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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 CÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Public Document

Response to Mr Gbagbo's request for leave to appeal the "Decision on Defence requests relating to the Prosecution's Pre-Trial Brief" (ICC-02/11-01/15-233)

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that Mr Gbagbo’s request (the “Request”) for leave to appeal the “Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief” (the “Decision”) does not satisfy the requirements of article 82(1)(d) of the Rome Statute and must be rejected.

2. The Request does not demonstrate that the issues identified by the Defence arise from the Decision and can be the subject of an interlocutory appeal, nor does it show how said issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The Request merely expresses the disagreement of the Defence with the ruling of Trial Chamber I (the “Chamber”).

II. Background

3. On 7 May 2015, the Chamber invited the Prosecution to file a “pre-trial brief” by 16 July 2015, which explains *“the Prosecution’s case theory with reference to the witnesses the Prosecution intends to call and the evidence it intends to rely on at trial”*.²

4. On 16 July 2015, the Prosecution filed its pre-trial brief (the “Pre-Trial Brief”).³

5. On 31 July 2015, the Defence for Mr Gbagbo filed a request concerning the Pre-Trial Brief, asking: (i) for an official translation into a language the Accused fully understands, namely French; (ii) for the response deadline to the Pre-Trial Brief to

¹ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

² See the “Order setting the commencement date for trial” (Trial Chamber I), No. ICC-02/11-01/15-58, 7 May 2015, para. 19.

³ See the “Prosecution’s Pre-trial Brief”, No. ICC-02/11-01/15-148, 16 July 2015, (the “Prosecution’s Pre-Trial Brief”), with annexes. A corrected version of Annexes 1 and 2 was filed on 28 July 2015, No. ICC-02/11-01/15-148-Anx1-Corr and No. ICC-02/11-01/15-148-Anx2-Corr, respectively.

run from its translation into French; and (iii) to postpone the commencement date of trial to six months after the Accused had been notified of the official French translation of the Pre-Trial Brief (the “Gbagbo Defence Request”).⁴

6. On 14 August 2015, the Prosecution responded to the Gbagbo Defence Request, asking the dismissal of the request for a postponement of the date of the trial.⁵

7. On 21 August 2015, the Legal Representative responded, asking the Chamber to reject the Gbagbo Defence Request in its entirety.⁶

8. On 16 September 2015, the Chamber issued the Decision, rejecting the Gbagbo Defence Request.⁷

9. On 26 August 2015, the Gbagbo Defence filed the Request,⁸ seeking leave to appeal the Decision on the following five issues:

- i) The Chamber made an error of law by considering that the “facts and circumstances” described in the charges constitute all the charges

⁴ See the “Requête en suspension des délais de réponse au mémoire préliminaire jusqu’à transmission de la traduction française du mémoire préliminaire déposé par le Procureur le 16 juillet 2015 (ICC-02-11-01/15-148-Conf-Anx2-Corr) et demande de report de la date de début du procès qui devra être fixée au moins 6 mois après la transmission de la traduction française de ce mémoire préliminaire”, No. ICC-02/11-01/15-174, 31 July 2015 (the “Gbagbo Defence Request”).

⁵ See the “Prosecution’s response to the Gbagbo Defence requests of 31 July 2015 (ICC-02/11-01/15-174)”, No. ICC-02/11-01/15-181, 14 August 2015 (the “Prosecution’s Response”).

⁶ See the “Consolidated response to the Defence’s requests for translation of the Prosecution’s Pre-Trial Brief, for suspension of the deadline to respond to said Brief and for postponement of the start of the trial (ICC-02/11-01/15-174 and ICC-02/11-01/15-176)”, No. ICC-02/11-01/15-187, 21 August 2015.

⁷ See the “Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief” (Trial Chamber I), No. ICC-02/11-01/15-224, 16 September 2015 (the “Decision”).

⁸ See the “Demande d’autorisation d’interjeter appel de la «Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief» (ICC-02/11-01/15-224), No. ICC-02/11-01/15-233, 22 September 2015 (the “Request”).

adequately notified to the Accused in the confirmation decision (the “First Issue”);⁹

- ii) The Chamber made an error of law by considering that the confirmation decision could constitute an adequate notification of the charges to the Accused (the “Second Issue”);¹⁰
- iii) The Chamber made an error of law by considering that the notification of the charges occurred by the disclosure of evidence by the Prosecution (the “Third Issue”);¹¹
- iv) The Chamber made an error by considering that the Defence could work efficiently on the basis of a non-official translation of the Pre-Trial Brief (the “Fourth Issue”);¹² and
- v) The Chamber made an error by not granting more time to the Defence to prepare for trial (the “Fifth Issue”).¹³

10. Pursuant to regulation 65(3) of the Regulations of the Court, the Legal Representative respectfully submits her response to the Request.

⁹ *Idem*, paras. 31-33.

¹⁰ *Ibid.*, paras. 34-37.

¹¹ *Ibid.*, paras. 38-40.

¹² *Ibid.*, paras. 41-49.

¹³ *Ibid.*, paras. 50-53.

III. Submissions

1. The issues identified by the Defence do not arise from the Decision

11. The First Issue does not arise from the Decision. Contrary to the Defence's contention,¹⁴ the Chamber did not limit its understanding of the charges notified to the Accused in a language he fully understands and speaks to the "facts and circumstances" described in the charges. By contrast, the Chamber made explicit reference to the confirmation decision as the document "setting out those charges".¹⁵

12. Following the jurisprudence of the Appeals Chamber, the Chamber further clarified that the charges confirmed by the Pre-Trial Chamber set the parameters for the trial,¹⁶ regardless of the evidence eventually used by the Prosecution to prove said charges during the trial. Contrary to the Defence's contention,¹⁷ the Chamber only referred to the "facts and circumstances" to highlight that the charges remain the same regardless of whether the evidence used by the Prosecution to support said charges at trial is different from the evidence used at the pre-trial stage.

13. The Decision did not deny either the "*notification [à la Défense] des charges postérieurs à la décision de confirmation de charges*" regarding article 28 of the Statute.¹⁸ In fact, the Chamber did not address at all in the Decision the "notification of the charge" related to article 28. By contrast, the Chamber notified the parties and participants of the "*possibility that the legal characterisation of the facts set out in the Gbagbo Confirmation Decision may be subject to change to include Mr Gbagbo's liability under Article 28(a) or (b) of the Statute*" on 20 August 2015.¹⁹ This matter is already

¹⁴ *Ibid.*, para. 31.

¹⁵ See the Decision, *supra* note 7, para. 13.

¹⁶ *Idem*, para. 14.

¹⁷ See the Request, *supra* note 8, para. 32.

¹⁸ *Contra idem*, para. 33.

¹⁹ See the "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court" (Trial Chamber I), No. ICC-02/11-01/15-185, 20 August 2015, p. 11.

before the Appeals Chamber²⁰ and therefore the Defence cannot raise it again before the Trial Chamber.

14. Similarly, the Second Issue does not arise from but it is a mere disagreement with the Decision.²¹ For this purpose, the Defence relies on the wording of several decisions of other Chambers to argue that “further details about the charges” *may* be provided for in documents subsequent to the confirmation of charges decision.²² The Chamber already considered this possibility of further details on the charges, referring, *inter alia*, to the evidence disclosed by the Prosecution by 30 June 2015, with French translations.²³ The Defence disagreement with the Chamber as to the scope of detail on the charges that *may* be provided to the Defence does not amount to an appealable issue.

15. In fact, under this issue the Defence appears to challenge the sufficiency of the confirmation decision to provide notice of the charges to Mr Gbagbo.²⁴ As argued in relation to the First Issue, if the Defence is of the view that a past decision did not comply with the law, it should have challenged it within the applicable deadline and cannot challenge it now.

16. The same holds true for the Third Issue because it does not arise from the Decision but from a disagreement with previous decisions issued by the Chamber. The Defence supports its arguments regarding this issue on the fact that the Chamber refused to provide the Defence with auxiliary documents additional to the Pre-Trial Brief, such as an in-depth analysis chart and an elements-based chart.²⁵ Once again,

²⁰ See the “Document à l’appui de l’appel de la «Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court» (ICC-02/11-01/15-185)”, No. ICC-02/11-01/15-231, 21 September 2015.

²¹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 8.

²² See the Request, *supra* note 8, para. 36.

²³ See the Decision, *supra* note 7, para. 16.

²⁴ See the Request, *supra* note 8, paras. 34-35.

²⁵ *Idem*, para. 38.

the Defence's arguments against rulings issued prior to the Decision must be dismissed.

17. Moreover, the Defence disagrees with the Decision without discussing the possible error by the Chamber.²⁶ The Defence simply repeats the same contentions made before the Chamber rendered the Decision, namely that it cannot navigate the copious evidence provided by the Prosecution without a detailed pre-trial brief in French.²⁷

18. The Fourth Issue is a new disagreement with the Decision, accompanied by a misinterpretation of the same.²⁸ Contrary to the Defence's contention,²⁹ the Decision does not impose on the Defence the duty to work in English, but simply notices its capacity to do so.³⁰ In fact, the Defence does provide evidence of said capacity when comparing the original Pre-Trial Brief in English with the non-official French translation provided to them.³¹ This example contradicts the Defence's contention that a non-official translation does not allow them to work in good conditions.³²

19. Moreover, the Defence merely disagrees with the finding of the Chamber that it may provide explanations to Mr Gbagbo "*should any questions concerning the Pre-Trial Brief arise*".³³ This disagreement between the Defence and the Chamber is manifested in the extensive argumentation provided by the Defence on the allegedly wrong interpretation made by the Chamber regarding the ECHR jurisprudence

²⁶ See the "Decision on three applications for leave to appeal" (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), para. 70.

²⁷ See the Request, *supra* note 8, paras. 39-40.

²⁸ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 19. See also the "Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record'" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-132, 10 July 2015, para. 3, and references contained therein.

²⁹ See the Request, *supra* note 8, para. 43.

³⁰ See the Decision, *supra* note 7, para. 20.

³¹ See the Request, *supra* note 8, para. 47.

³² *Idem*, para. 46.

³³ *Cf.* the Request, *supra* note 8, para. 43 with the Decision, *supra* note 7, para. 20.

relied upon in the Decision.³⁴ As such, a conflicting opinion with the Decision cannot be subject to an interlocutory appeal.³⁵

20. Finally, the Fifth Issue is yet again a mere disagreement with the Decision, not a topic requiring a decision for its resolution.³⁶ The Defence simply has a different opinion regarding the Chamber's decision not to postpone the commencement of the trial.³⁷ As such, this disagreement does not amount to an appealable issue.

2. The issues identified by the Defence do not affect the fair and expeditious conduct of the proceedings

21. Since it is clear that none of the issues identified by the Defence arise from the Decision, the Request must be dismissed on this basis alone. Assuming *arguendo* that any of said issues arise from the Decision, the Legal Representative opposes the Defence's contention that they significantly affect the fairness and expeditiousness of the proceedings.

22. In fact, the Defence does not provide in the Request detailed arguments on this point, limiting itself to referring to its right to have adequate time and facilities for the preparation of the trial.³⁸

23. In this regard, the Legal Representative contends that granting the request for leave to appeal and having the Decision reversed would in fact prejudice the right of the Accused to be tried without undue delay. This is the case where the trial

³⁴ See the Request, *supra* note 8, paras. 44-45.

³⁵ See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009" (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009, para. 80. See also the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'''" (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 30.

³⁶ See *supra* note 21.

³⁷ See the Request, *supra* note 8, para. 53.

³⁸ *Idem*, para. 56.

proceedings are scheduled to open in less than one month from the filing of the Request.

24. Finally, since the issues identified by the Defence do not affect the fair and expeditious conduct of the proceedings, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.³⁹

IV. Conclusion

25. For the foregoing reasons, the Legal Representative respectfully requests the Trial Chamber to reject the Request.



Paolina Massidda
Principal Counsel

Dated this 28th day of September of 2015

At The Hague, The Netherlands

³⁹ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 26.