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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
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 Defence requests related to the continuation of the confirmation proceedings"

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Introduction

1. On 24 February 2014, the Defence sought leave to appeal (“Application”)¹ the decision issued by Pre-Trial Chamber I (“Chamber”) on the Defence request related to the continuation of the confirmation proceedings (“Decision”)² in relation to the following five issues (“Issues”):
 - (i) Whether the Chamber committed an error of law by failing to provide adequate reasoning for its finding that the facts and circumstances have not changed (“First Issue”);
 - (ii) Whether the Chamber erred by allowing the Prosecution to add three modes of liability to its Amended Document Containing the Charges (“DCC”) by only relying on the concept of “the interests of justice” (“Second Issue”);
 - (iii) Whether notification of the new charges and the new modes of liability on 14 February 2014 and without legal basis was too late to meet the requirements under the Statute (“Third Issue”);
 - (iv) Whether the Chamber is authorised to rule on an application of the OPCV that is not based on a written and officially notified filing (“Fourth Issue”); and
 - (v) Whether the Chamber erred by not granting the Defence’s request for an oral hearing (“Fifth Issue”).
2. The Prosecution requests that the Application be rejected since the five Issues do not constitute appealable “issues” within the terms of Article 82(1)(d) that arise from the Decision. Even if they do, the five Issues do not meet the criteria for leave to appeal.

¹ ICC-02/11-01/11-620.

² ICC-02/11-01/11-619.

Submissions

3. The Defence in its Application make a number of submissions that discuss the merits of the Issues.³ The Prosecution will not entertain these arguments, but rather limits itself to the question whether the Issues as framed in the Application constitute appealable issues that arise from the Decision and whether they meet the criteria for leave to appeal.

A. The Issues do not constitute appealable issues arising from the Decision

(i) *The First Issue is not an appealable issue that arises from the Decision*

4. Contrary to the Defence's contention,⁴ the Chamber did not fail to provide adequate reasoning for its finding that the facts and circumstances have not changed. As a result, the question whether this would constitute an error of law does not arise from the Decision.
5. The Chamber found that "the facts and circumstances underpinning the contextual elements of the crimes charged as described in the charges in the Amended DCC do not exceed the facts and circumstances alleged to the same effect in the DCC of 17 January 2013. Indeed the factual parameters of the alleged widespread and systematic attack against the civilian population [...] as outlined in the Amended DCC remain the same as those shaping the attack described in the DCC of 17 January 2013."⁵ In the circumstances of this case,⁶ this finding "indicate[s] with sufficient clarity the basis of the decision".⁷ These relevant circumstances include the following previous decisions in this case in light of which an informed and reasonable reader can understand the Decision: (a) the Pre-Trial Chamber's decision regarding the material facts that the Prosecution

³ See for instance Application, paras.15, 21-25, 29-33, 40-47. For similar reasons, the Application inflates the original five Issues identified at paragraph 9 of the Application to eight Issues in the body of the Application, in particular in relation to the Fourth and Fifth Issues (argued in the Application as the 4th, 5th and 6th questions and the 7th and 8th questions respectively).

⁴ Application, paras.9(1), 13-17.

⁵ Decision, para.16.

⁶ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

⁷ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

must establish;⁸ (b) the Pre-Trial Chamber's request to the Prosecution to consider providing "further evidence" relevant to establish the *chapeau* elements under Article 7;⁹ and (c) the Pre-Trial Chamber's decision distinguishing between facts that may be included in the Amended DCC from other facts which would change the "factual scope of the charges."¹⁰ In light of these prior Decisions, the Pre-Trial Chamber, having reviewed all the relevant facts in the Amended DCC, concluded that they did not amend the charged facts and circumstances. The Chamber was not required to list each fact and elaborate how it had not changed.

6. Even if, *arguendo*, there was a lack of reasoning, this would not amount to an appealable issue under Article 82(1)(d). The Appeals Chamber has held that "[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."¹¹ The questions whether provision of additional factual detail in the Amended DCC constitutes an amendment to the "facts and circumstances," and whether the Chamber provided sufficient reasoning on this issue, was immaterial to the Chamber's overall conclusion in the Decision. Although Judge Van den Wyngaert in her separate opinion thought the additions to the Amended DCC constituted a change of the "facts and circumstances", she agreed with the Majority that "it would be preferable to allow the Prosecutor to add the new incidents in relation to the contextual elements of crimes against humanity".¹²

(ii) *The Second Issue is not an appealable issue that arises from the Decision*

7. Similarly, the question whether the Chamber erred by allowing the Prosecution to add modes of liability to its Amended DCC by only relying on the concept of "the

⁸ ICC-02/11-01/11-325, paras.27-28.

⁹ Adjournment Decision: ICC-02/11-01/11-432; See also decision partially granting leave to appeal the Adjournment Decision: ICC-02/11-01/11-464.

¹⁰ ICC-02/11-01/11-589, para.12, relied on by Defence Request, para.19.

¹¹ 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."

¹² Decision, Anx, paras.1-2.

interests of justice”¹³ does not arise from the Decision. Contrary to the Defence’s submission, “the interests of justice” is not the only legal basis underpinning the Chamber’s conclusion. The decision to allow the additional modes of liability is also based on the Chamber’s analogy to other methods by which charges may be amended, namely under Articles 61(4), 61(7)(c)(ii) and 61(9), and pursuant to Regulation 55,¹⁴ as well as on the notion of “judicial economy”.¹⁵

8. Moreover, the Second Issue does not amount to an appealable issue under Article 82(1)(d), because the legal basis relied upon by the Chamber for its decision to allow the additional modes of liability is immaterial for the Chamber’s overall conclusion. This is demonstrated by the separate opinion of Judge Van den Wyngaert who concurred with the Majority’s overall conclusion while relying on a different legal basis for her finding.¹⁶

(iii) The Third Issue is not an appealable issue arising from the Decision

9. The Third Issue, namely whether the Defence has been timely notified of the new facts and additional modes of liability included in the Amended DCC, and whether this notice can cure the alleged lack of legal basis for the amendments to the charges, also does not arise from the Decision.¹⁷ This is in part because it is based on an apparent misunderstanding by the Defence of the relevant portion of the Decision. The Defence submits that it should have been given notice already on 3 June 2013 when the Chamber issued the Adjournment Decision, and not only on 14 February 2014, when the Chamber issued the challenged Decision.¹⁸ It also argues that the comment made by the Prosecution during the oral hearing in February 2013 to the effect that all modes of liability may be satisfied is insufficient to provide adequate notice to the Defence.¹⁹ In the challenged Decision, however, the Chamber examined the question whether the Defence is in

¹³ Application, paras.9(2), 18-26.

¹⁴ Decision, para.21.

¹⁵ Decision, para.22.

¹⁶ Decision, Anx, paras.1, 3.

¹⁷ Application, paras.9(3), 27, 34.

¹⁸ Application, para.9(3).

¹⁹ Application, para.31.

a position to “meaningfully exercise all the procedural rights for the purposes of the confirmation of charges”.²⁰ The Chamber noted that the Defence had “received disclosure of the additional evidence relied upon by the Prosecutor in consecutive batches” and “has been on notice of the facts which may equally give rise to the additional modes of liability included in the Amended DCC since 17 January 2013.”²¹ It further considered that the time limits provided in the Adjournment Decision for the Defence presentation of its list of evidence and written response to the Amended DCC fully conformed with (and partly exceeded) the time limits under Rules 121(3) and 121(6).²² Accordingly, it found that the Amended DCC filed on 13 January 2014 and the additional evidentiary material,²³ together with the previous version of the DCC filed on 17 January 2013 and the previous evidentiary material supporting the facts as charged, provided adequate and timely notice to the Defence. When reaching this conclusion, the Chamber did not give any weight to the Prosecution’s statement of February 2013 referred to by the Defence.

10. Nor does the Third Issue constitute an appealable issue. Rather it is a mere disagreement by the Defence with the Pre-Trial Chamber’s conclusion. The Defence disagrees with the Chamber’s conclusion that it has been given sufficient notice and can effectively exercise its procedural rights. In its view, notice should have been given on 3 June 2013 when the Chamber issued the Adjournment Decision, and should have been done pursuant to the Chamber’s authority under Article 61(7)(c)(ii).²⁴ Consistent with the practice before this Court, a mere “question over which there is disagreement or conflicting opinion”²⁵ does not constitute an appealable issue pursuant to Article 82(1)(d).

²⁰ Decision, para.23.

²¹ Decision, para.23.

²² Decision, para.23.

²³ ICC-02/11-01/11-592-Conf-Anx2-Corr2 and ICC-02/11-01/11-592-Anx2-Corr2-Red.

²⁴ Application, para.33.

²⁵ 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.

(iv) *The Fourth Issue is not an appealable issue arising from the Decision*

11. In the Fourth Issue, the Defence challenges the finding of the Chamber to grant the OPCV up to 40 pages for its final written submissions in response to the Defence,²⁶ even though the OPCV had not provided a written request but rather made its request by email.²⁷ The Defence also submits that the Chamber's ruling was not adequately reasoned.²⁸ In the context of the Decision, these questions are minor procedural matters that do not amount to subjects "the resolution of which is essential for the determination of matters arising in the judicial cause under examination".²⁹ Accordingly, they do not amount to issues within the terms of Article 82(1)(d).

(v) *The Fifth Issue is not an appealable issue arising from the Decision*

12. The Fifth Issue, namely whether the Chamber erred by not granting the Defence's request for an oral hearing and did so without proper reasoning³⁰ is likewise not an appealable issue arising from the Decision. First, it is based on the erroneous assumption that the Amended DCC exceeded the scope of the Adjournment Decision and that the Prosecutor substantially amended the charges.³¹ The Chamber expressly rejected these propositions in its Decision.³² Second, the Defence filed two alternative requests to ensure that its procedural rights would be fully protected, namely that it be given an opportunity to make additional oral submissions,³³ or, if the confirmation proceedings were to continue in writing, that it be allowed up to 300 pages to make its submissions.³⁴ Since the Chamber granted the Defence's second request, and since the Defence conceded that this

²⁶ Decision, p.25, item (f).

²⁷ Application, paras.9(4), 35 (the 4th and 5th questions).

²⁸ Application, para.36 (the 6th question).

²⁹ 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."

³⁰ Application, paras.9(5), 37-47 (the 7th and 8th questions).

³¹ Application, title to 7th question, paras.37- 39.

³² Decision, paras.16, 18-19.

³³ ICC-02/11-01/11-599.

³⁴ ICC-02/11-01/11-607. See also Decision, para.26.

approach would be sufficient to meet the requirements of fairness, the Fifth Issue is not essential for the determination of matters arising in the judicial cause before the Chamber. Even if the Defence would have preferred the Chamber to adopt the first option, the Fifth Issue is “merely a question over which there is disagreement or conflicting opinion”³⁵ which does not amount to an appealable issue within the terms of Article 82(1)(d).

B. The Issues do not meet the criteria for leave to appeal under Article 82(1)(d)

13. If, *arguendo*, the five Issues raised in the Application were found to be appealable issues arising from the Decision, they do not meet the criteria for leave to appeal.

(i) *The Issues do not significantly affect the fair and expeditious conduct of the proceedings*

14. The Defence merely makes general statements that a modification of charges impacts on the rights of the suspect and the fairness of the proceedings. However, it fails to demonstrate how the specific Issues raised in the Application have this effect.³⁶ According to the jurisprudence of this Court, abstract or general complaints that a decision causes prejudice to the rights of the suspect are insufficient to meet the criteria for leave to appeal.³⁷

15. In any event, the Decision does not cause unfair prejudice to the suspect. In particular, it does not affect his right to be informed of the charges. According to the Decision, notice of the relevant facts and circumstances included in the Amended DCC was to a large extent already provided on 17 January 2013, when the Prosecution filed its previous version of the DCC.³⁸ In addition, contrary to the understanding of the Defence, notice of the additional facts and modes of

³⁵ 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.

³⁶ Application, paras.48-51.

³⁷ See ICC-01/04-168 OA3, para.10; ICC-01/04-01/06-2463, para. 31; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 paras. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

³⁸ Decision, para.23.

liability was given on 13 January 2014, when the Prosecution filed its Amended DCC, and then again through the issuance of the Decision on 14 February 2014.

16. The Decision also does not affect the right of the suspect to prepare his defence.

To the contrary, the Pre-Trial Chamber has amended the schedule for the continuation of the confirmation of charges proceedings and has granted the Defence additional time to file its final written submissions.³⁹

17. Similarly, the Decision does not affect the suspect's right to challenge the charges and to present evidence. Rather, it grants the Defence additional time to disclose evidence it intends to present,⁴⁰ and significantly extends the page limit for the Defence to file its observations on the Prosecution's evidence.⁴¹ The Chamber expressly allowed for this extension of time and page limits to give the Defence "a meaningful opportunity to address fully all relevant aspects [it] intends to raise".⁴²

18. Finally, since the Defence makes no submissions on how the Issues significantly affect the expeditious conduct of the proceedings, it thereby fails to meet its burden to demonstrate that this limb of the test under Article 82(1)(d) is satisfied. In any event, an appeal against the interlocutory Decision at this late stage of the confirmation of charges proceedings would not expedite the proceedings, but instead could significantly delay the decision of the Chamber pursuant to Article 61.

(ii) *The Issues do not affect the outcome of the trial*

19. Although the Defence generally alleges that the Issues affect the outcome of the trial,⁴³ it provides no argument in support of its submission. A general and abstract allegation is insufficient to meet the criteria for leave to appeal.

³⁹ Decision, p.24, item (c), para.43.

⁴⁰ Decision, p.24, item (a).

⁴¹ Decision, p.24, item (e).

⁴² Decision, para.31.

⁴³ Application, title prior to para.48.

(iii) *Immediate resolution by the Appeals Chamber of the Issues would not materially advance the proceedings*

20. The Defence's argument that immediate appellate intervention is required to avoid uncertainty with respect to the charges and to prevent unfair prejudice to the suspect⁴⁴ should be rejected. First, any alleged unfair prejudice will depend on whether the charges are confirmed. In this sense, the application for leave to appeal against this Decision is premature. Second, the Chamber will issue its decision under Article 61 soon,⁴⁵ and the Defence may be able to bring an appeal against that decision under Article 82(1)(d). Accordingly, any unfair prejudice that might result if the charges are confirmed may be cured by an appeal against the Chamber's decision under Article 61. In this sense, immediate resolution of the Issues will not materially advance the proceedings; rather, such resolution at this stage of the proceedings would cause a significant delay.

Conclusion

21. The Prosecution requests that the Defence Application be rejected.



Fatou Bensouda, Prosecutor

Dated this 27th day of February 2014

At The Hague, The Netherlands

⁴⁴ Application, paras.52-56.

⁴⁵ According to the updated schedule for the further conduct of the confirmation proceedings, the Defence is required to file its final written submissions by 14 April 2014 (Decision, p.24, item (c)). Pursuant to Regulation 53, the Chamber must issue its decision under Article 61 within 60 days from the end-date of the confirmation hearing, which in this case will be by mid-June 2014.