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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 Response to the Defence Application for Leave to Appeal the
“Decision on the date of the confirmation of charges hearing and proceedings
leading thereto (ICC-02/11-01/11-325)”**

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Introduction

1. On 11 December 2012, the Single Judge of Pre-Trial Chamber I (“Single Judge”) held a status conference with the Prosecution, the Defence and Registry to discuss issues related to the continuation of the proceedings leading to the hearing on the confirmation of charges.¹
2. On 14 December 2012, the Single Judge issued the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto” (“Decision”),² in which she ruled, inter alia, that the confirmation of charges hearing in the case against Laurent Gbagbo shall commence on Tuesday, 19 February 2013.³
3. On 24 December 2012, the Defence filed an application for leave to appeal the Decision (“Defence Application”).⁴ The Defence seeks leave to appeal on the following seven issues:
 - a. The failure to hear the Defence (“First Issue”);⁵
 - b. The reasoning of the Chamber (“Second Issue”);⁶
 - c. The assumption that the parties should have been ready since August 2012 (“Third Issue”);⁷
 - d. The finding that the successful completion of inquiries or investigations is generally not a “pre-condition” to hold the confirmation of charges hearing (“Fourth Issue”);⁸

¹ ICC-02/11-01/11-T-11-CONF-ENG and ICC-02/11-01/11-T-12-CONF-ENG.

² ICC-02/11-01/11-325.

³ Decision, para.23.

⁴ ICC-02/11-01/11-342.

⁵ Defence Application, paras.5-9.

⁶ Defence Application, paras.10-30. « Sur l’augmentation de la Chambre » - Based on the manner in which the Defence presents the Second Issue, the Prosecution assumes that the Defence meant to refer to it as follows:

« Sur l’argumentation de la Chambre »

⁷ Defence Application, paras.31-49.

⁸ Defence Application, paras.50-53.

- e. The dates provided for by the Decision prevent the Defense from conducting any investigation and from obtaining critical evidence (“Fifth Issue”);⁹
 - f. The dates provided for by the Decision make it impossible for the Defence to prepare for the confirmation of charges hearing (“Sixth Issue”);¹⁰ and
 - g. The error regarding the scope and purpose of the confirmation hearing and the delay in the proceedings (“Seventh Issue”)¹¹
4. The Prosecution opposes the Defence Application. The First, Third, Fourth and Seventh Issue do not arise from the Decision. The Defence misrepresents the relevant findings of the Single Judge. The Second, Fifth and Sixth Issue do not constitute “issues” within the meaning of Article 82(1)(d), but are mere disagreements with the Decision, which the Defence now seeks to re-litigate. Even if, *arguendo*, any of the issues referred to in the Defence Application would properly qualify as appealable issues, the Prosecution submits that the Defence Application fails to demonstrate how they would meet the criteria for leave to appeal under Article 82(1)(d).

Arguments

1. *The First, Third, Fourth and Seventh Issues do not arise from the Decision*
5. In relation to the First, Third, Fourth and Seventh Issues, the Defence Application misrepresents the relevant findings of the Decision. As a result, those issues do not arise out of the Decision.
6. For the First Issue, the Defence’s argument that the Single Judge has failed to hear the Defence for the purposes of fixing the date for the confirmation of charges hearing is predicated on the assumption that she had already made her decision

⁹ Defence Application, paras.54-62.

¹⁰ Defence Application, paras.63-64.

¹¹ Defence Application, paras.65-83.

prior to the status conference of 11 December 2012 and was determined to hold the hearing in February 2013.¹² This assumption is incorrect. The Single Judge stated during the hearing¹³ and noted in her Decision¹⁴ that her proposal for the confirmation of charges hearing to be held in February 2013 was a “preliminary” indication that the hearing “could” be held during that time. The Single Judge further allowed the Defence to present all its submissions and entertained them either during the hearing or in the Decision. The fact that the Single Judge eventually set the date for the confirmation of charges hearing to commence on 19 February 2013 is no indication that she had made up her mind before hearing from the Defence. On the contrary, the record shows that the Single Judge followed a proper process and heard all relevant arguments before making her final determination.

7. The Third Issue also does not arise from the Decision. The Defence submits that the Decision relies on an assumption that the parties should have been ready for the confirmation of charges hearing since August 2012.¹⁵ However, the Single Judge merely stated that “had proceedings for the determination of Mr Gbagbo's fitness not been undertaken, the Defence would have been expected to be ready to proceed to the confirmation of charges hearing scheduled for 13 August 2012”.¹⁶ This statement does not constitute any assumption, as suggested by the Defence. It merely notes a fact which is relevant for the purposes of determining the date for the confirmation hearing – and certainly, nothing in the statement suggests that the Single Judge considered that all investigative activities had to be completed: the Chamber expressly allowed the Defence and the Prosecution to conduct further investigations,¹⁷ and the Decision specifically permits the parties to disclose additional evidence “regardless of the time when it was collected”.¹⁸

¹² Defence Application, para.6.

¹³ ICC-02/11-01/11-T-11-CONF-ENG, p.4, lines 4 to 6.

¹⁴ Decision, paras.17-18.

¹⁵ Defence Application, paras.31-49.

¹⁶ Decision, para.20.

¹⁷ ICC-02/11-01/11-294, para.11.

¹⁸ Decision, para.31.

8. In relation to the Fourth Issue, the Defence submits that the Decision erroneously finds that the successful completion of inquiries or investigations is generally not a “pre-condition” for holding the confirmation of charges hearing.¹⁹ Once more, the Defence misrepresents the Decision. The Single Judge did not make any general ruling to that effect. Rather, she analyzed the Defence request for more time to investigate in the context of the circumstances of this case. In particular she referred to the Defence request “to conclude a number of investigative activities that it has initiated almost one year after Mr Gbagbo's initial appearance before the Court and several months after the Prosecutor's disclosure of the bulk of her evidence for the confirmation of charges hearing”.²⁰ The Single Judge then concluded that “[i]n these circumstances, [and] without prejudice to the possibility for the Defence to rely on further evidence that may be obtained before the expiration of the time limit under rule 121(6) of the Rules, the conclusion of such tardy investigative activities cannot constitute a precondition to hold the confirmation of charges hearing”.²¹ This is a narrow finding, confined to the specific circumstances of this case and in particular to the tardiness of the activities planned by the Defence.
9. For its Seventh Issue, the Defence submits that the Single Judge committed an error by referring to the limited scope and purpose of the confirmation hearing.²² While the Decision does contain such a reference,²³ the Defence takes it out of context and attaches a meaning to it that cannot be found in the Decision. Contrary to the suggestion by the Defence, this reference by no means restricts the Defence’s right to challenge the evidence of the Prosecution or to present its own evidence.²⁴ It also does not affect the adversarial nature of the proceedings,²⁵ the Defence’s right to prepare for the proceedings²⁶ and to effectively participate

¹⁹ Defence Application, paras.50-53.

²⁰ Decision, para.21.

²¹ Decision, para.21.

²² Defence Application, paras.65-78.

²³ Decision, para.22.

²⁴ Defence Application, para.67.

²⁵ Defence Application, para.68.

²⁶ Defence Application, para.69.

in them,²⁷ or otherwise restrict Mr Gbagbo's exercise of his rights under Article 67(1).²⁸ The Single Judge, after noting that the confirmation hearing has a limited scope and purpose, only emphasises that "the Chamber needs to take into account its obligation to conduct proceedings expeditiously in accordance with Mr Gbagbo's right under article 67(1)(c) of the Statute to be tried without undue delay".²⁹ Nothing in this statement can be construed to infringe the rights of Mr Gbagbo as advanced by the Defence.

10. For its Seventh Issue, the Defence also submits that the Single Judge committed an error by taking into account "the delays that have already taken place since the first appearance of Mr Gbagbo".³⁰ Again, the Defence misinterprets this reference. It erroneously suggests that the Chamber uses it to justify a deviation from the rights enshrined in Article 67(1),³¹ and also as a vehicle to maintain its predetermined decision to hold the confirmation of charges hearing in February 2013.³² The Single Judge, however, merely referred to any prior delays in light of the Chamber's "obligation to conduct proceedings expeditiously".³³ The allegations made by the Defence are unsupported and speculative.

2. The Second, Fifth and Sixth Issue do not constitute issues within the meaning of Article 82(1)(d)

11. The Second, Fifth and Sixth Issues largely repeat arguments that have already been submitted to the Single Judge during the status conference of 11 December 2012 and seek to re-litigate the same matters. The Defence merely disagrees with the manner in which the Single Judge adjudicated on these issues. According to the Appeals Chamber, "merely a question over which there is disagreement or

²⁷ Defence Application, para.68.

²⁸ Defence Application, paras.75, 77, 78.

²⁹ Decision, para.22.

³⁰ Decision, paras.22; Defence Application, paras.79-83.

³¹ Defence Application, para.79.

³² Defence Application, para.82.

³³ Decision, para.22.

conflicting opinion” does not constitute an appealable issue within the meaning of Article 82(1)(d).³⁴

12. Regarding the Second Issue, the Defence challenges the reasoning employed by the Single Judge in her Decision and presents at great length some of the arguments that it had already submitted previously. In particular, the Defence recalls that in its view a number of matters needed to be resolved before setting a date for the confirmation of charges hearing. As the Defence has already done during the status conference of 11 December 2012, it lists some of these matters and explains why, in its view, it is important to settle them prior to the confirmation of charges hearing. The Defence also submits that the Single Judge erred by rejecting the Defence arguments and by setting a date nevertheless.³⁵ However, a reiteration of prior arguments and an expression of disagreement with the analysis and the conclusions drawn by the Single Judge are inadequate to concretely identify a “subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.³⁶ As a result, the arguments submitted by the Defence under its Second Issue do not constitute an appealable issue within the meaning of Article 82(1)(d).

13. For its Fifth and Sixth Issue, the Defence submits that due to budgetary and logistical constraints, as well as the manner in which the Prosecution disclosed some of its information, the Defence is unable to successfully conduct investigations and obtain critical evidence³⁷ and therefore to prepare for the confirmation of charges hearing within the deadlines set in the Decision.³⁸ In so doing, the Defence repeats arguments that it has already advanced before the Single Judge during the status conference on 11 December 2012 and expresses its disagreement with the Decision. However, as already stated in relation to the

³⁴ ICC-01/04-01/06-168 OA3, para.10.

³⁵ Defence Application, paras.10-30.

³⁶ ICC-01/04-01/06-168 OA3, paras. 9-10. 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.”

³⁷ Defence Application, paras.54-62.

³⁸ Defence Application, paras.63-64.

Second Issue, such repetition of arguments and expression of disagreement are insufficient to identify an appealable issue.

3. The Defence Application fails to demonstrate how the Issues meet the criteria for leave to appeal under Article 82(1)(d)

14. The Defence's core argument that the Issues affect the fairness of the proceedings is that the Defence lacks appropriate resources and that there is an imbalance of resources between the Defence and the Prosecution.³⁹ However, the Defence Application fails to indicate how these submissions relate to any of the seven Issues raised. The Prosecution submits that the question of resources is irrelevant to the First, Second, Third, Fourth and Seventh issue, as they either raise legal or procedural matters that are unrelated to the number of staff or the amount of financial resources that is available to the Defence. With respect to the Fifth and Sixth, the question of resources has some relevance. Nevertheless, it is highly speculative to assume that additional resources for the Defence would enable the Defence to overcome the difficulties raised in the context of these issues. The Prosecution recalls that the Defence claims, among others, that it is unable to properly investigate and prepare for the confirmation hearing, also because of the alleged difficulties that it faces with some of the redacted information disclosed by the Prosecution⁴⁰ and due to time-consuming procedures within the Registry that need to be followed when organizing investigative missions.⁴¹ These alleged difficulties would remain, even if the Defence was given additional resources.

15. Moreover, the Defence also argues that the Issues affect the fairness of the proceedings because the Single Judge assumes that the Defence should have been ready for the confirmation of charges hearing already in August 2012.⁴² As

³⁹ Defence Application, paras.88, 90-94.

⁴⁰ Defence Application, para.57.

⁴¹ Defence Application, paras.58, 63.

⁴² Defence Application, para.89.

already stated above, this submission is misleading. The Decision does not rely on any such assumption.

16. The Defence Application does not include any coherent argument concerning the impact of the Issues on the expeditious conduct of the proceedings. The Defence merely argues that the Single Judge improperly referred to her duty to provide for the expeditious conduct of the proceedings and that the manner in which she applied her duty affects the rights of the accused.⁴³ These arguments are incapable of meeting the requirements for leave to appeal in relation to any of the seven Issues referred to in the Defence Application.
17. In addition, while the Defence correctly submits that the confirmation of charges hearing defines the scope of the trial,⁴⁴ it does not provide any arguments on how the Issues referred to in the Defence Application significantly impact on the outcome of the trial.
18. Similarly, the Defence submits that the confirmation of charges hearing is a critical stage of the proceedings,⁴⁵ but it fails to demonstrate in concrete terms why an immediate resolution by the Appeals Chamber of the seven Issues would materially advance the proceedings. The Defence merely makes some general statements regarding the need to rid the process of its flaws already at the pre-trial stage of the proceedings.⁴⁶ The Defence further submits that an immediate resolution of the Issues is necessary as the Defence would need to seek an extension of the relevant time limits set by the Decision in case that it is unable to meet these deadlines.⁴⁷ This argument undermines the Defence's submissions. According to its logic, the Issues do not need to be immediately resolved by the Appeals Chamber, as the Defence has another remedy available, namely a request for an extension of time pursuant to Regulation 35 of the Regulations of the Court.

⁴³ Defence Application, paras.99-102.

⁴⁴ Defence Application, para.98.

⁴⁵ Defence Application, para.105.

⁴⁶ Defence Application, paras.106-109,

⁴⁷ Defence Application, para.110.

Conclusion

19. For the above reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 31st day of December 2012

At The Hague, The Netherlands