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**International
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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 response to Laurent Gbagbo's Application for Leave to Appeal the
"Directions on the conduct of the proceedings" (ICC-02/11-01/15-205)**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Eric MacDonald

Counsel for Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

States Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. The application for leave to appeal¹ the Trial Chamber's "Directions on the conduct of the proceedings",² filed by the Defence of Laurent Gbagbo³ should be rejected. None of the three issues⁴ referred to in the Application are appealable issues arising from the Decision. In addition, they do not meet the criteria for leave to appeal under article 82(1)(d) of the Rome Statute.

Submissions

(i) The Issues do not arise from the Decision or do not constitute appealable issues

2. The First Issue, namely whether the Chamber erred by allowing the Prosecution to inform the Defence of the order of its witnesses "at the last moment" and thereby not giving the Defence sufficient time to prepare for cross-examination,⁵ does not arise from the Decision, as it does not correctly represent it. According to the Decision, the Prosecution must inform the Defence of the order its witnesses between 10 and 40 days prior to their appearance in court.⁶ The additional notice to be given on a weekly basis does not reduce this period.⁷ In addition, for the first 20 witnesses the notice period will be considerably longer.⁸ As a result, the Defence's submission that the Prosecution may provide notice of the order of its witnesses "at the last moment" and in some instances only one or a few working days prior to the appearance of the witnesses is based on a misunderstanding of the Decision.⁹

3. Moreover, to the extent that the First Issue is predicated on the assumption that the Decision does not leave the Defence sufficient time to prepare for cross-

¹ ICC-02/11-01/15-209 ("Application").

² ICC-02/11-01/15-205 ("Decision").

³ "Defence".

⁴ "Issues".

⁵ Application, paras.18-23.

⁶ Decision, para.18.

⁷ Decision, para.19.

⁸ Decision, para.19. See also, Application, para.18.

⁹ Application, paras.19-20.

examination,¹⁰ it expresses nothing more than a disagreement with the Chamber's exercise of discretion in ensuring the fair and expeditious conduct of proceedings. The Prosecution recalls that the Defence has been in possession of the Prosecution's list of witnesses and the prior statements of these witnesses for many months. The Defence's suggestion that in some instances it would have only one or a few working days to prepare for cross-examination of a witness¹¹ is incomprehensible. The decision to make use of the extensive notice of the Prosecution's list of witnesses and their prior statements rests with the Defence. Leaving the preparation of a cross-examination to one or a few days prior to the appearance of a witness is not owed to the amount of available time or resources,¹² but rather to their inefficient use. The consequences of the Defence's management of its time and resources do not amount to an appealable issue.

4. The Second Issue, namely whether the Chamber erred by finding that it may question a witness "at any time"¹³ does not arise from the Decision, because it does not correctly represent the Decision or the legal basis for the Chamber's exercise of discretion. Contrary to the contention of the Defence, the Decision does not deviate from rule 140(2)(c) of the Rules of Procedure and Evidence. Although the Trial Chamber does not quote from that provision, it expressly refers to it and bases its direction on it.¹⁴ Therefore, the Defence misinterprets the Decision when suggesting that the Chamber intends to conduct its questioning of a witness at times other than before or after a witness is questioned by a participant.¹⁵ However, the Chamber's general right to question a witness before or after the parties' questioning does not prevent the Trial Chamber from asking relevant questions to a witness at any other moment. The rule on the order of questioning of witnesses is subject, among others,

¹⁰ Application, paras.20-21.

¹¹ Application, paras.19-20, 22.

¹² Application, paras.21-22.

¹³ Application, paras.24-28.

¹⁴ Decision, para.27.

¹⁵ Application, para.26.

to article 64(8)(b) of the Statute.¹⁶ Accordingly, depending on the manner in which a party conducts its questioning of a witness or the evidence provided by a witness, it may be appropriate for the Chamber to ask discrete questions to a witness or to give directions to a witness or the Parties “at any time” to ensure the fair and expeditious conduct of the proceedings. The Second Issue disregards that rule 140 must be interpreted in this context and the Defence therefore incorrectly came to the conclusion that the Chamber exceeded its discretionary power by arrogating a duty not foreseen in the Court’s regulatory framework.¹⁷

5. The Third Issue, namely whether the Trial Chamber erred by giving the Defence not enough time to request for correction to a transcript,¹⁸ is not an appealable issue, but a mere disagreement with a discretionary trial management decision of the Chamber. This is demonstrated by the fact that the Defence merely repeats its arguments previously submitted to the Chamber and suggests that 10 days, instead of five days, would more appropriate in the circumstances.¹⁹ These arguments fall short of identifying anything else than a question over which there is disagreement or a conflicting opinion.²⁰

(ii) In any event, the Issues do not meet the criteria for leave to appeal

6. The Issues do not significantly affect the fair and expeditious conduct of the proceedings. The arguments of the Defence to that effect are entirely speculative.²¹ Whether any of the Trial Chamber’s directions on the conduct of the proceedings have an impact on their fair and expeditious conduct cannot be determined in the abstract and will depend on how they are implemented on a case-by-case basis. The Defence’s cross-examination and the Chamber’s examination of each witness must be assessed in the context of the circumstances specific to that witness. It is insufficient

¹⁶ Rule 140(2).

¹⁷ Application, para.27.

¹⁸ Application, paras.29-39.

¹⁹ Application, paras.30-39.

²⁰ ICC-01/04-168 OA3, para.9.

²¹ Application, paras.40-42.

for the Defence to sweepingly allege that the Chamber's directions in that context render the proceedings unfair. Similarly, whether the Defence has insufficient time to request for corrections of a transcript will depend on the specific circumstances of a particular transcript and the Defence's general arguments are insufficient to establish prejudice.

7. Finally, immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings.²² The Defence's argument that in the absence of immediate appellate intervention the "whole process would be called into question"²³ is unsupported and unrelated to the Issues, which concern discrete procedural directions that have no bearing on the overall fairness of the proceedings. The Defence is also incorrect to submit that, absent immediate appellate intervention, it would have no adequate remedy.²⁴ The Decision does not prevent the Defence from seeking a deviation from a particular direction on a case-by-case basis if it is able to demonstrate that implementation of such direction would in the context of a particular witness or transcript lead to unfairness.

Conclusion

8. For the reasons above, the Application should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 14th day of September 2015
At The Hague, The Netherlands

²² Application, paras.43-44.

²³ Application, para.43.

²⁴ Application, para.43.