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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

**Prosecution's consolidated response to the Defence requests for leave to appeal the
"Order setting the commencement date of trial" (ICC-02/11-01/15-58)**

Source: Office of the Prosecutor

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Introduction

1. On 7 May 2015, Trial Chamber I set the commencement of the trial for 10 November 2015, “in order to hear the opening statements of the parties and participants. Thereafter, the Prosecution will start its presentation of evidence in January 2016”.¹ On 13 May 2015, the Defence for Laurent Gbagbo, whose position was that the trial should commence in April 2016,² and the Defence for Charles Blé Goudé, who had indicated January 2016 as the earliest date that it could be ready to start,³ sought leave to appeal the Decision.⁴
2. The Defence Applications should be dismissed. None of the four issues identified by the Gbagbo’s Defence and the one issue advanced by the Blé Goudé’s Defence is appealable. Instead, they are largely based on mischaracterisations of the Decision or merely disagree with it.

Submissions

A. The Five Issues are not appealable

3. Chambers of this Court have consistently held that mere disagreements or conflicting opinions cannot constitute appealable issues.⁵ In addition, appealable issues do not arise when the applications are premised on misrepresentations of the Chamber’s findings.⁶ The Applications should be dismissed on these two bases alone: the First⁷ and Fourth Issues⁸ in Gbagbo’s Application, and the one

¹ ICC-02/11-01/15-58 (“Decision”), para.16.

² ICC-02/11-01/15-T-1-CONF-ENG ET, pp.89-92.

³ ICC-02/11-01/15-T-1-CONF-ENG ET, pp.92-93.

⁴ ICC-02/11-01/15-63, (“Gbagbo’s Application”) and ICC-02/11-01/15-64 (“Blé Goudé’s Application”).

⁵ See e.g., ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.25; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

⁶ 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.

⁷ Gbagbo’s Application, p.7: “*Sur l’absence de motivation de la décision au regard de la fixation de la date de début effectif du procès.*” (“First Issue”)

⁸ Gbagbo’s Application, p.14: “*La Chambre a erré en considérant que les déclarations d’ouverture pouvaient être détachées du début effectif du procès.*” (“Fourth Issue”)

Issue identified in Blé Goudé's Application⁹ misrepresent the Decision, and the Second¹⁰ and Third Issues¹¹ in Gbagbo's Application simply disagree with it. Even if the Trial Chamber were to find that the Applications identify appealable issues, the Defence's arguments do not demonstrate that the requirements under article 82(1)(d) are met.

(i) *The First and Fourth Issues in Gbagbo's Application and the one Issue in Blé Goudé's Application misrepresent the Decision*

4. As its First Issue, Gbagbo's Defence argues that the Trial Chamber failed to provide reasoning in fixing the trial date and by purportedly giving the Defence three months and three weeks to prepare before the presentation of the Prosecution's evidence.¹² This is not correct. First, the Trial Chamber reasoned its decision and, second, the Defence in fact has *six* months before the Prosecution commences its presentation of evidence. The Trial Chamber expressly took into account the Defence's arguments, in particular "those concerning the time needed for preparation, [...] the complexity of the case, the volume of the material disclosed, the joinder of the two cases, [...] available resources [and] the Court's relocation to new premises".¹³ The fact that the Defence disagrees with the Chamber's assessment of the arguments and its final Decision does not mean that the Chamber provided no reasoning. Moreover, the Chamber was not obliged to endorse or explicitly address the Defence's calculations as to the time needed to review the material disclosed.¹⁴ As the Appeals Chamber has held, a reasoned

⁹ Blé Goudé's Application, p.7: "Whether the Chamber by setting the trial date for 10 November 2015 violated Mr. Blé Goudé's fundamental right to have adequate time to prepare his defence under article 67(1)(b) of the Statute." The Defence arguments in paras.19 and 20 show that the issue relates to the Trial Chamber's separation of the opening statements from the Prosecution's presentation of evidence and the Chamber's purported understanding of whether the Defence needs to be fully prepared for trial by the time of the opening statements. Hence, the Prosecution will address this issue jointly with Gbagbo's Fourth Issue.

¹⁰ Gbagbo's Application, p.10: "*Sur la nature et le calcul du temps nécessaire à la préparation de la Défense.*" ("Second Issue")

¹¹ Gbagbo's Application, p.13: "*Sur l'erreur de fait: le calcul du temps auquel s'est livré la Chambre est erroné.*" ("Fourth Issue")

¹² Gbagbo's Application, paras.19-21, 26.

¹³ Decision, para.15.

¹⁴ *Contra*, Gbagbo's Application, paras.17, 20.

decision does not necessarily require a Chamber to recite and summarise each and every factor before it; a Chamber need only indicate with sufficient clarity the basis of its decisions.¹⁵ The Trial Chamber did just that in the Decision.

5. Further, the Defence is wrong when it says that it has three months before the opening, and then only three additional weeks before the Prosecution's evidence commences. The Defence erroneously excludes the Court recess from its calculations and overstates the time needed to relocate to the new premises.¹⁶ Thus, the Trial Chamber correctly noted that, as a result of the new dates, "the Defence will have more than four months between the date of full disclosure by the Prosecution and the opening statements. Thereafter, it will have two additional months before the commencement of the presentation of the evidence".¹⁷
6. Finally, the Chamber's 17 November 2014 Order envisaging five months between the end of the Prosecution's disclosure (6 February 2015) and the start of the trial (7 July 2015) is irrelevant.¹⁸ The 17 November 2014 Order was issued before the joinder of the two cases. The Chamber later suspended the Prosecution's disclosure deadline with respect to material related to ongoing investigations in the *Blé Goudé* case which was not in its possession¹⁹ and, as a result of the joinder, extended the Prosecution's deadline until 30 June 2015.²⁰ The Order did not entail that a five month gap between the end of the Prosecution's disclosure and start of trial would be maintained if circumstances were to change. In any event, the difference in time is minimal, the gap between the end of the Prosecution's

¹⁵ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

¹⁶ Gbagbo's Application, para.19.

¹⁷ Decision, para.16.

¹⁸ Gbagbo's Application, paras.18-19 referring to ICC-02/11-01/11-746, para.14, where the Trial Chamber suspended the 6 February 2015 deadline set out in ICC-02/11-01/11-723 ("17 November 2014 Order"), with respect to material that may become available to the Prosecution in ongoing investigations in the *Blé Goudé* case.

¹⁹ ICC-02/11-01/11-746, para.14.

²⁰ Decision, para.22.

disclosure and the opening statements now being four months and 10 days. Accordingly, the First Issue is misconceived and does not arise from the Decision.

7. Both the Fourth Issue raised by Gbagbo and the one Issue identified by Blé Goudé relate to the Chamber's decision to separate in time the opening statements (scheduled for 10 November 2015) and the start of the Prosecution's evidence (in January 2016).²¹ The Defence of both Accused make unfounded assumptions and mischaracterise the Decision. First, the Trial Chamber never stated that opening statements were mere political declarations devoid of any legal meaning,²² nor that the Defence need not review and analyse the totality of the Prosecution's evidence for the opening statements.²³ To the contrary, the Trial Chamber clearly referred to 10 November 2015 as "the trial commencement date".²⁴ Second, the Defences' understanding of the opening statements and the preparation required is misconceived. While the Defence needs to have reviewed the Prosecution's evidence and adopted a strategy with respect to the Prosecution's case at the time it delivers its opening statements, it need not be in a position to cross-examine all Prosecution witnesses, nor to challenge the credibility and reliability of their testimony.²⁵ The purpose of opening statements and cross-examination of witnesses is different, as are the type and degree of preparation required at those stages.²⁶ Moreover, the statutory framework imposes no obligation on the

²¹ Gbagbo's Application, paras.45-46; Blé Goudé's Application, paras.19-20.

²² Gbagbo's Application, paras.45, 50.

²³ Blé Goudé's Application, para.20. See also Gbagbo's Application, para.50.

²⁴ Decision, para.16.

²⁵ Rule 140(2)(b) of the Rules of Procedure and Evidence: "The prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters."

²⁶ In the *Kunarac* case at the ICTY, the Trial Chamber stated that: "the opening statement [...] are [sic] intended only to assist the Trial Chamber in understanding the evidence which is to be placed before it". See *Prosecutor v. Kunarac et al*, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, IT-96-23&23/I, Trial Chamber II, 3 July 2000, para. 10 at: <http://www.icty.org/x/cases/kunarac/tdec/en/00703EV213055.htm>. Further, in the *Norman* case at the SCSL, the Trial Chamber discouraged parties from arguing the credibility of witnesses during their opening statements, underscoring that such matters are reserved to the presentation of evidence or closing arguments: "To argue about the validity and trustworthiness or otherwise of a witness for the prosecution is not part of what is normally contained in an opening statement, as such. It is to be confined to the evidence you intend to lead. If you intend to lead evidence to show this witness should not be trusted, fine. But now you are arguing this witness is not to be believed and so on, which I suggest to you is quite proper for you to do and fully in your

Defence to make an opening statement. As Trial Chamber I stated in the *Lubanga* case: “[the defendant is] entitled to sit silently, leaving it to the prosecution to prove its case. It is for the accused to decide whether he or she wishes to make an unsworn written or oral statement during the trial (Article 67(l)(h) of the Statute) or a closing statement after the prosecution (Rule 141 (2) of the Rules).”²⁷ As a result, the Issues do not arise from the Decision.

(ii) *The Second and Third Issues of Gbagbo’s Application merely disagree with the Decision*

8. In its Second Issue, Gbagbo’s Defence merely disagrees with the Decision. The Defence argues that the Trial Chamber should have assessed the time needed for it to prepare its defence based on the objective and quantifiable criteria that it had advanced,²⁸ that the Trial Chamber should have endorsed the Defence’s calculations²⁹ and simply granted the requested time without considering the interests of the remaining parties and participants.³⁰ The Defence further argues that the Chamber improperly advanced “expeditiousness” against the interests of the Accused.³¹ These arguments not only show that the Second Issue merely disagrees with the Decision, but they also lack merit. The Trial Chamber was not obliged to use a mathematical calculation to ensure that the Defence’s rights under article 67(1)(b) were respected. It is also irrelevant that the Prosecution had referred to the same criteria in another case.³² In that case, the Prosecution supported its request to postpone the confirmation hearing on several factors, and

closing arguments, not in opening argument. So I would like you to confine your comments to what are expected to be opening statements, as such.” See *Prosecutor v. Norman et al*, Transcripts SCSL-04-14-T, Trial Chamber I, 16 January 2006, p.28, ln.26 to p.29, ln.6 at: <http://www.rscsl.org/Documents/Transcripts/CDF/CDF-011906.PDF>.

²⁷ ICC-01/04-01/06-1346, para.16.

²⁸ Gbagbo’s Application, para.27.

²⁹ Gbagbo’s Application, paras.28, 35-36, 39.

³⁰ Gbagbo’s Application, paras.32-34.

³¹ Gbagbo’s Application, paras.37-39.

³² *Contra*, Gbagbo’s Application, paras.13 and 27 referring to ICC-02/04-01/15-196-Red2, para.17 where the Prosecution had indicated that “from experience in previous cases, the average time required to review documents, including “unsearchables”, is 50 pages per person per day.”

the need to review documents for the purpose of disclosure to the Defence, was only one of them.³³ Moreover, not every case is the same, not every review is done with the same goal, and finally, not every page requires the same amount of time to be reviewed.

9. Further, the Defence disregards that the Chamber was duty bound to ensure the fairness and expeditiousness of the trial, and not solely the Defence's right under article 67(1)(b). To that end, the Trial Chamber was required to balance the Accuseds' rights and the need for expeditiousness,³⁴ but also to consider the rights and interests of the Prosecution and victims, notwithstanding its respect for the rights of the Accused. In the Decision, the Trial Chamber did just that. Recalling its obligation under article 64(2) and (3) to ensure the fairness and expeditiousness of the trial,³⁵ the Chamber considered the Defence's arguments, including "the time needed for preparation" and "the volume of the material disclosed",³⁶ and concluded that the start of the trial on 10 November 2015 and of the Prosecution's evidence in January 2016 respected the Defence's right under article 67(1)(b).³⁷ Hence, no appealable issue arises.
10. The Third Issue likewise disagrees with the Decision, in particular, with the Chamber's statement that, as a result of the new dates, "the Defence will have more than four months between the date of full disclosure by the Prosecution and the opening statements [and] two additional months before the commencement of

³³ ICC-02/04-01/15-196-Red2, paras.4-9. The Prosecution referred to (1) the need to review the material for the purposes of disclosure to the Defence; (2) the need to contact victims and witnesses regarding the disclosure of their statements and to assess their security situation; (3) the Prosecution's duty under article 54(1)(a) to conduct investigations; (4) the translation of the materials in a language that the accused fully understands and speaks; and (5) the need to seek the consent of the information providers to lift the restrictions under article 54(3)(e).

³⁴ The need to proportionally balance the accused's rights and the need for expeditiousness has been endorsed by the Appeals Chamber. ICC-01/04-01/07-2259 OA10, para.64: "In [the Appeals Chamber] view, when dismissing the Defence Motion, the Trial Chamber appropriately balanced Mr Katanga's rights and the need for expeditiousness. Requiring the accused person to act in an expeditious manner is not in itself inconsistent with full respect for his rights. [...] the accused's rights are given full respect so long as the accused person has been given the adequate opportunity to assert them [...] Mr Katanga was given an adequate opportunity to raise his alleged unlawful arrest and detention in the DRC. He did not, however, avail himself of this opportunity."

³⁵ Decision, para.14.

³⁶ Decision, para.15.

³⁷ Decision, para.16.

the presentation of the evidence".³⁸ The Defence argues that the Trial Chamber's calculations were erroneous and that it only has three months before the start of the trial on 10 November 2015 and three weeks more before the start of the Prosecution's evidence in January 2016.³⁹ The Defence's calculations are inaccurate: the Defence excludes one month based on the relocation to the new premises, and one month and 10 days because of the Court recess. However, the relocation should not take that long, and the Court recess should not impede the Defence's preparations. As the Appeals Chamber has noted in the *Katanga* case, "the [...] Court recess does not generally constitute a suspension of judicial activity".⁴⁰ Thus, the Third Issue does not arise from the Decision.

B. The Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor materially advance the proceedings

11. In addition, the Issues would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor materially advance the proceedings.

(i) *Gbagbo's Application fails to demonstrate that the purported issues affect the requirements of article 82(1)(d)*

12. Gbagbo's Application fails to fully address the requirements of article 82(1)(d). Rather, it only addresses the purported impact of the issues on the fairness of the proceedings,⁴¹ and how their immediate resolution would materially advance the proceedings.⁴² It does not address the purported impact of the issues on the expeditiousness of the proceedings or the outcome of the trial. On this basis alone, the Application should be dismissed. However, even on their merits the

³⁸ Decision, para.16.

³⁹ Gbagbo's Application, para.41.

⁴⁰ ICC-01/04-01/07-115 OA, para.9. *Contra*, Gbagbo's Application, para.43.

⁴¹ Gbagbo's Application, paras.52-55.

⁴² Gbagbo's Application, paras.56-59.

Defence's arguments should be rejected as unsupported and premature. The Defence argues that because the issues relate to the Accused's fundamental right to prepare his defence, the fairness of the proceedings is necessarily affected,⁴³ and the Appeals Chamber should necessarily intervene.⁴⁴ This is not correct. First, the Defence fails to demonstrate how the Decision causes a *significant* impact on the fairness of these proceedings.⁴⁵ A purely general complaint does not suffice to significantly affect the fairness of the proceedings.⁴⁶

13. Second, the Trial Chamber emphasised in the Decision that it has an "obligation under Article 64(2) and (3) of the Statute to ensure the fairness and expeditiousness of the trial".⁴⁷ Accordingly, if the Defence, at a future point in trial, were to face concrete and identifiable obstacles, and adequately support its claim, it could then raise the matter with the Chamber which will decide on an adequate remedy if needed.⁴⁸ Further, and contrary to the Defence's assertions,⁴⁹ it is not sufficient that the issues refer to a matter of principle to grant leave to appeal.⁵⁰ Thus, a resolution of these Issues by the Appeals Chamber at this stage will not provide significant guidance or assist the proceedings to "move forward".⁵¹

⁴³ Gbagbo's Application, paras.52.

⁴⁴ Gbagbo's Application, paras.56-58.

⁴⁵ See ICC-02/11-01/15-42, para.17 where the Trial Chamber noted that the joinder "by its very nature contemplates minimal prejudices" but that "the Defence does not demonstrate that this procedural modification, risk of minimal prejudice, or any other factor would have any *significant* impact on the fairness and expeditiousness of the proceedings or the outcome of the trial".

⁴⁶ ICC-01/04-01/07-2463, para. 31.

⁴⁷ Decision, para.14.

⁴⁸ See, for example, ICC-02/11-01/15-1, para.61, where the Trial Chamber stated that "the question of the time needed for adequate trial preparation on the part of the Defence teams is a matter of trial management to be determined by the Chamber at the appropriate time in the proceedings."

⁴⁹ Gbagbo's Application, para.57.

⁵⁰ As previously found, it is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest: ICC-02/11-01/15-42, para.18; ICC-01/09-01/11-817, para.16; ICC-01/05-01/08-1169, para.25; and ICC-01/04-01/06-1191, para.11.

⁵¹ ICC-01/04-168, paras.14-15,18.

- (ii) *Blé Goudé's Application also fails to meet the requirements of article 82(1)(d)*

14. Blé Goudé's arguments are similarly unsupported and speculative. The Application presumes that the Decision impairs the Accused's right under article 67(1)(b) and that, as a result, the fairness of the proceedings⁵² and the outcome of the trial⁵³ are affected, and that the intervention of the Appeals Chamber is needed to materially advance the proceedings.⁵⁴ However, Blé Goudé's Application, like Gbagbo's, fails to demonstrate how the Defence's right under article 67(1)(b) is *significantly* impaired. The purported recent appointment of the Defence team has been previously argued by the Defence and dismissed by the Trial Chamber in its decision on the Defence request for extension of time to respond to the joinder request. In addressing that request, the Chamber noted that, before being appointed to their current positions in January 2015, Lead Counsel for Blé Goudé was appointed as *pro bono* counsel on 8 September 2014 and Co-Counsel was appointed as a legal assistant on 19 August 2014, thus, prior to the start of the confirmation of charges hearing.⁵⁵ Moreover, the Trial Chamber never indicated that the opening statements do not "require[] a sound and complete knowledge of the case",⁵⁶ and it did factor the Court's relocation in setting the start of the trial date.⁵⁷

15. Similarly, the Defence for Blé Goudé fails to show how it will be disadvantaged and placed "in an antagonistic and impossible position" as a result of the Decision so that the outcome of the trial will be affected.⁵⁸ As Chambers of this

⁵² Blé Goudé's Application, para.23.

⁵³ Blé Goudé's Application, para.35.

⁵⁴ Blé Goudé's Application, para.38.

⁵⁵ *Contra*, Blé Goudé's Application, paras.25-26. See ICC-02/11-02/11-209, paras.11-12.

⁵⁶ Blé Goudé Application, para.29.

⁵⁷ *Contra*, Blé Goudé's Application, para.29. See Decision, para.15.

⁵⁸ Blé Goudé's Application, para.35.

Court have stated, it does not suffice for an issue to have a hypothetical impact on the outcome of the trial.⁵⁹

16. Finally, the Defence's arguments regarding the expeditiousness of the proceedings are also speculative and premature: the Defence submits that it will be required to request postponements of its opening statement and to cross-examine witnesses, leading to time consuming procedural issues.⁶⁰ However, if such issues were to arise, the Trial Chamber could resolve them at the appropriate time. Raising such issues now before the Appeals Chamber would not significantly expedite proceedings, but rather could only delay them.

Conclusion

17. For the above reasons, Gbagbo's and Blé Goudé's Applications should be rejected.



Fatou Bensouda, Prosecutor

Dated this 18th day of May 2015

At The Hague, The Netherlands

⁵⁹ ICC-01/04-01/07-1958, para.20; ICC-01/09-02/11-406, paras.42-43.

⁶⁰ Blé Goudé's Application, paras.31-32.