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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekaterina Trendafilova
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public

**Prosecution's Response to the Defence Request for Leave to Appeal the "Decision
on the confirmation of charges against Laurent Gbagbo"**

Source: Office of the Prosecutor

Document 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 the Defence

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Ms Natacha Fauveau Ivanovic

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence's request for leave to appeal ("Application")¹ the "Decision on the confirmation of charges against Laurent Gbagbo" ("Decision" or "Confirmation Decision")² should be rejected. None of the nine alleged issues and multiple sub-issues ("Issues") raised by the Defence constitute appealable "issues" within the terms of Article 82(1)(d) of the Statute, nor do they arise from the Decision. Even if they did, the Issues do not meet the criteria for leave to appeal.

2. Further, the Application does not meet the expected standards for filings by parties before the Court. Despite using 44 of the 50 allotted pages to present its submissions, the Defence fails to make any substantive argument demonstrating that the alleged Issues meet the criteria for leave to appeal. In some instances, the Application effectively amounts to arguing the merits of the appeal, thus circumventing the statutory procedure. Moreover, on several occasions, the Defence inaccurately represents the Decision. An applicant has the burden to act diligently and provide coherent legal and factual arguments in support of its request.³ The Defence has not done so, and the Application should be dismissed on that basis alone.⁴

Submissions

3. The Appeals Chamber has ruled that "only an issue may form the subject-matter of an appealable decision. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."⁵ None of the Issues identified by the Defence meet this test. Some in

¹ ICC-02/11-01/11-676-Conf and ICC-02/11-01/11-676-Red.

² ICC-02/11-01/11-656.

³ ICC-01/09-127-Red, para.12.

⁴ The Appeals Chamber has dismissed submissions based on a demonstrated lack of diligence and clarity: *See* ICC-01/09-127-Red, para.12.

⁵ ICC-01/04-168 OA3, para.9; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para.7. *See also*, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

fact misstate the Decision, while others cannot be said to arise from it since they are wholly unrelated to the Decision. Others constitute mere disagreements or conflicting opinions with the Decision or relate to matters that were not essential for the confirmation of the charges against Laurent Gbagbo. On this basis, the Application should be rejected without further analysis.

4. However, even if the Chamber were to find that one or more of the Issues qualify as an appealable issue arising from the Decision under Article 82(1)(d), and notwithstanding the absence of any Defence argument on the second limb of the test, as set out further below, the criteria for leave to appeal are not met.

(a) The First Issue does not arise from the Confirmation Decision

5. The First Issue (with five sub-issues)⁶ does not arise from the Decision. It either concerns prior decisions,⁷ or relates to Defence arguments that were not accepted by the Chamber. Although the Defence argues that these prior decisions affect the legality of the Decision,⁸ this does not meet the legal threshold. For an issue to be appealable under Article 82(1)(d), it must arise from the impugned decision⁹ and not from a prior decision, even if the latter may have had some effect on the impugned decision. In this respect, appeals brought under Article 82(1)(d) differ from appeals under Article 81, where an appellant may argue that earlier procedural decisions materially affected the impugned decision.

6. The Defence's examples under the five sub-issues do not establish that the First Issue arises from the Decision or how it would "constitute a subject the resolution of which [was] essential for the determination of matters arising in the judicial cause

⁶ Application, paras.15-43.

⁷ The Defence concedes as much: Application, para.15. See also Application, para.44, where the Defence submits that *other* issues relate directly to the Decision.

⁸ Application, para.16.

⁹ It must concern "the determination of matters arising in the judicial cause under examination", see ICC-01/04-168 OA3, para.9.

under examination,”¹⁰ namely, the confirmation of the charges against Laurent Gbagbo.

7. First, the fact that the Chamber has not ruled on a number of Defence submissions arguing that the Legal Representative of the Victims acted as an auxiliary prosecutor,¹¹ does not arise from the Decision. The Chamber’s alleged omission is completely unrelated to the Decision and the Defence’s contrary argument¹² is speculative. Similarly, although presented under its Second Issue, the Defence’s submissions that it was not granted sufficient pages to respond to the Prosecution and to the Legal Representative, and that the Legal Representative allegedly exceeded their page limits,¹³ relate to different decisions of the Pre-Trial Chamber, namely those of 14 February 2014¹⁴ and 2 April 2014.¹⁵ These matters do not arise from the Confirmation Decision.

8. Second, the Defence’s contention that it was left in the dark as to the test for leave to appeal through the Chamber’s allegedly inconsistent application of the standard throughout the pre-trial proceedings¹⁶ is unsupported. The Application does not demonstrate that the Chamber deviated from the Court’s consistent jurisprudence regarding the standard for leave to appeal under Article 82(1)(d). Even if the Chamber came to different factual conclusions in some decisions than in others, and at times one judge appended a dissenting opinion to a decision on leave to appeal, this does not show inconsistent application of the legal principles. Each application must be decided on its facts, which may vary according to the nature and stage of the proceedings. And even if, *arguendo*, the Chamber’s prior decisions under Article 82(1)(d) had been unclear on the applicable criteria,¹⁷ which allegedly affected the

¹⁰ ICC-01/04-168 OA3, para.9.

¹¹ Application, paras.17-23.

¹² Application, heading prior to para.17.

¹³ Application paras.45-50.

¹⁴ ICC-02/11-01/11-619, page 25.

¹⁵ ICC-02/11-01/11-645.

¹⁶ Application, paras.24-31.

¹⁷ Application, para.30.

Defence's ability to appeal the Confirmation Decision,¹⁸ this neither affects the content of the Confirmation Decision, nor gives rise to a matter that was essential for the confirmation of the charges against Laurent Gbagbo.

9. Third, the sub-issue regarding the absence of an additional oral hearing¹⁹ does not arise from the Decision. The Defence made such a request previously, which was rejected by the Chamber in its decision of 14 February 2014.²⁰ In the Application, the Defence merely reiterates its prior submissions that an additional hearing would have been required and disagrees with the 14 February 2014 decision.²¹ Further, even if that prior decision had been incorrect, the question regarding an additional hearing does not arise from the Confirmation Decision: the Decision does not include any finding to that effect, and the absence of an additional hearing had no identifiable impact on its content.

10. Fourth, the Defence's contention that the Chamber did not consider the Prosecution's alleged failure to discharge its duty to investigate incriminating and exonerating circumstances equally²² is unsupported. The Defence's submissions on the Prosecution's allegedly deficient investigations are extraneous to the subject matter of the Confirmation Decision²³ and the issue therefore does not arise from it.

11. Fifth, the sub-issue alleging that the Prosecution erroneously added further modes of liability in its amended Document Containing the Charges ("DCC") also does not arise from the Confirmation Decision. The Defence challenged the form of the DCC (including the articulated modes of liability) in an earlier motion, and this was rejected by the Chamber in its decision of 14 February 2014.²⁴ In its Application,

¹⁸ Application, para.26.

¹⁹ Application, paras.32-36.

²⁰ ICC-02/11-01/11-619, para.31.

²¹ See in particular Application, para.36.

²² Application, paras.37-39.

²³ The Defence relies on the Dissenting Judge's statement that for her, the previously identified problem regarding anonymous hearsay evidence remained (See ICC-02/11-01/11-656-Anx, para.2, referring to ICC-02/11-01/11-432, para.35). However, the Majority did not agree with this view and confirmed the charges.

²⁴ ICC-02/11-01/11-619, paras.13-25.

the Defence merely reiterates its prior submissions and expresses its disagreement with the Chamber's prior decision.²⁵ Although the Decision confirmed the charges on the additional modes of liability pursuant to Article 25 included in the DCC, the question whether such additions were permissible, does not arise from the Confirmation Decision, but rather from the decision of 14 February 2014.²⁶

12. Because the First Issue (and five sub-issues) is not directly related to the Decision, it does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial such that it should be remedied by an appeal at this stage. For the same reason, its immediate resolution by the Appeals Chamber would not materially advance the proceedings.

(b) The Second Issue does not arise from the Confirmation Decision

13. The Second Issue (and four related sub-issues) likewise does not arise from the Decision. It concerns alleged errors of law regarding the standard of proof under Article 61(7) and the manner in which the Chamber assessed the evidence and entered factual findings.²⁷ However, the Defence's submissions are based on an erroneous interpretation of the Decision and amount to no more than disagreements or conflicting opinions with the manner in which the Chamber assessed the evidence.²⁸ Accordingly, leave to appeal this Issue (and sub-issues) should be rejected.

14. The first sub-issue is predicated on the Defence's erroneous conjecture that the Chamber applied a presumption of truth with respect to the evidence presented by the Prosecution.²⁹ The Defence similarly submits that the Chamber applied a

²⁵ Application, para.42.

²⁶ ICC-02/11-01/11-619, paras.18-21.

²⁷ Application, paras.51-78. The Prosecution has responded to the Defence's arguments in the Second Issue relating to the submissions of the Legal Representative of Victims (Application, paras.45-50) in its response to the First Issue (see also para.7 above).

²⁸ According to the consistent jurisprudence of this Court, mere disagreements fall short of constituting appealable issues: see ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

²⁹ Application, paras.56-65.

presumption as to the authenticity of Prosecution documents,³⁰ and the credibility of Prosecution evidence, thus allegedly reversing the burden of proof.³¹

15. When analysing the evidence and making its factual findings, the Chamber did not apply such assumptions or ignore evidence to the contrary.³² Instead, the Chamber's determination "[was] based on an assessment of the evidence relied upon by the Prosecutor and the Defence".³³ Rather than looking at evidence in isolation, the Chamber assessed "all the available evidence, considered as a whole".³⁴ It also "assessed the probative value of the relevant evidence" and the "credibility of witnesses".³⁵ Following the Appeals Chamber's case law, the Chamber was aware that the evaluation of the credibility of witnesses at the confirmation stage is "necessarily presumptive" and that "it should take great care in finding that a witness is or is not credible".³⁶ This does not mean that the Chamber accepted *per se* the Prosecution's submissions on witness credibility and evidence. To the contrary, it demonstrates that the Chamber appropriately evaluated the evidence before it, and was mindful that "the credibility of witnesses [...] can only be properly addressed at trial".³⁷

16. The Chamber properly assessed the parties' evidence and was careful "in finding that a witness is *or is not* credible".³⁸ This further demonstrates that the Chamber did not merely apply assumptions, as the Defence alleges; as such, the first sub-issue of the Second Issue does not arise from the Decision. The examples given by the Defence merely illustrate its disagreement with how the Chamber assessed the evidence and the conclusions that it drew from it.³⁹ Moreover, because the Chamber

³⁰ Application, para.66.

³¹ Application, paras.67-70.

³² *Contra*, Application, para.57.

³³ Decision, para.20.

³⁴ Decision, para.22.

³⁵ Decision, para.21.

³⁶ Decision, para.21, relying on ICC-01/04-01/10-514, para.48.

³⁷ Decision, para.21. See also ICC-01/04-01/10-514 OA4, paras.47-48.

³⁸ Decision, para.21.

³⁹ Application, paras.59, 61-63, 65-66.

expressly followed the Appeals Chamber's case law on that matter, immediate resolution of the sub-issue by the Appeals Chamber would not materially advance the proceedings.

17. The second sub-issue also does not arise from the Decision: it is based on the erroneous assumption that the Chamber entered factual findings without taking into consideration exculpatory information.⁴⁰ However, the Defence disregards the Chamber's express statement that "lack of explicit reference to an item of evidence may signify that [...] a certain finding, satisfactorily established in light of the evidence taken as a whole, is not negated by one or more other discrete items of evidence".⁴¹ The Defence's argument in effect (and once again) is no more than a mere disagreement with the Chamber's assessment of the evidence and its conclusions.

18. The third sub-issue, namely whether the Chamber relied on the "totality of evidence" without specifying individual items of evidence underpinning its findings,⁴² mischaracterises the Decision and therefore also does not arise from it. In relation to the Defence's first example,⁴³ the Chamber in fact referred to both specific items of incriminating *and* exculpatory evidence,⁴⁴ and based on the totality of *that* specific evidence, it reached its conclusion. In the second example,⁴⁵ the Chamber inferred from "other evidence" that certain radio communications must be interpreted as an order to use force.⁴⁶ The Defence reads this finding in a piecemeal manner. However, the context of that finding makes clear that the Chamber's reference to "other evidence" concerns the same analysis in that paragraph and those preceding it, wherein the Chamber determined the circumstances regarding the radio communications and referred to the evidence pertaining to those

⁴⁰ Application, paras.71-74.

⁴¹ Decision, para.22.

⁴² Application, paras.75-76. See also the Fourth Issue, where the Defence raises similar arguments.

⁴³ Application, para.75.

⁴⁴ Decision, para.125.

⁴⁵ Application, para.76.

⁴⁶ Decision, para.40.

circumstances, which is in fact the “other evidence” relied upon by the Chamber in the challenged finding.

19. The fourth sub-issue, namely that the Chamber should have found that certain items of evidence were inadmissible for their alleged lack of authenticity,⁴⁷ is no more than a disagreement with how the Chamber assessed that evidence. Indeed the Defence repeatedly challenges the Chamber’s reliance on evidence which it views as doubtful.⁴⁸

20. In addition, the Second Issue (and four sub-issues) does not meet the criteria for leave to appeal. Because it is based on erroneous interpretations of the Decision, it does not affect the fair or expeditious conduct of the proceedings or the outcome of the trial. For the same reason, immediate resolution by the Appeals Chamber of these issues would not materially advance the proceedings.

(c) *The Third Issue is not an appealable issue*

21. The Third Issue, namely “whether the Chamber adopted a different approach in its assessment of the Prosecution and Defence evidence” overlaps somewhat with the Second Issue and likewise amounts to a mere disagreement with the Chamber’s findings. It is not an appealable issue because it does not constitute an identifiable subject or topic requiring a decision for its resolution.⁴⁹ Furthermore, the Defence’s submissions are cursory and misstate the Decision, often relying on selective portions to advance its argument.

22. As its first sub-issue, the Defence claims that the Chamber preferred the Prosecution’s submissions even when they were contradictory or erroneous.⁵⁰ However, in attempting to show an alleged contradiction between the Chamber’s findings that the FDS units were instructed not to use force, and the planning and

⁴⁷ Application, paras.77-78.

⁴⁸ Application, paras.77-78.

⁴⁹ ICC-01/04-168 OA3, para.9.

⁵⁰ Application, paras.79-81.

co-ordination of the repression of the demonstration, the Defence disregards the Chamber's detailed explanation of its findings and the evidence it relied upon.⁵¹ Indeed, the Chamber, while noting that the FDS units were instructed to use force only in self-defence, was persuaded on the totality of the evidence "that [it was] sufficiently demonstrated that the mission of the FDS was conceived and executed in order to achieve the goal of preventing the demonstration from taking place, by using all means, including lethal violence against civilians."⁵² To support its conclusion, the Chamber listed and relied upon seven separate findings and their underlying evidence,⁵³ which the Defence fails to mention.

23. Likewise, in claiming that the Chamber made allegedly erroneous findings, the Defence advances arguments based on an erroneous interpretation of the Decision.⁵⁴ The Defence claims that the Chamber relied on purportedly vague concepts such as "the totality of the evidence" and "other evidence" to support the Prosecution narrative. However, in so doing it disregards the Chamber's consideration of the individual pieces of evidence in reaching its conclusion. In fact, the Chamber listed several individual pieces of evidence comprising the "totality of the evidence" and "other evidence."⁵⁵ Moreover, this listing of the evidence was not intended or required to be exhaustive.⁵⁶ Equally, the Defence fails to acknowledge that the Chamber fully considered its submissions on the demonstrators' conduct, but found they lacked merit.⁵⁷

24. The Defence's second sub-issue, alleging the imprecise nature of the allegation relating to the Yopougon attack by pro-Gbagbo forces,⁵⁸ is itself imprecise. Apart from claiming that the Chamber simply accepted the Prosecution narrative and

⁵¹ Application, para.79.

⁵² Decision, para.40.

⁵³ Decision, para.40.

⁵⁴ Application, paras.80-81.

⁵⁵ See for example, Decision, para.148, footnotes 397 and 398 *contra* Application, para.81; Decision, para.158, footnotes 421,422 *contra* Application, para.81.

⁵⁶ Decision, para.22.

⁵⁷ See Decision, footnotes 192,193, *contra* Application, para.81.

⁵⁸ Application, para.82.

speculating that “there exist other examples” of such acceptance,⁵⁹ the Defence fails to elaborate how this constitutes an identifiable subject or topic as required for an appealable issue, much less meets the criteria under Article 82(1)(d).

25. As its third sub-issue, the Defence claims that the Chamber contradicted its earlier decision of 3 June 2013⁶⁰ by its reliance on NGO reports.⁶¹ The question of whether to grant leave to appeal the Confirmation Decision must be limited to that Decision and cannot be extended to other decisions, such as the 3 June 2013 Decision. As a result, this sub-issue does not arise from the Decision. In any event, the Defence’s submissions are incorrect. First, in its 3 June 2013 Decision, the Chamber did not entirely discount the probative value of NGO reports *per se*. Instead, it found that “NGO reports and press articles may be a useful introduction to the historical context of a conflict situation.”⁶² Second, and most importantly, the Chamber did not confirm the charges based on NGO reports and anonymous hearsay alone. Such evidence was used to corroborate primary sources of evidence, such as direct witness statements and official government documents. The Chamber’s extensive reliance on witness statements and a wide variety of other sources of evidence is evident from footnotes 32 to 224 (paragraphs 24 to 77) of the Confirmation Decision. Accordingly, the issue raised by the Defence does not arise from the Decision.

26. Finally, the Defence’s speculation that the Chamber preferred the Prosecution’s terminology over its own, including the use of the phrase “organised resistance groups” as opposed to “rebels”,⁶³ raises no appealable issue. The Chamber’s function is to assess whether there are substantial grounds to believe that the charges, as brought by the Prosecution, are made out.⁶⁴ In so doing, the Chamber is not bound by the exact words used by the Prosecution in its DCC but it may describe the

⁵⁹ *Ibid.*, para.82.

⁶⁰ ICC-02/11-01/11-432 (“3 June 2013 Decision”).

⁶¹ Application, paras. 83-85.

⁶² ICC-02/11-01/11-432, para.35.

⁶³ Application, para.86.

⁶⁴ ICC-01/04-01/06-774 OA6, para.47.

charges in a manner that it deems best reflects the relevant evidence. As with the other sub-issues raised, the Defence merely disagrees with the Chamber's assessment of the evidence and its factual findings without identifying any appealable issues.

(d) The Fourth Issue does not arise from the Confirmation Decision and is not an appealable issue

27. The Fourth Issue, as to whether the Chamber failed to provide a reasoned opinion, is not an appealable issue. Nor does it arise from the Decision. The Defence reiterates arguments it made under its Second and Third Issues by objecting to the Chamber's use of the phrase "other evidence", claiming it was used without evidentiary support or despite contrary evidence.⁶⁵ The Defence also argues that the Chamber adopted the Prosecution's thesis without evidentiary support.⁶⁶ As already shown, neither of these sub-issues arises from the Decision since they do not accurately reflect the Decision and are thus based on an incorrect premise. The Chamber scrupulously articulated and applied the Appeals Chamber's standard for a reasoned decision.⁶⁷

28. The Appeals Chamber has held that a Chamber must indicate with sufficient clarity the basis of its decisions. The extent of the reasoning will depend on the circumstances of each case. Such reasoning will not necessarily require reciting and summarising each and every factor; rather a Chamber must identify the facts relevant to its conclusion.⁶⁸

29. The Chamber, in this case, did just that. It clearly indicated which pieces of evidence constituted the "other evidence" it relied on.⁶⁹ The examples given by the

⁶⁵ Application, paras.89-91.

⁶⁶ *Ibid.*, paras.92-93.

⁶⁷ Decision, paras.22-23.

⁶⁸ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

⁶⁹ *Contra* Application, paras.89-91.

Defence (paragraphs 40 and 158 of the Decision)⁷⁰ are clearly supported by explanatory footnotes listing relevant evidence, thus satisfying the reasoned opinion requirement. For the most part, the Defence merely complains about the Chamber's assessment of the evidence and attempts to re-litigate settled issues. In particular, the Defence expresses its dissatisfaction with the Chamber's findings on the orders given to the FDS,⁷¹ meetings,⁷² the presence of pro-Ouattara armed forces at the 16 December 2010 RTI march⁷³ and the promotions of FDS officers to secure their allegiance.⁷⁴ However, none of these differences in opinion constitutes an appealable issue.

(e) *The Fifth Issue is not an appealable issue*

30. As its Fifth Issue, the Defence objects to discrete factual findings made by the Pre-Trial Chamber, which allegedly exceed the Prosecution's factual narrative in its DCC.⁷⁵ The Defence's assertions are unsupported and constitute mere disagreement or a conflicting opinion with the Decision, which does not amount to an appealable issue for the purposes of Article 82(1)(d).

31. The facts and circumstances of the charges confirmed by the Chamber in the Decision⁷⁶ correspond to, and do not exceed, the facts and circumstances described in the DCC.⁷⁷ The Defence apparently questions whether the Pre-Trial Chamber may interpret the evidence differently from the Prosecution. Since these submissions are based on a misunderstanding of the Statute and Appeals Chamber case law on the role of a Pre-Trial Chamber in the confirmation process, they do not qualify as an issue essential for the determination of the matter and thus an appealable one.⁷⁸

⁷⁰ Application, para.89 footnote 117 and para.90 footnote 118.

⁷¹ Decision, para.40, *contra* Application, para.89.

⁷² Decision, paras.158-159, *contra* Application, para.90.

⁷³ Decision, paras.38-39, *contra* Application, para.92.

⁷⁴ Decision, para.125, *contra* Application, para.93.

⁷⁵ Application, paras.94-105.

⁷⁶ Decision, paras.267-277.

⁷⁷ ICC-02/11-01/11-592-Anx1, paras.212-231.

⁷⁸ ICC-01/04-168 OA3, para.9.

32. The Pre-Trial Chamber cannot be expected to “rubberstamp” the Prosecution’s narrative and interpretation of the evidence. If the Pre-Trial Chamber were unable to deviate somewhat from the interpretation of the evidence proposed by the Prosecution, it would have to confirm the charges in an identical manner as described, or fail to confirm the charges outright. This would interfere with its functions and duties to freely assess the evidence,⁷⁹ to draw its own conclusions from the evidence,⁸⁰ and to decide on whether or not to confirm the charges.⁸¹

33. In addition to not being an appealable issue, since the law on this Fifth Issue is settled, an immediate resolution of it by the Appeals Chamber would not materially advance the proceedings.

(f) The Sixth Issue does not arise from the Confirmation Decision and is not an appealable issue

34. The Defence’s Sixth Issue is based on the incorrect premise that the Decision on the confirmation of charges against Laurent Gbagbo determines Charles Blé Goudé’s culpability in some manner. By challenging the Chamber’s factual findings on Laurent Gbagbo’s alleged co-perpetrator Blé Goudé, the Defence apparently argues that the Chamber was estopped from confirming the charges against Laurent Gbagbo unless it had also made a judicial determination to the requisite standard against Blé Goudé. This wrongly assumes that the Decision concerned Blé Goudé’s criminal culpability, when in fact it was limited to establishing substantial grounds to believe that Laurent Gbagbo committed the crimes charged. References to Blé Goudé in the DCC and the Confirmation Decision were relevant to the determination of whether reasonable grounds existed to believe that Laurent Gbagbo is criminally responsible for the crimes charged. For instance, because the Prosecution alleged that Laurent Gbagbo is responsible for the crimes, *inter alia*, as

⁷⁹ ICC-01/04-01/10-514 OA4, paras.42-43.

⁸⁰ ICC-01/04-01/10-514 OA4, para.39.

⁸¹ Article 61(7).

an indirect co-perpetrator who acted through an organised structure of power, the Chamber had to enter findings in relation to individuals other than the accused. Such findings were not made to confirm charges or enter criminal convictions against other persons such as Blé Goudé.⁸² Accordingly, the Sixth Issue relating to Blé Goudé's criminal responsibility does not arise from the Decision.

35. Further, in arguing that the findings on Charles Blé Goudé remain hypothetical,⁸³ the Defence misapprehends the purpose of the confirmation procedure and the standard of proof at this stage. The Chamber confirmed the charges against Laurent Gbagbo because it found that there was sufficient evidence to establish substantial grounds to believe that he committed the charged crimes.⁸⁴ As part of this determination, the Chamber found that Blé Goudé was part of the accused's inner circle and instrumental in a number of ways for the accused to commit the crimes.⁸⁵ This is not mere speculation⁸⁶ but rather, a judicial determination grounded solidly in the evidence.

36. Nor does this show bias or any appearance of bias on the part of the Judges. International criminal proceedings frequently involve overlapping issues concerning accused persons and their alleged co-perpetrators. In the absence of contrary evidence, it is presumed that judges hearing a case, by virtue of their training and experience, will rule fairly on the issues, relying solely and exclusively on the evidence before them.⁸⁷ The Judges did so in this case.

⁸² See *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-T, Judgement, 29 November 2002, para.23.

⁸³ <http://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf>

⁸⁴ Application, para.112.

⁸⁵ Article 61(7).

⁸⁶ See for instance, Decision, paras.68, 70, 83-86, 106, 119, 137, 140, 145, 165-166, 180-181, 235, 240, 245, 276.

⁸⁷ *Contra* Application, para.115.

⁸⁷ *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para.378. <http://www.unict.org/Portals/0/Case/English/Karera/decisions/090202apl.pdf>

(g) The Seventh Issue does not arise from the Confirmation Decision

37. As its Seventh Issue, the Defence argues that the Prosecution failed to comply with the Chamber's 3 June 2013 Decision, and the Chamber failed to ensure such compliance.⁸⁸ These arguments, even if true, are irrelevant to the Confirmation Decision and therefore do not demonstrate any issue arising from it.

38. In any event, in its 3 June 2013 Decision, the Chamber, *inter alia*, "request[ed] the Prosecutor to consider providing, to the extent possible, further evidence or conducting further investigation with respect to" certain discrete issues.⁸⁹ These requests were not mandatory.⁹⁰ By confirming the charges against Laurent Gbagbo in the Confirmation Decision, the Chamber concluded that the evidence before it at that time was sufficient to establish substantial grounds to believe that he committed the crimes charged. Finding that the evidence was sufficient to confirm the charges, the Chamber had no need to further comment on its prior invitation to the Prosecution to submit additional evidence.

(h) The Eighth Issue does not arise from the Confirmation Decision and is not an appealable issue

39. In its Eighth Issue, the Defence raises three alleged errors in relation to the Chamber's findings on crimes against humanity, but fails to demonstrate that they constitute identifiable subjects essential for the determination of the matter (an appealable issue) or that they meet the Article 82(1)(d) criteria.

40. As its first sub-issue, the Defence incorrectly claims that the Chamber legally erred because it did not definitively pronounce on the definition of "organisation" for the purposes of crimes against humanity.⁹¹ However, this misreads the Decision: the Chamber in fact considered two possible legal definitions of "organisation" and

⁸⁸ Application, paras.116-122.

⁸⁹ 3 June 2013 Decision, para.44.

⁹⁰ 3 June 2013 Decision, para.44.

⁹¹ Application, paras.123-126.

held that “regardless of the interpretation of the notion of organisation [...] the organisation alleged by the Prosecutor and satisfactorily established by the available evidence would meet the threshold under either interpretation.”⁹² Therefore, the issue as characterised by the Defence is not an appealable issue, as it does not arise from the Decision.

41. Moreover, the Appeals Chamber has ruled that a Pre-Trial Chamber’s responsibility is limited to “determin[ing] whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.⁹³ The applicable law, including the definition of “organisation”, will be left to a Trial Chamber⁹⁴ (and, when necessary, the Appeals Chamber). Pursuant to Article 74(2), a Confirmation Decision merely binds a Trial Chamber with respect to the confirmed facts and circumstances. The Trial Chamber hearing the trial is free to deviate from any legal findings entered by the Pre-Trial Chamber in the Confirmation Decision.⁹⁵ As long as the facts are established, the Trial Chamber is entitled to change the legal characterisation of the crimes during trial.⁹⁶ Therefore, even if the Pre-Trial Chamber had been wrong by not deciding on one definition of “organisation,” intervention by the Appeals Chamber at this stage would be premature, and an immediate resolution would not materially advance the proceedings in any way.

42. As its second sub-issue, the Defence argues that the evidence was insufficient to demonstrate a “state or organisational policy” under Article 7(2), and claims that the Chamber ruled “in the absence of all evidence.”⁹⁷ Once again, the Defence misstates the Decision. It is clear from the Decision’s plain text that the Chamber considered there was sufficient evidence on the existence of a policy, including Laurent

⁹² Decision, paras.217, 218-221.

⁹³ ICC-01/04-01/07-475 OA, para.68.

⁹⁴ ICC-01/04-01/06-1084, paras.5-6, 47.

⁹⁵ See also Regulation 55.

⁹⁶ ICC-01/04-01/06-1084, para.47.

⁹⁷ Application, paras.127-129.

Gbagbo's speech at Divo, and various preparatory activities.⁹⁸ As a result, the Defence fails to identify any issue arising from the Decision and its arguments amount to mere disagreements on the assessment of the evidence.

43. As its third sub-issue, the Defence claims that the Chamber did not conduct a factual analysis to determine whether the elements of "other inhumane acts" were met in accordance with the Statute. It also argues that the Chamber did not distinguish between the different mental elements required for "other inhumane acts" and "attempted murder."⁹⁹ These matters are not appealable issues. As noted above, it is the Trial Chamber, not the Pre-Trial Chamber, which will pronounce on Laurent Gbagbo's culpability and will articulate and apply the relevant legal definitions for the crimes of "other inhumane acts" and "attempted murder" after having assessed all the evidence on the record. Any legal findings made by the Pre-Trial Chamber in the Confirmation Decision are not binding on the Trial Chamber. As a result, the alleged error raised by the Defence does not amount to an appealable issue that meets the criteria for leave to appeal. In addition, appellate intervention at this stage would not materially advance the proceedings.

(i) The Ninth Issue does not arise from the Confirmation Decision and is not an appealable issue

44. The Ninth Issue (and two sub-issues) concerns alleged errors relating to the modes of liability.¹⁰⁰ However, no appealable issues arise from the Decision. The Defence interprets the Decision incorrectly or argues its merits, instead of demonstrating that appealable issues arise from it.

45. The first sub-issue, namely whether the Trial Chamber erred in confirming several modes of liability cumulatively,¹⁰¹ does not arise from the Decision. First, it is

⁹⁸ Decision, paras. 218, 123-149.

⁹⁹ Application, paras.130-133.

¹⁰⁰ Application, paras.134-155.

¹⁰¹ Application, paras.135-148.

based on an erroneous interpretation of the Decision. The Chamber did not confirm the different modes of liability cumulatively, but it did so in the alternative.¹⁰² This makes the Defence's references to the Court's jurisprudence on cumulative charging redundant.¹⁰³ Second, the question whether a DCC may include more than one mode of liability based on the same facts and circumstances and whether the DCC was articulated correctly in this case was already decided in the Chamber's decision of 14 February 2014.¹⁰⁴ Although the Confirmation Decision follows the principle established in the 14 February 2014 decision, the issue, if any, arises from that earlier decision and not from the Confirmation Decision. Third, this sub-issue does not meet the criteria for leave to appeal because the Trial Chamber is in any event free to legally re-characterise the facts pursuant to Regulation 55, and early notice that several modes of liability are being charged is in the interests of the Defence and preserves the fairness of the proceedings.¹⁰⁵

46. As its second sub-issue, the Defence foreshadows a number of alleged errors in relation to each mode of liability that it will raise if and when the Chamber grants leave to appeal.¹⁰⁶ In so doing, it does not properly identify any appealable issues, but rather circumvents the leave procedure by advancing the merits of its grounds of appeal and disagrees with the Decision.¹⁰⁷ However, the correctness of a decision is irrelevant in assessing an application for leave to appeal under Article 82(1)(d).¹⁰⁸ Therefore, no appealable issue exists.

¹⁰² Decision, para.278. Note the use by the Chamber of the phrase "article 25(3)(a), (b) or (d)" (emphasis added).

¹⁰³ Application, paras.136-139.

¹⁰⁴ ICC-02/11-01/11-619, paras.18-20.

¹⁰⁵ ICC-02/11-01/11-619, paras.20-21.

¹⁰⁶ Application, para.149.

¹⁰⁷ Application, paras.150-155.

¹⁰⁸ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

Conclusion

47. The Defence fails to meet the standard for leave to appeal under Article 82(1)(d) for any of the identified Issues. Accordingly, the Prosecution requests that the Chamber reject the Application.



Fatou Bensouda, Prosecutor

Dated this 4th day of August 2014

At The Hague, The Netherlands