

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/11
Date: 10 January 2014

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's "*Demande d'autorisation d'interjeter appel de la « Decision on Defence request on the suspension of time limits during judicial recess» du 27 décembre 2013 (ICC-02/11-01/11-585)*"

Source: Office of the Prosecutor

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

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Introduction

1. The Defence seeks leave to appeal ("Application")¹ the "Decision on Defence request on the suspension of time limits during judicial recess" ("Decision")² on the following three issues:
 - i. Whether the Single Judge can make such an important decision without addressing the arguments of the Defence regarding compliance with Labour Law ("First Issue");
 - ii. Whether the Single Judge can make such an important decision without any legal basis ("Second Issue");
 - iii. Whether the Single Judge can use the concept of the right to be tried without undue delay to prevent the Accused from asserting his rights ("Third Issue").³
2. The Prosecution requests that the Application be rejected. The Issues, as framed by the Defence, do not arise from the Decision. Even if they did, the Issues do not meet the criteria for leave to appeal pursuant to Article 82(1)(d).

Procedural History

3. On 17 December 2013, Pre-Trial Chamber I issued its "Decision establishing a calendar for further proceedings" (the "Calendar Decision")⁴ in which it, taking into consideration the Winter Judicial Recess, set out a calendar for the proceedings concluding the pre-trial phase in this case. The Chamber ordered the Prosecution to disclose to the Defence by Monday, 13 January 2014 the evidence on which it intends to rely for the purposes of confirmation of

¹ ICC-02/11-01/11-586.

² ICC-02/11-01/11-585.

³ Application, para.23.

⁴ ICC-02/11-01/11-576.

charges proceedings⁵ and also submit, on the same day, the amended document containing the charges, the amended list of evidence and the updated consolidated Element Based Chart.⁶ The Chamber also ordered the Defence to submit justified proposals for redactions, if any, by the same day.⁷

4. On 20 December 2013, the Defence filed its *“Requête urgente afin que soient suspendus les délais durant les vacances judiciaires”* (“Request”) in which it asked the Chamber to suspend all deadlines during the Winter Judicial Recess period.⁸ The Defence argued, *inter alia*, that the Chamber is obliged to respect the fundamental human rights to rest and leisure as well as the right to family life of the members of the Defence team⁹ and that the Chamber is obliged to respect those fundamental human rights when setting the procedural calendar.¹⁰
5. On 27 December 2013, Single Judge Silvia Fernandez de Gurmendi of Pre-Trial Chamber I (“Single Judge”) issued the Decision,¹¹ rejecting the Defence Request.
6. On 6 January 2013 the Defence submitted the Application.¹²

⁵ ICC-02/11-01/11-576, page 6.

⁶ ICC-02/11-01/11-576, page 6.

⁷ ICC-02/11-01/11-576, page 6.

⁸ ICC-02/11-01/11-58.

⁹ Request, para.14.

¹⁰ Request, paras. 31-33.

¹¹ ICC-02/11-01/11-585.

¹² ICC-02/11-01/11-586.

Submissions

The Issues do not arise from the Impugned Decision

The First Issue does not arise from the Decision

7. In the First Issue, the Defence questions whether the Single Judge can make such an important decision without addressing the arguments of the Defence regarding Labour Law.¹³
8. The Defence does not properly present the Decision. The Single Judge did note the Defence's arguments regarding Labour Law.¹⁴ The Single Judge also addressed the question of equality of treatment of Defence and the Prosecution, and indicated that the time limits set out in the Calendar Decision benefit other parties and participants than the Prosecution, which is required to prepare, *inter alia*, the amended DCC and list of evidence, by 13 January 2014.¹⁵
9. Further, the Chambers' duty to provide a reasoned decision does not "necessarily require reciting each and every factor that was before the respective Chamber to be individually set out".¹⁶ Rather, it need only "identify which facts it found to be relevant in coming to its conclusion".¹⁷ The Single Judge abided by these requirements. Hence, the First Issue is predicated on a mischaracterisation of the Decision and accordingly does not arise from it.¹⁸

¹³ Application, para.23.

¹⁴ Decision, para.2.

¹⁵ Decision, para.6.

¹⁶ ICC-01/04-01/06-773 OA5, para. 20; ICC-01/04-01/06-774 OA6, para.30.

¹⁷ ICC-01/04-01/06-773 OA5, para. 20; ICC-01/04-01/06-774 OA6, para.30.

¹⁸ ICC-01/09-02/11-406, para.46; ICC-01/04-01/07-15, para.15; ICC-01/04-01/07-1732, paras.15,17-18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras.26-29; ICC-01/04-01/10-106, p. 6; ICC-02/11-01/11-350, paras.42,44.

The Second Issue does not arise from the Decision

10. In the Second Issue, the Defence questions whether the Single Judge can issue the Decision without any legal basis. This issue is also based on a mischaracterisation of the Decision. The Single Judge did provide a legal basis. She relied, *inter alia*, on Articles 21 and 67(1)(c) read in conjunction with Regulation 19*bis* which regulates procedure relating to periods of Judicial Recess.¹⁹ The Single Judge also took into consideration other relevant factors such as the stage and length of proceedings,²⁰ and the prospective duration of the confirmation of charges proceedings.²¹

11. In this case, the Single Judge, having considered all the relevant factors, exercised her discretion under Regulation 19*bis* in a manner with which the Defence disagrees. Hence, the Second Issue does not arise from the Decision.

The Third Issue does not arise from the Decision

12. In the Third Issue, the Defence argues that the Single Judge erroneously relied on the principle of expeditiousness to reject its Request. According to the Defence, only the accused can decide to resort to this principle to preserve his rights.²² The Appellant further argues that the Single Judge's use of this principle is an invented concept,²³ and that she ruled without legal basis.²⁴

13. The Defence, again, does not properly characterise the Decision. The Single Judge did consider the accused's right to be tried without delay pursuant to Article 67(1)(c) but also considered the Chamber's *duty* to ensure that this right is effectively guaranteed in light of the circumstances of this case.²⁵

¹⁹ Decision, paras. 3 and 5.

²⁰ Decision, para.5.

²¹ Decision, para.6.

²² Application, para.38.

²³ Application, para.38.

²⁴ Application, para.42.

²⁵ Decision, paras.5-6.

Further, the Single Judge also considered *other* applicable legal provisions, such as Article 21, which indicates that the basic texts of the Court should be firstly applied, and Article 61, which imposes additional obligations to the Chamber, such as the holding of a confirmation hearing “within a reasonable time after the person's surrender or voluntary appearance before the Court”.²⁶ Moreover, the Single Judge also considered Regulation 19*bis*(2), which instructs that time limits shall not be suspended during Judicial Recess, unless otherwise determined by the Chamber,²⁷ and that the power of the Chamber to modify time limits does not extend to those established in the Statute and the Rules.²⁸ Accordingly, as the arguments put forward by the Defence stem from a misunderstanding of the Decision,²⁹ the Third Issue does not arise from the Decision.

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

The Issues do not significantly affect the fair conduct of the proceedings

14. The Prosecution submits that the Issues do not significantly affect the fair conduct of the proceedings.
15. Firstly, the Defence has not substantiated its claim that the lack of suspension of time limits has affected the proper representation of Mr. Gbagbo and indicates in general terms that it will need to “analyse and eventually respond to motions and decisions, analyse the numerous documents disclosed by the Prosecution, try to anticipate the charges to identify the evidence that requires redactions”.³⁰ The Defence does not describe any particular impact that the

²⁶ Decision, para.3. Article 61(1) establishes that “within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber *shall* hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.” Emphasis added.

²⁷ Decision, para.5.

²⁸ Decision, para.7.

²⁹ ICC-02/11-01/11-350, para.41.

³⁰ Application, para.48.

non-suspension of the time limits during the Winter Recess will have on the rights and proper representation of Mr Gbgabo. The Prosecution notes in this context that even in the initial Request the Defence only focused on the alleged violations of the rights of members of the Defence team, as opposed to the violation of any right of the accused. A purely general complaint of this nature is not sufficient for leave to appeal to be granted.³¹

16. Secondly, and as noted by the Single Judge,³² the Defence did not identify any deadline which would have expired during the Winter Recess. The only possible deadlines that would have expired during the Winter Recess were identified by the Single Judge as those pertaining to Article 82(1)(d) that the Single Judge found cannot be varied by her. Moreover, after the expiry of the Recess, the Chamber granted the Defence a two week extension of time for submitting justified proposals for redactions.³³ These factors also indicate that even if the Decision was wrongly decided, there is no significant impact on the fair conduct of proceedings.

17. Thirdly, although the Defence claims that the fairness of the proceedings is affected because of the imbalance between the two parties³⁴ the Single Judge has already made a finding that the Defence is not unfairly disadvantaged in comparison to the Prosecution.³⁵ Indeed, the Single Judge found that the new schedule set forth in the Calendar Decision, which did take into account the judicial recess, benefits mainly parties and participants *other than* the Prosecution.³⁶

³¹ ICC-01/04-01/06-2463, para.31.

³² Decision, para.7.

³³ ICC-02/11-01/11-589.

³⁴ Application, para.49.

³⁵ Decision para.6.

³⁶ Decision para.6.

The Issues do not significantly affect the expeditious conduct of the proceedings

18. An *ex post facto* appellate review of deadlines relating to a recess period that has already concluded, in the midst of pre-trial proceedings that are noted for their unusually lengthy duration³⁷ would only unnecessarily delay the proceedings.

Immediate Resolution of the Issue will not materially advance the proceedings.

19. The intervention of the Appeals Chamber at this stage would not materially advance the proceedings. If and when a prejudice to the rights of the accused has been caused as a result of the non-suspension of the deadlines over the Winter Recess, the Defence can raise this matter at confirmation and request the Pre-Trial Chamber to take this factor into consideration in issuing its decision. Further, the Defence can also seek leave to appeal the confirmation decision. In light of these options, an appeal is unnecessary to “move forward” the proceedings or to rid the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.³⁸

20. The Defence argues that the question of suspension of time limits is now the subject of conflicting answers from different Trial Chambers and that appellate review is required for the purposes of legal certainty.³⁹ This argument is incorrect. Regulation 19*bis* explicitly envisions that different Chambers may make different orders regarding the suspension of time limits based on the circumstances of the individual case. Hence, the fact that Chambers in different cases decide differently on whether deadlines should be

³⁷ Decision, para.6 (“the Single Judge is mindful of the fact that the suspect was transferred to the Court on 30 November 2011 and that, consequently, pre-trial proceedings have been ongoing for more than two years.”)

³⁸ ICC-01/04-168 OA3, para.14.

³⁹ Application, para.54.

suspended is not an indicator of legal uncertainty and does not justify appellate review.

Conclusion

21. In light of the above, the Prosecution requests that the Defence Application be rejected.



Fatou Bensouda, Prosecutor

Dated this 10th day of January 2014

At The Hague, The Netherlands