



Original: English

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

Date: 30 April 2020

THE APPEALS CHAMBER

Before: Judge Chile Eboe-Osuji, Presiding
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

**Decision rescheduling, and directions on, the hearing before the
Appeals Chamber**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Laurent Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representative of Victims
Ms Paolina Massidda

Counsel for Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber I of 15 January 2019 (ICC-02/11-01/15-T-232-ENG), with reasons issued on 16 July 2019 (ICC-02/11-01/15-1263 and its annexes),

Noting the ‘Order scheduling a hearing before the Appeals Chamber and setting a time limit for any request for leave to reply’ of 20 March 2020 (ICC-02/11-01/15-1318),

Issues the following

DECISION

1. The Appeals Chamber, considering that the receipt of further submissions on the issues below which arise out of the appeal, including from the submissions of the parties and victims, would be useful in the determination of the appeal, invites the Prosecutor, Mr Gbagbo, Mr Blé Goudé and the victims participating in the appeal to make submissions in answer to the questions, and in accordance with the procedure, outlined below.
2. Nothing in the questions should be understood to be determinative of the position ultimately to be taken in the appeal by the Appeals Chamber. The questions are intended to guide the parties and victims in their submissions and need not be answered individually. Furthermore, in making submissions in answer to the questions, attention may be given to particular issues or topics over others as preferred.
3. The Prosecutor, Mr Gbagbo and Mr Blé Goudé are invited to make submissions in response to the below questions, not exceeding 25 pages in length, by noon on Friday, 22 May 2020. The victims are invited to make submissions, not exceeding 15 pages in length in the same timeframe.

4. The hearing in this appeal, currently scheduled to take place from Monday, 11 May 2020 to Wednesday, 13 May 2020, is hereby vacated. This hearing shall now take place at a time between Wednesday, 27 May 2020 and Friday, 29 May 2020. The Appeals Chamber shall communicate the exact date(s) and form of this hearing, whether virtual or otherwise, in due course, including a precise schedule for the hearing (during which any necessary elaborations of and/or replies to the written submissions will be heard).
5. The Registrar is ordered to liaise with the parties and the victims as to any technical parameters with respect to the form of the hearing.¹

¹ Noting: [Prosecution's application to postpone or cancel the appeal hearing scheduled for 11-13 May 2020 and to consider alternative proposals to expedite the appeal](#), 20 April 2020, ICC-02/11-01/15-1330; [CLRV Response to the 'Prosecution's application to postpone or cancel the appeal hearing scheduled for 11-13 May 2020 and to consider alternative proposals to expedite the appeal'](#), 20 April 2020, ICC-02/11-01/15-1331; [Réponse de la Défense à la 'Prosecution's application to postpone or cancel the appeal hearing scheduled for 11-13 May 2020 and to consider alternative proposals to expedite the appeal' \(ICC-02/11-01/15-1330\)](#), 21 April 2020, ICC-02/11-01/15-1334; and [Blé Goudé Defence Response to the 'Prosecution's application to postpone or cancel the appeal hearing scheduled for 11-13 May 2020 and to consider alternative proposals to expedite the appeal' \(ICC-02/11-01/15-1330\)](#), 21 April 2020, ICC-02/11-01/15-1335.

Questions to be addressed before the Appeals Chamber

I. GROUND ONE OF THE APPEAL²

1. What provision of the Rome Statute should govern the decision that a Trial Chamber issues pursuant to a motion of ‘no case to answer’?
2. Is it reasonable to interpret the term ‘decision’ in article 74 as a reference to the final judgment of the Trial Chamber?
3. Is there anything in the interpretation of article 74 that necessarily precludes from its ambit the decision of the Trial Chamber following a ‘no case to answer’ motion, if that is the final judgment of the Trial Chamber?
4. In particular,
 - a) How is the phrase ‘entire proceedings’ to be construed in any given circumstance, within the meaning of article 74(2)? Does it have an exclusive reference to trial proceedings in which the Defence has presented its case? Or does it reasonably accommodate the entire proceedings up to the point of the ‘no case to answer’ motion?
 - b) Are there exclusive outcomes (such as convictions, acquittals, etc.) that are contemplated in article 74 before the provision can apply? If so, is the provision necessarily inapplicable merely because all those possible outcomes are not equally applicable in any particular set of circumstances? For instance, does article 74 remain applicable to a decision further to a submission of ‘no case to answer’ notwithstanding that the ‘no case to answer’ procedure does not carry an equal possibility of a conviction at that stage, as it does an acquittal?
 - c) In *Prosecutor v. Ntaganda*, the Appeals Chamber considered *inter alia*: (i) that it is within the discretion of the Trial Chamber to decide whether ‘no case to answer’ proceedings should be held at all; and, (ii) that the purpose of those

² In particular, see [Prosecutor’s Appeal Brief](#), paras 34-39, 99, 115-121; [Mr Gbagbo’s Response](#), paras 41-51, 58-60, 147-152; [Mr Blé Goudé’s Response](#), paras 2, 13, 16, 22-31, 158-168; [Victims’ Observations](#), paras 28-29, 82, 105, 107.

proceedings is arguably to protect the rights of the accused. This includes, it may be considered, by ensuring that he/she does not have to continue being tried / remain in custody beyond the end of the close of the Prosecutor's case if the submission is successful. Do these considerations necessarily remove the resulting decision from the regime of article 74?

5. How are the victims' rights and interests to be accommodated in the 'no case to answer' procedure?
6. Is there any guidance to be derived from ICTY jurisprudence which, it is suggested,³ specifically distinguished acquittals further to 'no case to answer' proceedings from those entered at the end of the trial; and that appeals of the former could only be entertained if they had been certified by the relevant trial chamber? Or are those cases distinguishable from the current case before the Appeals Chamber? On what substantive basis would it be correct to deny the Prosecutor the right to appeal a final judgment of acquittal, if such a judgment possibly imposes upon her the disability of *ne bis in idem*?
7. Even if article 74(5) does not apparently apply, should it not be *deemed* to be applicable in the present circumstances, given that an acquittal has resulted in substance, thus engaging the possibility of finality to the proceedings and the regime of *ne bis in idem*? Why should article 74(5) not be applicable in those circumstances, particularly bearing in mind that there is no provision that specifically regulates differently judgments resulting from 'no case to answer' proceedings?
8. Can a Trial Chamber issue an oral decision of acquittal or conviction, with reasons following later? If so, what should be the content of such an oral decision? Is this contemplated under article 74(5)?
9. Noting the submissions of the Prosecutor, on what legal authority can it be said that violations of article 74(5) of the Statute render the decision 'null and void'? Does this mean that it is not necessary to establish the material effect of the alleged errors on the outcome of the application for 'no case to answer' and, if so, is this compatible

³ [Mr Blé Goudé's Response](#), footnote 42.

with article 83(2) of the Statute? Does a violation of article 74(5) preclude all consideration that justice was nevertheless served in substance?

II. GROUND TWO OF THE APPEAL⁴

10. The essence of ‘no case to answer’ motions is that the Prosecutor did not present sufficient evidence the whole of which could convince a reasonable trier of fact reasonably to convict. What standard of proof should a Trial Chamber apply to this stage of the proceedings? What approach should the Trial Chamber take to the assessment of evidence at the ‘no case to answer’ stage? Regardless of the specific test to be applied in making that determination, does the question of sufficiency of evidence not ultimately engage the issue of error of fact that satisfies the chosen test?

11. Does a failure to set out a clearly defined standard of proof for ‘no case to answer’ proceedings and other evidentiary standards for the evaluation of evidence amount to a legal and procedural error?

12. For purposes of an appeal, does the failure of the Trial Chamber to ‘direct itself’ (correctly or at all) as to the applicable legal standard amount to the same thing as the failure of the Trial Chamber to give the parties advance notice of the applicable legal standard?

13. Is there a continuing appealable error, if it is possible to see in the Trial Chamber’s decision that it directed itself correctly as to the applicable standard, notwithstanding the persistence of an initial error of failure to give the parties advance notice of the applicable legal standard?

14. In the present case, did such errors materially affect the Trial Chamber’s decision? Or, as submitted by the Prosecutor, are the alleged errors themselves sufficient to invalidate the decision?

15. Should the fact that the parties may have been given the opportunity to make submissions on the applicable standard of proof affect the Appeals Chamber’s

⁴ In particular, see [Prosecutor’s Appeal Brief](#), paras 122-263; [Mr Gbagbo’s Response](#), paras 153-404; [Mr Blé Goudé’s Response](#), paras 168-236; [Victims’ Observations](#), paras 110-174.

consideration regarding (a) whether or not the Trial Chamber committed an error; and (b) whether or not any such error would be material?

16. If the Majority disagreed on the standard of proof and applicable legal provisions for a ‘no case to answer’ procedure, what is the effect of this on the assessment of evidence and on the decision of the Majority?

17. The Prosecutor alleges, under this ground of appeal, errors of law and/or errors of procedure. She submits that she does not allege errors of fact and that the six examples of factual findings she presents are intended to show how the Trial Chamber’s approach was ambiguous, inconsistent and flawed.

- a) Against what standard of review should the six examples of factual findings be assessed?
- b) Is the Prosecutor in fact alleging errors of fact?

18. In relation to the factual findings, in general, to what extent does the Trial Chamber deserve appellate deference regarding the factual assessment in judgments of acquittal (i) at the conclusion of the defence case, and (ii) resulting from a ‘no case to answer’ motion?

19. In the particular circumstances of this case, to what extent does the Trial Chamber’s factual assessment of the evidence deserve appellate deference, even given due allowance that the case also or primarily engages questions of error of law or procedure?

III. REMEDY⁵

20. What remedy is the Prosecutor seeking in this appeal, bearing in mind the different submissions that have been made?

- a) Is she seeking a remedy that simply declares a mistrial, as requested at paragraphs 264 to 267 of her appeal brief? If so:

⁵ In particular, see [Prosecutor’s Appeal Brief](#), paras 4, 264-267; Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 44, lines 6-11; p. 46, line 16 to p. 48, line 12; p. 50, line 21 to p. 52, line 23; Transcript of hearing, 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG, p. 94, line 17 to p. 95 line 19; [Mr Gbagbo’s Response](#), paras 26, 405-422; [Mr Blé Goudé’s Response](#), paras 237-251; [Victims’ Observations](#), paras 175, 178-179.

- (i) What does the Prosecutor submit that the remedy of a “mistrial” comprises?
- (ii) On what legal basis can the Prosecutor seek a declaration of a mistrial at this stage of the proceedings?
- (iii) What are the consequences of the remedy of a mistrial in the present case?
- In particular, is the Prosecutor seeking a declaration of a mistrial, following which she will herself determine whether to continue the prosecution?
 - Is this a decision for the Prosecutor, bearing in mind article 61(9) of the Statute and the fact that, ‘[a]fter commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges’; in particular, if charges have been confirmed, and therefore ‘substantial grounds’ found, is it for the Prosecutor to decide or must the matter proceed unless she has leave to withdraw the charges?
- (iv) Could a declaration of a mistrial be entered at this stage of the proceedings in a manner that is fair and fully respects the rights of the accused? In this regard, could a declaration of a mistrial be entered in a manner consistent with the fundamental rights of the accused, including the principle of *ne bis in idem* under article 20 and the right to present a defence case under article 67(1)(e) of the Statute?
- b) Or is the Prosecutor in fact seeking a new trial before a new Trial Chamber, which appeared to be her position at the hearing on 6 February 2020 in the related interim release proceedings? If so, could any such retrial now be carried out in a manner that is expeditious and fair, in particular to the accused, also bearing in mind that the case was, at the time of the ‘no case to answer’ proceedings, at the stage where the Prosecutor’s submission of evidence was closed and the Defence case had yet to be heard; and arguments made as to, e.g. the length of time since these proceedings began and the possible impact of this on the evidence?

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



Judge Chile Eboe-Osuji
Presiding

Dated this 30th of April 2020

At The Hague, The Netherlands