Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-02/11-01/15**
Date: **14 October 2015**

THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Kuniko Ozaki
Judge Howard Morrison
Judge Piotr Hofmański
Judge Chang-ho Chung

SITUATION IN CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO and
CHARLES BLÉ GOUDÉ

Public Document

Reply to the "Response to Laurent Gbagbo's appeal against the 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'" (ICC-02/11-01/15-265)

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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1. In its response of 2 October 2015 to the Defence document in support of its appeal against the Decision giving notice pursuant to regulation 55, the Prosecution requested the Appeals Chamber to dismiss the Defence appeal *in limine*.[1] The Prosecution argued that the appeal served no purpose. In doing so it raised notions, in particular that of prejudice, which have no place in any discussion on the admissibility of an appeal. In fact, the Prosecution sought, indirectly, to revisit the Trial Chamber's decision allowing the appeal. In other words, it sought to appeal against the Trial Chamber's Decision granting the Defence leave to appeal.

1. In the main, the Prosecution arguments used to seek to revisit the Trial Chamber's decision must be dismissed

2. The Prosecution states in a footnote that:

> The Appeals Chamber should make its own assessment on this matter and is not bound by the Trial Chamber's findings that the two issues for which it granted leave to appeal, have a significant impact on the fair and expeditious conduct of the proceedings or outcome of the trial.[2]

3. The Prosecution argument is therefore tantamount to requesting the Appeals Chamber to revisit the reasons which led the Trial Chamber to grant the Defence leave to appeal the impugned decision. In other words, the Prosecution is submitting a veiled appeal against the decision granting leave to appeal.

4. The Prosecution, however, advances no legal basis drawn from the Statute or jurisprudence which would allow it to assert that "the Appeals Chamber should make its own assessment on this matter". There is no other legal basis on which it could rely.

5. The Statute is in fact clear: it is for the Pre-Trial Chamber or the Trial Chamber alone to determine whether the criteria of article 82(1)(d) for granting a party leave to file an interlocutory appeal are met.

6. The jurisprudence is equally clear on this point. In *Lubanga*, the Appeals Chamber noted that:

> a right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This

[1] ICC-02/11-01/15-265, paras. 3-6.
[2] ICC-02/11-01/15-265, footnote 10.

> opinion constitutes the definitive element for the genesis of a right to appeal. **In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue.**[3]

Similarly, in the instant case, the Appeals Chamber has had occasion to remind the Prosecution, which had sought to revisit on appeal an appeal matter dismissed by the Pre-Trial Chamber, that "it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent."[4]

7. The Appeals Chamber therefore has no authority to revisit a decision to grant leave to appeal and to reassess, *a posteriori,* whether the criteria of article 82(1)(d) have been met. We note, further, that never in the history of this Court has an Appeals Chamber conducted such an assessment, which would be inconsistent with the letter and the spirit of the Statute.

8. Whatever the circumstances, in the decision granting leave to appeal, the Chamber noted that:

> if the timing of the Impugned Decision was in error, the related proceedings may continue on an unsound legal basis. In light of the above, the Chamber is satisfied that appellate resolution of these issues could 'ensure] that the proceedings follow the right course', thereby removing any doubt that any consequences of the Impugned Decision - such as the additional investigations or changes in strategy the Gbagbo Defence claims to be necessary - are justified. Accordingly, the Chamber considers that Issues One and Two satisfy the leave to appeal criteria: they may have a significant impact on the fair and expeditious conduct of the proceedings or outcome of the trial, and immediate appellate resolution may materially advance the proceedings.[5]

9. The Trial Chamber therefore clearly defined how the impugned decision might affect the outcome of the trial or the fairness of the proceedings. In its response to the Defence appeal, the Prosecution merely expressed disagreement with the Trial Chamber, which disagreement should have prompted it to lodge a request for leave to appeal. That disagreement has no effect now on the admissibility of the appeal.

2. In the alternative, as to the merits of the response

10. In its response, the Prosecution noted that the Defence appeal served no purpose since, firstly, the notice of possible recourse to regulation 55 at such an early stage in the proceedings would not cause prejudice to the Defence and, secondly, since once the trial opened on 10 November 2015, the Chamber would be able to give notice anew at any time.

[3] ICC-01/04-168, para. 20.
[4] ICC-02/11-01/11-572, para. 63.
[5] ICC-02/11-01/15-212, para. 12.

2.1. Prosecution argument no. 1: early notice of possible recourse to regulation 55 would not cause prejudice to the Defence, warranting dismissal of the Defence appeal *in limine*

2.1.1. The existence of prejudice is not a relevant ground on which to determine the admissibility of an appeal

11. For an appeal to be admissible, it is sufficient that the appellant has complied with the formal conditions and time limits laid down by the Statute and the Regulations.

12. The Appeals Chamber noted in *Lubanga* that:

> the Appeals Chamber does not find any other basis upon which not to consider the merits of the appeal. The Pre-Trial Chamber granted the Prosecutor leave to bring this appeal under article 82(1)(d) of the Statute […]. Furthermore, the Prosecutor has, as stipulated in regulation 64(2) read with regulation 65(4) of the Regulations of the Court, filed a document in support of the appeal setting out the grounds of the appeal and containing the legal and/or factual reasons in support of each ground. Grounds of appeal for appeals brought under article 82(1)(d) of the Statute can include those grounds that are listed at article 81(1)(a) of the Statute, which include errors of law. The Prosecutor's document in support of the appeal sets out three grounds of appeal and argues that the Pre-Trial Chamber made errors of law in respect of each […]. Whether the arguments of the Prosecutor are persuasive is a question of the merits of the appeal, not of its admissibility. The Prosecutor also complied with the time and page limits laid down for the document in support of the appeal, as set out in the Regulations of the Court […].[6]

13. In this appeal, the Defence has indeed complied with all the formal conditions and time limits and there is therefore no reason for its appeal to be dismissed *in limine*.

2.1.2. The Prosecution misconstrues the function of the Appeals Chamber

14. In accordance with article 83, the function of the Appeals Chamber is not to determine the existence or the scope of any prejudice to the appellant party, but to determine whether (i) "the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence" or (2) whether the decision "appealed from was materially affected by error of fact or law".[7]

15. The Appeals Chamber has had occasion to clarify the meaning of that article:

> In previous decisions, the Appeals Chamber has required that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision. In its judgment of 13 July 2006 in relation to the appeal *Situation in the Democratic Republic of the Congo* OA (hereinafter: "Judgment in DRC OA"), the Appeals Chamber stated that an error materially affected the impugned decision if the decision would have been "substantially different". In its judgment of 13 October 2006 in relation to the appeal

[6] ICC-01/04-01/06-568, para. 19.

[7] Article 83(2).

> *Lubanga* OA 3, the Chamber reversed a decision of the Trial Chamber because it 'was based solely on the Pre-Trial Chamber's erroneous finding'. In the judgment on the appeal *Lubanga* OA of 21 October 2008, the Appeals Chamber reversed a decision of the Trial Chamber because it was 'materially affected' by an error. In the judgment of 23 February 2009 on the appeal *Situation in Uganda* OA, the Appeals Chamber did not reverse an impugned decision […] because 'the error […] was inconsequential and did not materially affect the correctness of the overall finding […] that [the applicants […] [were] victims'.[8]

16. The relevant criterion used by the Appeals Judges to examine the merits of the appeal would appear to be whether, in the impugned decision, the Bench erred in law or in fact and whether that error materially affected the impugned decision, that is, whether without that error, the decision would have been different. Here, however, as the Bench itself acknowledged in its decision granting the Defence leave to appeal the impugned decision, it seems clear that, had it not interpreted regulation 55 broadly, the Trial Chamber would not have been able to give the notice. Consequently, if the Bench's broad interpretation proved to have been erroneous, a decision made on a sound basis would have been different. The matter of appeal, which is the interpretation of regulation 55, is not then, as argued by the Prosecution, an "abstract issue" but a very concrete issue, the interpretation of which explains the tenor of the decision adopted, and which must be resolved by the Appeals Chamber.

2.2. Argument no. 2: the appeal served no purpose because the decision of the Appeals Judges could be given near the date of the opening statements on 10 November 2015

17. According to the Prosecution,

> [i]n addition, the Appeal will become moot as soon as the charges are read to the Accused and the Prosecution delivers its opening statement on 10 November 2015, or by the very latest at the commencement of the evidentiary phase of the trial in January 2016. At that stage of the proceedings, it will be irrelevant whether the Trial Chamber's initial regulation 55 notice was issued prematurely. In addition, the remedy requested by the Appellant, namely a reversal of the Decision, would then cease to have any impact on the proceedings because the Trial Chamber could simply re-issue a decision to the same effect or simply provide notice orally immediately after the charges have been read. Since all other relevant factors considered by the Trial Chamber in its Decision are likely to be unchanged, it can be assumed that the Trial Chamber would follow such course of action.[9]

18. Firstly, as is the case for the Prosecution's first argument, the purpose of the argument is to indirectly revisit the decision to grant leave to appeal. Indeed, the Trial Chamber itself considered that the impugned decision could have an impact on the continuation of the proceedings, regardless of the date of 10 November 2015. It is

[8] ICC-01/04-01/07-1497, para. 37.
[9] ICC-02/11-01/15-265, para. 5.

therefore not for the Appeals Chamber, for the reasons set out above (see *supra*), to revisit this issue in the framework of the appeal.

19. Secondly, the Prosecution has misread the Defence appeal: in the view of the Defence, the notice cannot be given before the start of the trial because, at that moment, nothing has fundamentally changed since the Decision on the Confirmation of Charges. Otherwise put, the Trial Bench has nothing more than what was in the possession of the Pre-Trial Bench and has no specific material warranting modification of the confirmation decision. That will still be the case on 10 November 2015 and will remain so until the Prosecution starts to present consistent evidence, enabling the Bench to justify possible legal recharacterisation of the facts. The ability of the Trial Bench to use regulation 55 at a subsequent stage of the proceedings is dependent upon the outcome of this appeal, which highlights the need for discussion of the conditions for application of that regulation.

20. Thirdly, while asserting that "all other relevant factors considered by the Trial Chamber in its Decision are likely to be unchanged", were the Chamber to decide to examine the possibility of recourse to regulation 55 at a later stage, the Prosecution fails to address the issue raised by the Defence of the Trial Bench's use – erroneous in the view of the Defence – of the notion of "exceptional circumstances" in the impugned decision. Were it to be shown that the Chamber had erred in fact and law on this issue, the "relevant factors considered by the Trial Chamber in its decision" would be called into question. It is therefore vital that the Appeals Chamber consider the merits of the Defence appeal on this matter.

21. Lastly, the Defence notes that, in seeking to have the appeal dismissed *in limine*, the Prosecution argues on the one hand, and erroneously, that the Defence appeal concerned only an "abstract issue", while on the other hand inviting the Appeals Chamber to consider a purely abstract hypothesis – the possibility of the Bench's using regulation 55 at a later stage – which even the Trial Bench had not considered relevant in the discussion, to have the Defence appeal dismissed.

3. Conclusion

22. The Prosecution's reasoning appears to be based on an assumption: the automatic use of regulation 55. In its view, the only choice is between using the regulation now or using it later. At no point does it envisage that the regulation cannot be used. In other words, recourse to regulation 55 is, in the Prosecution's view, a vested right.

23. Such an approach cannot be endorsed by the Appeals Chamber lest the whole procedural balance of the Rome Statute be undermined, thereby transforming a regulation considered by the Court's judges to be "an exceptional instrument which, as such, should be used only sparingly if absolutely warranted"[10] into a tool enabling

[10] PRE-TRIAL PRACTICE MANUAL, September 2015, p. 18.

the Prosecution, as it sees fit, to offset its errors in the investigation and presentation of its case and its strategy in relation to the charges. The Accused, whose freedom is at stake, would therefore be up against a party in the proceedings having at its disposal more attempts to hit its goals, somewhat akin to a video game ("same player, shoot again"), which would undermine the fairness of the proceedings.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

Having regard to articles 82(1)(d) and 83 of the Statute:

– **Reject** the Prosecution arguments concerning the dismissal *in limine* of the Defence appeal.

Consequently:

– **Examine** the merits of the Defence appeal.

[signed]

Emmanuel Altit

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Dated this 14 October 2015

At The Hague, the Netherlands