

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15
Date: 29 January 2016

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 submission and admission of evidence

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr 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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I ('Chamber') of the International Criminal Court, by majority, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('Gbagbo and Blé Goudé case'), having regard to Articles 64 and 69 of the Rome Statute ('Statute') and Rule 140 of the Rules of Procedure and Evidence ('Rules'), issues this 'Decision on the submission and admission of evidence'.

I. Background

1. During the status conference held on 14 January 2016, the parties and participants made oral submissions relating to the procedure by which the parties and participants would submit, and the Chamber would admit, evidence during the trial. The Prosecutor indicated a preference for a system whereby the Chamber determines 'the admissibility of evidence on a rolling basis as the witnesses come to court and as documents are shown to the witnesses individually', and noted that relevance and probative value of a submitted item could be established at the time when that item is shown to a witness.¹ The Legal Representative of Victims ("LRV") supported the Prosecutor's preference.²
2. The Defence for Mr Gbagbo ('Gbagbo Defence') and the Defence for Mr Blé Goudé ('Blé Goudé Defence') expressed a similar view.³ In particular, the Defence for Mr Gbagbo submitted that, since the issue of the probative value or weight to be given to a piece of evidence only arises if that piece of evidence has been considered admissible, 'there needs to be a discussion about the admissibility of the piece of evidence beforehand'; accordingly, the Chamber's determination on admissibility has to occur 'at the earliest occasion', with a view to avoiding uncertainty.⁴

¹ ICC-02/11-01/15-T-8-CONF-ENG ET, page 57, lines 3-5, 21-25.

² ICC-02/11-01/15-T-8-CONF-ENG ET, page 60, lines 1-2.

³ ICC-02/11-01/15-T-8-CONF-ENG ET, page 59, lines 19-23.

⁴ ICC-02/11-01/15-T-8-CONF-ENG ET, page 58, lines 12-18.

II. Determinations by the Chamber

3. The Chamber notes Articles 64, 69, 74 of the Statute and Rules 63, 64 and 140 of the Rules, as well as the relevant case-law and practice of the Court.
4. Articles 64(8)(b) and 69(3) of the Statute stipulate that the parties may submit evidence relevant to the case in accordance with the provisions of the Statute and subject to any directions of the Presiding Judge. Article 69(3) of the Statute vests the Chamber with the authority to request the submission of all evidence that it considers necessary for the determination of the truth.
5. Article 74(2) of the Statute provides that, in rendering its final judgment on the merits of the case, the Chamber 'may base its decision only on evidence submitted and discussed before it at the trial'.
6. The Appeals Chamber has clarified that evidence must be regarded as 'submitted' within the meaning and for the purposes of Article 74(2) of the Statute when 'it is presented to the Trial Chamber by the parties on their own initiative or pursuant to a request by the Chamber for the purpose of proving or disproving facts in issue'.⁵
7. Pursuant to Rule 64(1) of the Rules, an issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to the Chamber, or, exceptionally, immediately after the issue has become known. Whilst the Chamber retains the discretion ("may") to request that the issue be raised in writing, it is the Chamber's view that, as regards evidence presented during a hearing, issues of this nature should be immediately raised orally at the same hearing.

⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 3 May 2011, ICC-01/05-01/08-1386 OA 5 OA 6.

8. Articles 64(9)(a) and 69(4) of the Statute set forth the fundamental principles governing the Chamber's authority to rule on the admissibility or relevance of the evidence. Pursuant to Article 64(9)(a) of the Statute, the Trial Chamber 'shall have, *inter alia*, the power on application of a party or on its own motion to: (a) [r]ule on the admissibility or relevance of evidence'. Pursuant to Article 69(4) of the Statute, '[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence'.
9. The wording of both provisions (in particular, the reference to the Chamber's 'power' and the use of 'may') makes it clear that it falls within the discretion of the Chamber to decide whether and, in the affirmative, at what point in time a ruling on the admissibility or relevance of evidence shall occur. As clarified by the Appeals Chamber, 'the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber'. Accordingly, it may decide either (i) to make the ruling on relevance and/or admissibility of the evidence at the time of its submission and defer the determination of its probative value to the end of the trial, or (ii) to defer this ruling to the end of the proceedings, making it 'part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person'.⁶
10. However, the Chamber's discretion is limited by its need to comply with two fundamental principles: on the one hand, its obligation to ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses; on the other hand, its duty not to omit the consideration of 'the relevance, probative value and potential prejudice to the accused of each item of evidence at some

⁶ ICC-01/05-01/08-1386, para. 37.

point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial’.⁷

11. The parties and participants have expressed a preference for an approach whereby the Chamber would rule on the admissibility of a given item of evidence at the time of its submission.
12. Contrary to the arguments raised by the parties, the Chamber is not persuaded that this approach will be beneficial to the fairness and expeditiousness of the trial, or, even more fundamentally, effectively instrumental to its ultimate duty to determine the truth. Several factors militate instead in favour of a solution whereby, as a matter of principle, the assessment of both the admissibility and the relevance or probative value of the evidence is deferred until the moment when the Chamber will be deliberating its judgment, pursuant to Article 74(2) of the Statute.
13. First, it is only at the end of the trial, once the submission of the evidence will have been completed that the Chamber will be in the best position to meaningfully assess each item of evidence as submitted throughout the course of the proceedings. A determination on the admissibility or the relevance of a given item of evidence upon its submission would unduly restrict the Chamber’s power to assess that particular piece of evidence in light of all the others pieces which are yet to be submitted, and to amend its assessment if and as required; as such, it would result in unnecessarily restraining the Chamber’s right and duty ‘to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69’ as provided in Rule 63(2) of the Rules.
14. Second, deferring the Chamber’s determination of all of the issues concerning a given piece of evidence to the time of the judgment will prevent multiple

⁷ ICC-01/05-01/08-1386, para. 37.

determinations on one and the same item of evidence are made at different stages of the trial, including as a result of the need to resolve pending litigation. Intermediate rulings on the evidence, by their very nature based on a partial knowledge of the case, might themselves become the subject matter of additional interlocutory litigation, thereby further disrupting the course of the proceedings. Accordingly, deferral will prevent (or at least significantly circumscribe) the need for multiple – and possibly contradictory – rulings on one and the same item of evidence and thus contribute to the expeditiousness of the trial. The Chamber's obligation, as set forth in Article 74 of the Statute, to determine the guilt or the innocence of the accused in light of all of the evidence presented during the trial would make it always imperative for the Chamber to determine, at the end of the trial, whether the determination made at an earlier stage on a particular piece of evidence still stands, in particular in light of the evidence which has been presented after the making of that initial ruling. It is not indeed exceptional that the relevance of a particular item only emerges in light of material submitted at a later stage.

15. Third, deferring the Chamber's determination to the time of the judgment as a general rule will also ensure that all the evidence submitted will be subjected to a uniform treatment; whether the Chamber decides or not to anticipate its ruling at an earlier stage will not depend on the fact that an issue has or has not be raised by one of the parties at a given moment, but rather on the Chamber's exercise of its discretion in light of its statutory obligations. The Chamber believes that this will contribute to the overall certainty and fairness of the proceedings as a whole.
16. The Chamber notes that a determination of admissibility and/or relevance upon the submission of an item of evidence might provide necessary and appropriate in a system where fact-finding is conducted by a jury, with a view to preventing that the proceedings be compromised by irrelevant or

prejudicial material; this is not the case where decisions are taken by a bench of professional judges. The Chamber is not persuaded that the large nature of the case – and/or the large amount of evidence presented by the parties - is a factor *per se* requiring that evidentiary determinations be taken on a rolling basis. As stated at the opening of the trial, numbers (of items, of witnesses or of hours required for the presentation of the evidence) are just numbers, as such neutral in respect of the procedure to be followed for the admission of evidence.

17. This general principle is without prejudice to admissibility objections being considered by the Chamber upon submission of the relevant item whenever required by the Statute or the Rules (such as motions made under Article 69(7) of the Statute). Furthermore, the Chamber, in the exercise of its discretion, may rule on admissibility of certain items whenever this may be necessary or appropriate in order to preserve the expeditiousness and fairness of proceedings, including upon a request of the parties relating to a specific item of evidence, or categories of evidence. The continuous consideration of the submitted evidence by the Chamber throughout the trial will allow it to promptly determine the need, or the desirability, to advance a particular evidentiary determination to an earlier stage of the proceedings. It will also allow the Chamber to adequately exercise its authority to request the submission of all evidence it considers necessary for the truth.
18. In the view of the Majority, the need to ensure the impartiality of the proceedings does not allow the Chamber to assist the parties with their preparations for the case or, even less, to permit them to “remedy” any flaws which might affect their case, including their possible failure to satisfy their respective burden of proof. The Majority does expect that all the parties and participants will “conduct their investigations and prepare their respective cases in light of all evidence submitted” and that they will address the

Chamber “in such a manner so as to cover all eventualities”; indeed, this appears to the Majority an essential component of the parties’ professionalism.

19. Finally, the Chamber determines that only items presented and relied upon by the parties and, if applicable, the participants, for the purposes of the final judgment must be transmitted to the Chamber. Items disclosed *inter partes* or not submitted in trial proceedings are not to be transmitted to the Chamber. Consistently with the approach taken in the confirmation proceedings in this case, the Chamber considers it unnecessary to assign an 'EVD' number to submitted exhibits. These items will continue to be referenced by their pre-existing unique identification number (“ERN”) which is stamped on each page of each item and which they will retain throughout the course of the proceedings. However, the Registry is to ensure that the e-court metadata clearly reflects which items have been formally submitted to the Chamber as the trial advances and whether an oral objection has been made.⁸ The Registry is also to ensure that any and all issues raised under rule 64(1), as well as any decision rendered by the Chamber, will be duly and promptly annotated in the e-court metadata pertaining to the piece of evidence to which they relate.

⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf) 24 September 2015, ICC-01/05-01/13-1285, para. 17.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY, by majority,

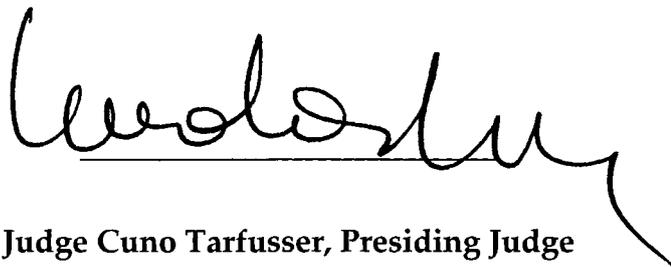
DECIDES that any decision on the admissibility and relevance of the evidence submitted will be deferred to the final judgment, except when an intermediate ruling is required under the Statute or otherwise appropriate;

DECIDES that evidentiary items will only be identified and referred to by means of their ERN;

ORDERS the Registry to ensure that the e-court metadata reflects the evidence which has been formally submitted to the Chamber and to promptly annotate any issue raised by the parties pursuant to Rule 64 of the Rules as well any decision rendered by the Chamber in the e-court metadata pertaining to the piece of evidence to which they relate.

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 29 January 2016

At The Hague, The Netherlands