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No.: ICC-02/11-01/15
Date: 17 September 2020

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public Document

Information for the Appeals Chamber pursuant to its Decision of 2 September 2020

Source: Defence team for Laurent Gbagbo

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. Procedural history

1. On 26 November 2019, in its “Decision on Mr Gbagbo’s requests for extension of time, translations and correction of transcripts”, the Appeals Chamber stated that, upon receipt of the revised version of Judge Henderson’s Reasons, “which is expected in July 2020, Mr Gbagbo may file a request to supplement his response to the Prosecutor’s Appeal Brief, if necessary”.¹

2. On 17 June 2020, in its “Decision rescheduling the hearing before the Appeals Chamber”, the Appeals Chamber recalled that “it ha[d] already provided counsel for Mr Gbagbo with the opportunity to seek leave to file further submissions if necessary, once this document has been received, and considers that there is no reason for altering this approach”.²

3. On 24 July 2020, the Prosecutor filed the “Prosecution request regarding Mr Gbagbo’s potential request for leave to supplement his response to the Prosecution’s Appeal Brief”,³ wherein she moved the Appeals Chamber to

fix a reasonable date by which Mr Gbagbo is to file any request for leave to supplement his Response. The Prosecution further requests the Chamber to direct Mr Gbagbo to concretely identify and explain why the arguments in his Response may need to be supplemented, if at all.⁴

4. That same day at 17.40, that is to say, several hours after the Prosecutor had filed her request, the final version of the French translation of Judge Henderson’s Reasons was officially notified to the Judges, the Parties and the participants.

5. On 6 August 2020, the Defence filed submissions on the Prosecutor’s request of 24 July 2020.⁵ Therein it underscored:

¹ ICC-02/11-01/15-1289, para. 25.

² ICC-02/11-01/15-1359, para. 20.

³ ICC-02/11-01/15-1368.

⁴ ICC-02/11-01/15-1368, para. 4.

⁵ ICC-02/11-01/15-1374-Conf.

[TRANSLATION] Since the final version, which runs to 1,012 pages, of the translation of Judge Henderson’s Reasons has been notified to the Judges, the Parties and the participants, it rests with the Defence, pursuant to the decision of the Appeals Chamber of 26 November 2019, to analyse it. Specifically, it rests with the Defence to compare the two French versions – draft and final – in order to identify what might have changed from one version to the other and to determine the logical and legal consequences of any change on an understanding of Judge Henderson’s line of reasoning. It must be noted that the analysis exercise includes checking all of the footnotes. Once that analysis is complete, the Defence will be in a position to determine what in its response to the Prosecutor’s appeal brief needs to be changed and what does not. The Defence must, therefore, engage in a meticulous analysis.⁶

6. On 2 September 2020, the Appeals Chamber issued a “Decision on the Prosecutor’s request to set a time limit for any request by counsel for Mr Gbagbo for leave to supplement his response to the appeal brief”⁷ wherein it decided to

set a deadline for counsel for Mr Gbagbo to file any request for leave to supplement his Response. The request, if any, should be filed by 17 September 2020, and it should identify which arguments of his Response specifically need to be supplemented in light of the revised French translation, and explain why. Should counsel for Mr Gbagbo not intend to file any such request, it should inform the Chamber, the parties and the Victims accordingly at the earliest opportunity.⁸

II. Discussion

7. An analysis of the final French version of Judge Henderson’s Reasons reveals that the revisers changed the wording in many instances and/or corrected numerous errors in the draft version.

8. It should be pointed out that the revision exercise was, therefore, absolutely necessary in order for the Judges and the Parties to have at their disposal a French version of the Reasons that is more faithful to Judge Henderson’s thinking.

9. The Defence first compared the two French versions – draft and final – of the quotations from the Reasons which it had used and the two French versions of the references to the Reasons which it had made in its response to the appeal

⁶ ICC-02/11-01/15-1374-Conf, paras. 10-12.

⁷ ICC-02/11-01/15-1377.

⁸ ICC-02/11-01/15-1377, para. 6.

brief, so as to identify what had been changed between the two versions and what had not. In its response to the Prosecutor's appeal brief, the Defence substituted the previous wording of the draft version with the new wording of the final version; hence the Defence is filing, concurrently with the present memorandum, a corrigendum to its response to the Prosecutor's appeal brief with an explanatory note appended that sets out the substitutions in detail.

10. The Defence undertook a thorough analysis of the revisers' changes to the draft French version of Judge Henderson's Reasons so as to ascertain whether the changes required it to rework part of its response to the Prosecutor's appeal brief.

11. Upon analysis, it is clear that submissions supplementary to the Defence's response to the Prosecutor's appeal brief need not be filed.

12. That said, the Defence draws the attention of the Chamber to the following points:

13. First, it must be noted that the Defence is not in a position to determine whether the final French translation of Judge Henderson's Reasons duly reflects the English original.

14. It is not for the Defence to check the French version for accuracy against the English original; the Defence has merely looked at the English original of a number of quotations it used in its response. Some inaccuracies remain.

15. For instance, the expression "a combination of circumstantial evidence" at paragraph 87 of the English version of Judge Henderson's Reasons has been translated as "*un ensemble de preuves indirectes*" in the final French version, which does not amount to exactly the same thing.

16. By way of further example, the expression "In addition to the evidentiary considerations outlined above" at paragraph 1888 of the English

version of Judge Henderson's Reasons has been translated as "*en plus des considérations relatives à l'administration de la preuve dont il est question plus haut*", which does not amount to the same thing, since here Judge Henderson is not referring to "*l'administration de la preuve*" as a legal standard, but is making a broader reference to the analysis which the Judges made of the Prosecutor's evidence and to the considerations at which they arrived on the basis of the weakness of that evidence.

17. Those two examples suggest that there could be some remaining mistranslations from English to French, meaning that the French-speaking reader would only have at his or her disposal a document which does not reflect exactly Judge Henderson's thinking.

18. Second, the Defence has noticed that the revisers have made corrections to sixty-seven quotations from the Reasons which it used in its response. In the corrigendum to its response, the Defence has therefore substituted the previous wording with the new wording in sixty-seven instances.

19. In that respect, the Defence notes that it would make sense for the French version of the Prosecutor's appeal brief to be amended accordingly so that the quotations used by the Office of the Prosecutor and the quotations used by the Defence all come from the final French version of Judge Henderson's Reasons.

20. Third, the Defence sees that, whereas the corrections made by the revisers often afford nuances in meaning when compared to the wording of the draft French version, at no point is the spirit of Judge Henderson's line of thinking or the detail of the reasoning he sets out fundamentally altered by the changes. Otherwise put, the nuances are not of such significance as to warrant the filing of a request for leave to file further submissions.

21. Fourth, of note is that the changes made by the revisers lend support to the positions taken by the Defence in its response to the Prosecutor's appeal brief. The linguistic nuances contributed by the revisers flesh out in French Judge Henderson's thinking, lending support to the Defence's line of argument.

22. Accordingly, the new French wording of Judge Henderson's Reasons makes it even clearer that, contrary to what the Prosecutor states in her appeal brief, the Majority did not test the Prosecutor's evidence against an overly stringent standard; rather the Majority frequently gave the Prosecutor the benefit of the doubt.

23. For example, after revision, paragraph 87 of Judge Henderson's Reasons states: *"S'il est vrai que la teneur (criminelle) du plan commun peut, en principe, se déduire d'un ensemble de preuves indirectes, cette possibilité théorique ne dispense pas le Procureur de formuler un argument convaincant sur ce point"*.⁹ That wording shows, even more so than the previous wording, that the Majority did not rule out, on principle, the presentation of circumstantial evidence by the Prosecutor but merely found fault with her for not formulating a cogent argument on the basis of that circumstantial evidence.

24. By way of further example, the corrected French version of Judge Henderson's Reasons states: *"Aux fins de cet exercice, on partira du principe que les faits allégués quant aux victimes sont établis. Cela ne signifie pas nécessairement que les éléments de preuve concernant chaque victime présumée sont suffisants pour atteindre le seuil requis"*.¹⁰ Here, even more so than in the previous wording, it is quite clear that the Majority gave the Prosecutor the benefit of the doubt since it was willing, for the sake of argument, to accord "victim" status to many individuals, even where the evidence presented by the Prosecutor to establish that status was insufficient.

⁹ ICC-02/11-01/15-1263-Conf-AnxB-tFRA, para. 87.

¹⁰ ICC-02/11-01/15-1263-Conf-AnxB-tFRA, para. 1392.

25. Furthermore, the final, corrected version of the French translation of Judge Henderson's Reasons makes apparent in French, in an even more manifest fashion than before, that, contrary to what the Prosecutor claims in her appeal brief, the Majority did undertake a holistic, and not merely an atomistic, analysis of all of the evidence adduced by the Prosecutor.

26. For instance, the corrected version of the French translation of Judge Henderson's Reasons states: "*L'évaluation globale des preuves ne saurait revenir à analyser une boîte noire des preuves et les chambres ne devraient pas avoir à deviner les détails des arguments avancés par le Procureur en matière de preuve*".¹¹ From that passage it is even clearer than it was before that the Majority finds fault with the Prosecutor for not accomplishing her task of substantiating each of her submissions. The Majority did not decline to entertain the Prosecutor's evidence as a whole: it found fault with her for not substantiating her submissions in detail.

27. Lastly, the Defence underscores that certain corrections make apparent in French, with even greater clarity, the criticism which the Majority levels at the Prosecutor in relation to the responsibility of Laurent Gbagbo: the Majority points out that the Prosecutor has not been able to establish any nexus whatsoever between Laurent Gbagbo and the alleged incidents, or to establish the existence of any common plan whatsoever or any organization whatsoever. The Defence recalls that, in her appeal brief, the Prosecutor did not call into question the Chamber's findings in those respects.¹²

28. To cite just one striking example which the Prosecutor revisited time and again despite the dearth of evidence: her allegation of a direct link between Laurent Gbagbo and Colonel Dadi, the commander of BASA. The sole piece of evidence adduced by the Prosecutor in support of the allegation was the testimony of one of Dadi's subordinates, P-0239, who allegedly heard him

¹¹ ICC-02/11-01/15-1263-Conf-AnxB-tFRA, para. 87.

¹² ICC-02/11-01/15-1277-Conf, para. 129.

bragging about receiving orders from Laurent Gbagbo.¹³ In this respect, the final corrected French version of Judge Henderson's Reasons is clearer than the previous version:

il convient de noter que la valeur probante du témoignage de P-0239 est faible : le témoin n'a pas vu lui-même le colonel Dadi recevoir des ordres de Laurent Gbagbo et "pense" simplement que le colonel Dadi a rendu visite à Laurent Gbagbo au cours de la crise électorale, n'étant pas en mesure de donner des exemples précis de telles visites. En outre, même si le témoignage de P-0239 était fiable, il se peut qu'il n'atteste que de l'idée erronée que se faisait le colonel Dadi de son rôle au sein des FDS : celui-ci se serait désigné comme "le conseiller militaire" du Président et aurait déclaré qu'il était chargé d'assurer la sécurité d'Abidjan, mais son statut élevé autoproclamé au sein des FDS n'a été confirmé par aucun des témoins. Il se peut très bien que le colonel Dadi ait enjolivé les choses afin de s'assurer la déférence de ses subordonnés : comme indiqué plus haut, P-0164 a déclaré que le colonel Dadi cherchait à exercer un contrôle total sur les membres du BASA. Bien que l'on ne puisse conclure avec certitude que le colonel Dadi exagérait les choses lorsqu'il a, semble-t-il, dit qu'il recevait directement des ordres de Laurent Gbagbo, le fait qu'une telle possibilité ne puisse être exclue, conjugué à l'absence notable de preuves corroborant les affirmations du colonel Dadi, fait qu'il serait difficile pour une chambre de première instance raisonnable d'accorder une grande importance à ces témoignages.¹⁴

29. Here it is even more apparent that, in the view of the Majority, the Prosecutor's allegation of a direct link between Laurent Gbagbo and BASA rests on unverifiable, uncorroborated hearsay and ultimately on testimony of no probative value.

30. Generally speaking, it appears that the final, corrected French translation of Judge Henderson's Reasons makes Judge Henderson's thinking more apparent than the previous version and lends support to the Defence's arguments as set forth in its response to the Prosecutor's appeal brief.

31. That being so, the Defence respectfully informs the Appeals Chamber that the new wording in French of Judge Henderson's Reasons does not warrant the filing by the Defence of a request to make submissions supplementary to its response to the Prosecutor's appeal brief.

¹³ ICC-02/11-01/15-1277-Conf, para. 207.

¹⁴ ICC-02/11-01/15-1263-Conf-AnxB-tFRA, para. 411.

[signed]

Emmanuel Altit
Lead Counsel for Laurent Gbagbo

Dated this 17 September 2020

At The Hague, Netherlands