

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15

Date: 2 July 2015

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

**Decision on Defence requests for leave to appeal the 'Order setting the
commencement date for trial'**

Decision 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 Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('Gbagbo and Blé Goudé case'), having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Defence requests for leave to appeal the "Order setting the commencement date for trial"'.

I. Procedural History

1. On 17 November 2014, the Chamber in the case of *The Prosecutor v. Laurent Gbagbo* ('Gbagbo case'), *inter alia*, set 6 February 2015 as the deadline for completion of disclosure by the Office of the Prosecutor ('Prosecution') and 7 July 2015 as the commencement date for the trial.¹
2. On 11 December 2014, Pre-Trial Chamber I confirmed the charges against Mr. Blé Goudé in the case of *The Prosecutor v. Charles Blé Goudé* ('Blé Goudé case').² On 20 December 2014, the Presidency referred the *Blé Goudé* case to the Chamber.³
3. On 13 February 2015, a status conference was convened in the *Blé Goudé* case, prior to and during which the parties and participants made submissions on, *inter alia*, the status of disclosure and proposals for the start date for trial.⁴
4. On 11 March 2015, the Chamber granted the Prosecution's requests to join the *Gbagbo* and the *Blé Goudé* cases, and scheduled a status conference for 21 April

¹ Order setting the commencement date for the trial and the time limit for disclosure, 17 November 2014, ICC-02/11-01/11-723.

² Pre-Trial Chamber I, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186. *See also* Partly Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-02/11-02/11-186-Anx.

³ Corrigendum to the "Decision referring the case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I", ICC-02/11-02/11-193, 20 December 2014 (registered on 22 December 2014), 22 December 2014, ICC-02/11-02/11-193-Corr.

⁴ Transcript of hearing dated 13 February 2015, ICC-02/11-02/11-T-9-Red-ENG ET, 13 February 2015.

2015,⁵ prior to and during which the issues, *inter alia*, of timing of disclosure and proposals for the commencement date of the joint trial were discussed.⁶

5. On 7 May 2015, the Chamber issued its 'Order setting the commencement date for trial', in which it, *inter alia*, set 30 June 2015 as the deadline for completion of disclosure by the Prosecution and 10 November 2015 as the commencement date for the trial ('Order').⁷
6. On 13 May 2015, the defence team for Mr Gbagbo and the defence team for Mr Blé Goudé (respectively 'Gbagbo Defence' and 'Blé Goudé Defence', collectively 'Defence') each filed requests for leave to appeal the Order ('Gbagbo Defence Request' and 'Blé Goudé Defence Request', respectively; together, 'Defence Requests').⁸
7. On 18 May 2015, the Prosecution and the Legal Representative of Victims ('LRV') filed their responses ('Prosecution Response' and 'LRV Response', respectively).⁹

⁵ Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé* and related matters, with public Annex A, 11 March 2015, ICC-02/11-01/15-1. See also ICC-02/11-01/15-810 and ICC-02/11-02/11-222.

⁶ Transcript of hearing dated 21 April 2015, ICC-02/11-01/15-T-1-CONF-ENG ET. See also, Prosecution's submission on the provisional agenda for the 21 April status conference, 14 April 2015, ICC-02/11-01/15-35-Red; Conf (a public redacted version was filed on 15 April 2015: ICC-02/11-01/15-35-Red) with Confidential Annex; *Soumissions de la Défense concernant l'ordre du jour de la conférence de mise en état prévue le 21 avril 2015*, 14 April 2015, ICC-02/11-01/15-32-Conf with Public Annex (a public redacted version was filed on the same day: ICC-02/11-01/15-32-Red); Defence Submissions on Agenda Items for the Status Conference of 21 April 2015, 14 April 2015, ICC-02/11-01/15-33 with Public Annex; Submissions on the Provisional Agenda for the Status Conference to be held on 21 April 2015, 14 April 2015, ICC-02/11-01/15-36.

⁷ Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58.

⁸ *Demande d'autorisation d'interjeter appel du « order setting the commencement date for trial »* (ICC-02/11-01/15-58), 13 May 2015, ICC-02/11-01/15-63; Defence request for leave to appeal the "Order setting the commencement date of trial" (ICC-02/11-01/15-58), 13 May 2015, ICC-02/11-01/15-67; Common Legal Representative'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), 18 May 2015, ICC-02/11-01/15-64, 18 May 2015, ICC-02/11-01/15-66.

2 July 2015

I. Submissions

Gbagbo Defence Request

8. In its request for leave to appeal, the Gbagbo Defence identifies four issues ('Gbagbo Issues') for appeal:
 - a) the Order fails to provide reasons for setting the commencement date for trial ('First Gbagbo Issue');
 - b) the nature of and calculations for the time necessary for the Defence to prepare ('Second Gbagbo Issue');
 - c) the Chamber erred in calculating the time granted to the Defence for preparation of the trial ('Third Gbagbo Issue'); and,
 - d) the Chamber erred in finding that the opening statements can be separated from the actual start of the trial ('Fourth Gbagbo Issue').¹⁰

9. In relation to the First Gbagbo Issue, the Gbagbo Defence submits, *inter alia*, that the Chamber neither explains why the five-month period considered reasonable in the *Gbagbo* case was reduced to less than four months despite the increased workload caused by the joinder of the two cases, nor why it did not consider the calculations made by the Defence. It argues that the Chamber fixed the date for the commencement of the trial '[TRANSLATION] arbitrarily and without motivation', depriving the decision of any legal basis.¹¹ Concerning the Second Gbagbo Issue, the Gbagbo Defence submits, *inter alia*, that the Chamber failed to adequately consider its submissions on the time required to prepare for trial, which were the result of calculations based on '[TRANSLATION] objective and quantifiable' criteria and took into account the tasks the Defence needed to accomplish and the resources available. In its view, by not granting the time requested, the Chamber violated the rights of the accused enshrined in Article 67

¹⁰ Gbagbo Defence Request, ICC-02/11-01/15-63, paras 16-51.

¹¹ Gbagbo Defence Request, ICC-02/11-01/15-63, paras 15, 17-26.

of the Statute.¹² As to the Third Gbagbo Issue, the Gbagbo Defence claims that the Chamber has effectively granted the Defence only three months to prepare for trial, and three additional weeks before the commencement of the presentation of evidence (considering, among other factors, the relocation of the Court to the new premises and the Court's periods of recess). If the Chamber considered that six months were necessary for the Defence to prepare for trial, opening statements should have been scheduled for 30 March 2016.¹³ Regarding the Fourth Gbagbo Issue, the Gbagbo Defence submits that opening statements cannot be detached from the rest of the proceedings, in other words, cannot be made before the Defence has decided on its own strategy with regard to the evidence of the Prosecution, and therefore, before the preparatory work, in view of the cross-examination of witnesses, is finalised. Further, by detaching them from the presentation of the Prosecution's case, the Chamber has reduced their value, preventing the Defence to be heard just before the Prosecution's case, thus affecting the fairness of the proceedings. Also, according to the Gbagbo Defence, since the nature and application of the opening statements has not yet been addressed by the Court, it is important that the Appeals Chamber addresses this issue.¹⁴

10. Concerning the requirements of Article 82(1)(d) of the Statute, the Gbagbo Defence argues that the determination of the date for the commencement of trial has an impact on the exercise of the fundamental rights of the accused, and thus the fairness of the trial.¹⁵ The Defence further contends that an immediate resolution by the Appeals Chamber would materially advance the proceedings as, if it appeared at a later stage that the accused did not have sufficient time to prepare, it would irreparably impact the fairness of the proceedings and the

¹² Gbagbo Defence Request, ICC-02/11-01/15-63, paras 27-39.

¹³ Gbagbo Defence Request, ICC-02/11-01/15-63, paras 40-44.

¹⁴ Gbagbo Defence Request, ICC-02/11-01/15-63, paras 45-51.

¹⁵ Gbagbo Defence Request, ICC-02/11-01/15-63, paras 52-55, also making reference to jurisprudence of other international tribunals.

rights of the accused. It is submitted that the resolution of a matter of principle could also be considered as materially advancing the proceedings.¹⁶

Blé Goudé Defence Request

11. The Blé Goudé Defence identifies the following appealable issue which it submits arises from the Order: '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 [A]rticle 67(1)(b) of the Statute' ('Blé Goudé Issue'; together with the Gbagbo Issues, 'Issues'). It clarifies that the central issue is whether the Chamber correctly held that the Defence would have an additional two months in which to prepare for trial following the opening statements on 10 November 2015, considering that, in order to make any form of opening statement, the Defence must have reviewed and analysed the totality of the Prosecution's evidence.¹⁷
12. The Blé Goudé Defence submits that both requirements of Article 82(1)(d) of the Statute are met. With regard to the first one, it submits, *inter alia*, that by scheduling the date for start of trial on 10 November 2015, the Chamber deprived the accused of the right to properly prepare his opening statement and his defence against the Prosecution's case. In the view of the Blé Goudé Defence, the opening statement is 'decisive of the trial's momentum' and, as such, requires sound and complete knowledge of the case, 'at least one month before it is scheduled'. Furthermore, the Blé Goudé Defence argues that by not properly considering the relocation of the Court to the new premises, and the Court's recess, it is very unlikely that the Defence will actually benefit from full two

¹⁶ Gbagbo Defence Request, ICC-02/11-01/15-63, paras 56-59.

¹⁷ Blé Goudé Defence Request, ICC-02/11-01/15-64, paras 18-20.

months from the opening statements to prepare for the presentation of the Prosecution's case.¹⁸

13. The Blé Goudé Defence further submits that the Order also affects the expeditious conduct of the proceedings insofar as the Defence will find itself compelled to request a postponement of its opening statements as well as of the examination of Prosecution's witnesses.¹⁹ It further argues that the resolution of the issue would affect the outcome of the trial, as 'the disadvantaged party will find itself in an antagonistic and impossible position to bridge the gap of time'.²⁰ With regard to the second prong of Article 82(1)(d) of the Statute, the Blé Goudé Defence submits that the Order infringes on the right of the accused to prepare for the trial, and as such, requires an immediate resolution of the issue by the Appeals Chamber.²¹

Prosecution Response

14. The Prosecution submits that none of the issues presented constitute appealable issues. In the view of the Prosecution, the First and Fourth Gbagbo issues and the Blé Goudé Issue misrepresent the Order,²² while with regard to the Second and Third Gbagbo Issues, the Defence merely disagrees with the Order and its arguments lack merit.²³
15. The Prosecution also argues that the Defence's arguments do not demonstrate that the requirements under Article 82(1)(d) are met. It submits, *inter alia*, that the Gbagbo's Request 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

¹⁸ Blé Goudé Defence Request, ICC-02/11-01/15-64, paras 22-29.

¹⁹ Blé Goudé Defence Request, ICC-02/11-01/15-64, paras 30-33.

²⁰ Blé Goudé Defence Request, ICC-02/11-01/15-64, paras 34-35.

²¹ Blé Goudé Defence Request, ICC-02/11-01/15-64, para. 38.

²² Prosecution Response, ICC-02/11-01/15-67, paras 4-7.

²³ Prosecution Response, ICC-02/11-01/15-67, paras 8-10.

proceedings, and for this reason alone it should be dismissed.²⁴ The Prosecution submits that the Blé Goudé Request also fails to demonstrate how the Defence's right under Article 67(1)(b) is significantly impaired. It also fails to show how it will be disadvantaged and placed 'in an antagonistic and impossible position' as a result of the Order so that the outcome of the trial will be affected. The Prosecution submits that should the Defence file requests for postponement of its opening statement and/or of cross-examination of witnesses, the Chamber will resolve them at the appropriate time.²⁵

LRV Response

16. The LRV submits that the Defence fails to identify an issue that arises from the Order, as required by Article 82(1)(d) of the Statute.²⁶ In relation to the First Gbagbo Issue, the LRV submits that it does not arise from the Order.²⁷ In relation to the Second Gbagbo Issue, the LRV submits it is not an appealable issue pursuant to Article 82(1)(d) of the Statute, as the Defence merely disagree with the Order.²⁸ Concerning the Third Gbagbo Issue and the Blé Goudé Issue, the LRV submits that they are not appealable issues, but mere disagreements with the Order, and that the Defence's submissions are based on a misreading of the Order and of the legal instruments of the Court.²⁹ The LRV submits that the Fourth Gbagbo Issue does not arise from the Order, and simply reiterates the Defence's disagreement therewith.³⁰

17. The LRV also submits that the issues raised by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that

²⁴ Prosecution Response, ICC-02/11-01/15-67, paras 12-13.

²⁵ Prosecution Response, ICC-02/11-01/15-67, paras 14-16.

²⁶ LRV Response, ICC-02/11-01/15-66, para. 27.

²⁷ LRV Response, ICC-02/11-01/15-66, paras 28-32.

²⁸ LRV Response, ICC-02/11-01/15-66, paras 33-35.

²⁹ LRV Response, ICC-02/11-01/15-66, paras 36-39.

³⁰ LRV Response, ICC-02/11-01/15-66, paras 40-44.

an immediate resolution thereon by the Appeals Chamber may not materially advance the proceedings.³¹

II. Applicable law

18. Article 82(1)(d) of the Statute sets out the requirements applicable to grant a request for leave to appeal, as follows:

- a) whether the decision involves an issue that would significantly affect:
 - i. the fair and expeditious conduct of proceedings; or
 - ii. the outcome of the trial; and
- b) whether in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

19. Accordingly, Article 82(1)(d) of the Statute does not confer an automatic right of appeal. In determining whether an issue identified by the parties meets the criteria of Article 82(1)(d), the Chamber will first consider whether the issue or issues identified by the party arise from the operative part of the impugned decision. For example, if an issue put forward by a party misstates or misapprehends the disposition of the Chamber, it cannot be said to have arisen from the decision as such and must be dismissed. Similarly, to the extent that an issue put forward by a party constitutes 'mere disagreement' or simply a conflicting opinion, this also cannot form an appealable issue within the meaning of Article 82(1)(d) of the Statute.³²

20. It may be noted that in deciding on a request for leave to appeal, a Trial Chamber is not concerned with the correctness of the impugned decision, *per se*; determination of whether the Chamber erred is a matter for the Appeals Chamber should leave be granted. Rather, the role of the Trial Chamber is simply to

³¹ LRV Response, ICC-02/11-01/15-66, paras 45-57.

³² *Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

determine whether any of the issues presented by the parties seeking leave meet the requirements as set out in Article 82(1)(d) of the Statute.

III. Analysis

21. Having set out the requirements of Article 82(1)(d), the Chamber observes that both Defence Requests rely mainly on assertions which misinterpret, make unfounded assumptions concerning or repeat submissions already taken into account in the Order.
22. In the Order, the Chamber, after having considered the submissions of all of the parties and participants regarding, *inter alia*, their preferred timing for commencement, set a schedule leading to the trial commencement date including complete disclosure by the Prosecution; the filing of a witness list, evidence list and pre-trial brief; *inter partes* consultation concerning agreed facts; and a deadline for the parties and participants to file motions that require resolution prior to the commencement of trial. It set out that the trial will start on 10 November 2015 with the parties' and participants' opening statements, and would continue with the Prosecution's presentation of evidence in January 2016, at a date to be confirmed. In so deciding, it expressly considered the submissions of all parties and participants, 'its duty to ensure a fair and expeditious trial', and provided its reasons. Accordingly, the Chamber considers that the First Gbagbo Issue and Second Gbagbo Issue, which repeat prior submissions on the time needed to prepare, simply constitute mere disagreement with the Order. Likewise, the Third Gbagbo Issue misrepresents the Order, and as such, does not arise from it; the Chamber never found that six months, as calculated by the Gbagbo Defence, were necessary for Defence preparations. Rather, it considered that the schedule set afforded the Defence 'sufficient time to carry out all

necessary preparations'.³³ Thus, to the extent that the issues raised by the Defence either (1) repeat prior arguments or (2) express mere disagreement with the Chamber's reasoning and conclusions as articulated in the Order, these issues cannot warrant certification for appeal.

23. Notwithstanding this, in the view of the Chamber, none of the issues raised meet the two-prong criteria provided for in Article 82(1)(d) of the Statute. Neither Defence Request demonstrates how the issues identified therein meet all of the elements required under the first limb of Article 82(1)(d): *i.e.* that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Gbagbo Defence's general reference at the end of its request to the accused's fundamental rights and how the alleged violation necessarily affects the fairness of the proceedings, without more, cannot satisfy the leave to appeal criteria, which requires a showing of a specific link between the issue which has been identified and a significant impact on the fair and expeditious conduct of the current proceedings.

24. The Blé Goudé Defence's arguments are equally insufficient in demonstrating how the fairness of the proceedings is significantly affected. With regard to the arguments concerning expeditiousness of the proceedings, the Chamber considers that any request for postponement the Defence may feel compelled to file will be dealt by the Chamber at the appropriate time. Moreover, the Chamber finds that the assertions of the Blé Goudé Defence that it will be disadvantaged and placed 'in an antagonistic and impossible position'³⁴ as a result of the Order so that the outcome of the trial will be affected are unsupported. These submissions amount to mere speculation as to prejudice it may suffer depending on the manner in which the schedule set in the Order progresses.

³³ Order, ICC-02/11-01/15-58, para. 16.

³⁴ Blé Goudé Defence Request, ICC-02/11-01/15-64, para.35.

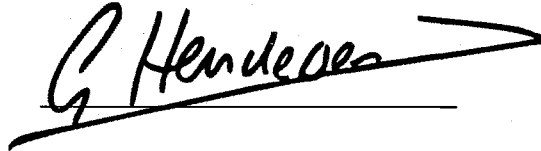
25. However, the Chamber observes that all of the issues presented in the Defence Requests raise to some extent the general issue of whether the Chamber erred in its determination of the trial date, thereby violating the rights of the defence to have adequate time and facilities for the preparation of the defence. In this regard, the Chamber stresses that the Order only deals with this specific phase of the proceedings. While the Order indeed sets, among other things, the commencement date for trial, it does not decree the sitting schedule or the ordering of witnesses, which remain within the Chamber's trial management powers. Furthermore, the Chamber considers that the schedule set in the Order provides the Defence repeated and ample opportunities to raise any issue, if and as it arises, before the trial commencement date. In addressing these issues at the appropriate time, the Chamber will ensure the fairness and expeditiousness of the proceedings.

26. In these circumstances, the Chamber does not consider that the Order involves any issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, as required under the first limb of Article 82(1)(d) of the Statute. Therefore, in light of these findings, it is unnecessary for the Chamber to consider the remaining element of Article 82(1)(d) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Requests.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'G. Henderson', written over a horizontal line.

Judge Geoffrey Henderson, Presiding Judge

A handwritten signature in black ink, appearing to read 'Olga C.', written over a horizontal line.

Judge Olga Herrera Carbuca

A handwritten signature in black ink, appearing to read 'Bertram', written over a horizontal line.

Judge Bertram Schmitt

Dated 2 July 2015

At The Hague, The Netherlands