, dated 9 December 2016.¹⁶ Leave to appeal granted at the time *inter alia* on this specific aspect resulted in the Appeals Chamber stating that “depending on the circumstances, the authenticity of a given document may be further elucidated by other evidence, be it evidence specifically adduced for that purpose or evidence otherwise submitted in the course of the trial”.¹⁷ On the same occasion, the Appeals Chamber also clarified that deferral of admissibility rulings falls within the scope of a Chamber’s discretion and that, for a party to succeed on appeal of a decision exercising such discretion it is necessary to establish (i) that the Trial Chamber erred in the exercise of its discretion and (ii) that this materially affected the relevant

¹⁶ ICC-02/11-01/15-773.

¹⁷ ICC-02/11-01/15-995.

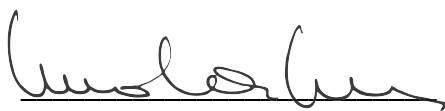
decision.¹⁸ The Request does not go beyond a generic statement to the effect that the Chamber erred in failing to exercise this discretion in deciding to defer the assessment of the Defence's submission to a later stage, without identifying a specific reason flawing this decision; as such, it constitutes a reiteration of a mere disagreement and does not qualify as an appealable issue within the meaning of Article 82(1)(d) of the Statute.

14. Accordingly, none of the Issues identified by the Defence for Mr Gbagbo qualify as appealable issues within the meaning of article 82(1)(d) of the Statute and leave to appeal cannot be granted.

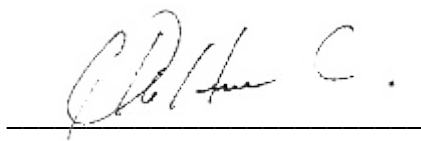
FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY REJECTS the Request.

Judge Henderson appends a dissenting opinion.

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



Judge Cuno Tarfusser, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Geoffrey Henderson

Dated 12 July 2018 at The Hague, The Netherlands

¹⁸ ICC-02/11-01/15-995, para 46.