



Original: English

No.: ICC-02/11-01/15
Date: 14 October 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

Prosecution's response to the Blé Goudé "Defence observations and objections on the conduct of proceedings" (ICC-02/11-01/15-263)

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
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
Ms Claver N'dry

Legal Representatives of the Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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**

Other

Introduction

1. The Blé Goudé Defence request, entitled “Defence observations and objections on the conduct of proceedings”¹ (“Request”) seeks “modifications” of the Trial Chamber’s Directions on the conduct of proceedings (“Directions on Conduct”)² and should be rejected.
2. The Request is made on the basis both of (i) the Trial Chamber’s 7 May 2015 order that the Parties file by 1 October all motions requiring “resolution prior to the commencement of the trial and which are not already before the Chamber”³ (“7 May 2015 Order”), and (ii) the Trial Chamber’s “further instructions”, given at the status conference on 25 September 2015, related to rule 134(2) of the Rules of Procedure and Evidence (“Rules”).⁴
3. The Request is opposed. First, the Request amounts to a motion for reconsideration of the Trial Chamber’s Directions on Conduct, but fails to meet the threshold for reconsideration developed by the jurisprudence of this Court. The Request does not raise issues “requiring resolution prior to the commencement of the trial” - within the meaning of the Trial Chamber’s 7 May 2015 Order - because the matters raised in it have already been “before the Chamber”, the Trial Chamber having issued its Directions on Conduct on 3 September 2015. It may be recalled that the Blé Goudé Defence did not file a request for leave to appeal these directions, although the Gbagbo Defence did.⁵
4. Second, the Request is not appropriately made under rule 134(2) of the Rules. Rule 134(2) relates to the proceedings after the confirmation hearings and before the trial commences. It provides a means whereby

¹ ICC-02/11-01/15-263.

² ICC-02/11-01/15-205.

³ ICC-02/11-01/15-58, para. 28.

⁴ See Request, para. 1; ICC-02/11-01/15-T-4-ENG, p.37, l. 11-18.

⁵ On 9 September 2015 the Gbagbo Defence filed a request for leave to appeal the Directions on Conduct (ICC-02/11-01/15-209). This request was rejected by the Trial Chamber on 18 September 2015, in Decision ICC-02/11-01/15-229.

the Defence may raise observations or objections related - for example - to any irregularities in the conduct of these proceedings. It does not provide a legal basis for appealing, or seeking reconsideration of, the Trial Chamber's Directions on Conduct, which relate to the future conduct of the trial.

Procedural History

5. On 11 March 2015, the Trial Chamber instructed the Parties and Legal Representatives of Victims ("LRV") to file written submissions on the conduct of proceedings.⁶ The Blé Goudé Defence filed their "Defence Submissions on Agenda Items for the Status Conference of 21 April 2015" ("Defence Submissions for the Status Conference"), on 14 April 2015.⁷
6. During a status conference held on 21 April 2015, the Chamber heard the Parties' and LRV's oral submissions on the conduct of proceedings. The Chamber then provided the Parties and LRV with a further opportunity to submit any additional observations on the conduct of proceedings by 21 May 2015.⁸
7. On 7 May 2015, the Trial Chamber set the commencement date for the trial, 10 November 2015,⁹ and ordered that the Parties file by 1 October all motions requiring "resolution prior to the commencement of the trial and which are not already before the Chamber".¹⁰
8. The Blé Goudé Defence filed their "Defence observations on the conduct of proceedings" ("Defence Observations on Conduct"), on 19 May 2015.¹¹

⁶ ICC-02/11-01/15-1, para. 75 and ICC-02/11-01/15-1-AnxA, item (f).

⁷ ICC-02/11-01/15-33, para. 35.

⁸ ICC-02/11-01/15-T-1-CONF-ENG, p. 56, l. 23-25.

⁹ 7 May 2015 Order, para. 16.

¹⁰ 7 May 2015 Order, para. 28.

¹¹ ICC-02/11-01/15-77.

9. On 3 September 2015, the Chamber issued its Directions on Conduct, which the Gbagbo Defence appealed.¹²

Submissions

The Request seeks reconsideration of the Directions on Conduct

10. The Request amounts to a request for reconsideration of the Directions on Conduct.
11. According to the consistent jurisprudence of the Court, “[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.”¹³ However, facts that were “within the Chamber’s contemplation” in rendering a decision do not warrant reconsideration.¹⁴
12. The Request fails to meet this threshold and should therefore be rejected.
13. The Blé Goudé Defence not only had ample opportunity to present their observations on the conduct of proceedings in advance of the issuance of the Trial Chamber’s directions, but did so, in submissions filed on 14 April 2015¹⁵ and 19 May 2015.¹⁶
14. In their Defence Observations on Conduct, the Blé Goudé Defence addressed all four of the topics that are the subject of their present Request, namely, (i) the use of documents during the examination of witnesses,¹⁷ (ii) refreshing the memory of a witness,¹⁸ (iii) recourse to

¹² ICC-02/11-01/15-209.

¹³ ICC-01/05-01/13-1282, para. 8; ICC-01/05-01/13-1085-Conf, para. 4; ICC-01/09-01/11-1813, para. 19.

¹⁴ ICC-01/09-01/11-1813, para. 21.

¹⁵ Defence Submissions for the Status Conference, para. 35.

¹⁶ Defence Observations on Conduct.

¹⁷ Defence Observations on Conduct, para. 21.

¹⁸ Defence Observations on Conduct, para. 34.

private/closed session,¹⁹ and (iv) admission of the previously recorded testimony of a witness not attending.²⁰

15. These issues have thus been “before the Chamber”, and were decided upon, upon the issuance of the Directions on Conduct.

16. The Blé Goudé Defence characterises the first three issues as observations and the last as an objection,²¹ but the same relief – modification of the existing Directions on Conduct – is sought in respect of each.²²

17. On the first issue (the use of documents during the examination of witnesses), the Blé Goudé Defence make additional submissions in the Request, seeking the adoption of a provision regulating any amendment to the list of material to be used during the examination of a witness.²³ In relation to topics two (refreshing the memory of a witness) and three (recourse to private/closed session), the Blé Goudé Defence raised the same issues in its Defence Observations on Conduct as are argued in the present Request. In relation to the fourth topic (admission of previously recorded testimony of a witness not attending), the Request is different in the significant respect that it seeks to rectify a prior error.

18. In the Defence Observations on Conduct, the Blé Goudé Defence requested that the Chamber “require that the party file an application under rule 68(2) of the Rules 21 days before the witness is scheduled to appear”.²⁴ This position misunderstood the purpose of rule 68(2). In the Request, the Blé Goudé Defence clarify their position, stating that since “Rule 68(2) applications pertain to witnesses not present before the Trial Chamber, the Defence avers that the same procedure [whereby Rule 68 applications must be filed within 21 days of the date of the witness’

¹⁹ Defence Observations on Conduct, para. 51.

²⁰ Defence Observations on Conduct, para. 41.

²¹ See Request, para. 2.

²² Request, para. 8.

²³ Defence Observations on Conduct, para. 21.

²⁴ Defence Observations on Conduct, para. 41.

appearance] cannot apply to these applications”.²⁵ The Blé Goudé Defence now “propose that the Chamber require that the parties submit such applications 21 days before the party wishes to introduce the prior recorded testimony”.²⁶

19. In any event, the Blé Goudé Defence presented their views on this broad topic – as it did on all of the topics raised in the Request - prior to the adoption of the Trial Chamber’s Directions on Conduct, on 3 September. All the issues raised in the Request may appropriately be characterised as “within the Chamber’s contemplation” in issuing the Directions on Conduct. There is no error of reasoning identified in the Request in relation to any of the issues raised, nor is it suggested that there are new facts or arguments arising since the Directions on Conduct were issued. Justice does not require that the Chamber take the exceptional course of reconsidering its prior decision.

The Request is not appropriately made on the basis of the Trial Chamber’s 7 May 2015 Order

20. In its 7 May 2015 Order, the Chamber set a deadline of 1 October 2015 for the filing of “all motions that, in the view of the parties and participants, require resolution prior to the commencement of trial and *which are not already before the Chamber*”²⁷ (emphasis added).
21. For the reasons stated, the Request is not appropriately made on the basis of the Trial Chamber’s order. As elaborated above, the Request amounts to a request for reconsideration of a matter which is not only “already before the Chamber”, but also decided upon, in circumstances where no application for leave to appeal was made by this Defence team.

²⁵ ICC-02/11-01/15-263, para. 6.

²⁶ ICC-02/11-01/15-263, para. 7.

²⁷ 7 May 2015 Order, para. 28.

The Request is not appropriately made under rule 134(2)

22. The Request is also not appropriately made on the basis of the Trial Chamber's "further instructions" given at the status conference on 25 September 2015. These instructions related to rule 134(2) of the Rules.²⁸ Rule 134(2) relates to objections or observations concerning the conduct of the proceedings from the confirmation hearings until the commencement of trial. It does not offer a backdoor to appealing or requesting the Chamber to reconsider its prior decision on the conduct of the proceedings *during trial*.
23. In this respect, rule 134(2) reflects the language of rules 122(3) and (4) of the Rules which make similar provision in respect of issues "related to the proper conduct of the proceedings prior to the confirmation hearing" (rule 122(3)).
24. Rule 134(2) provides a platform for challenging "procedures that occurred between the confirmation hearing and the commencement of the trial"²⁹ – not the conduct of the trial itself. It provides a means whereby the Defence may raise observations or objections related - for example - to any irregularities in the pre-trial (and post-confirmation) proceedings.
25. This analysis is supported by the drafting history of the provision. The language contained in the proposals submitted by the country delegations to assist the Preparatory Commission³⁰ reveals a clear and unambiguous intention to distinguish between pre-trial preliminary motions and motions relating to the procedures taking place after the commencement of trial. The Australian delegation specifically indicated

²⁸ See Request, para. 1; ICC-02/11-01/15-T-4-ENG, p. 37, l. 11-18.

²⁹ Roy S. Lee (ed.), *The International Criminal Court: Elements of the Crimes and Rules of Procedure and Evidence*, Transnational Publishers 2001, pp. 543-544.

³⁰ Preparatory Commission for the International Criminal Court.

that the first shall be decided upon “as expeditiously as possible”³¹, and that parties may only file the latter “after the trial commences”.³² Similarly, the American Bar Association created a separate section for pre-trial preliminary motions, to be “disposed of before the commencement of the opening statements”.³³ The French proposal equally outlined a distinction by confining the review of “pleas regarding procedural irregularities” to the Opening of the proceedings, and the “[c]onduct of bearing on establishment of the facts” to the subsequent Ordinary proceedings.³⁴

Further observations on the operation of rule 134(2)

26. The Prosecution notes the Blé Goudé Defence submission that the observations and objections contained in their Request “do not preclude the Defence from exercising its right to address other issues arising from the conduct of proceedings in the future under Rule 134 of the Rules of Procedure and Evidence”.³⁵

27. For the reasons stated above, any further observations or objections concerning the conduct of the proceedings – insofar as any arise after 1 October 2015 – may not be made under rule 134(2) insofar as they purport to re-open the issue of the conduct of the proceedings upon and after commencement of the trial.

³¹ PCNICC/1999/DP-1, Draft Rules of Procedure and Evidence of the International Criminal Court: Proposal submitted by Australia, 27 January 1999, Section 3, Rule 77(e). Available at <http://www.legal-tools.org/doc/79ba83/>.

³² PCNICC/1999/DP-1, Draft Rules of Procedure and Evidence of the International Criminal Court: Proposal submitted by Australia, 27 January 1999, Section 3, Rule 78. Available at <http://www.legal-tools.org/doc/79ba83/>.

³³ Draft Rules of Procedure and Evidence for the International Criminal Court. Prepared by a Working Group of the American Bar Association, Section of International Law and Practice, Rule 66. 11 February 1999. Available at <http://www.legal-tools.org/doc/6d651c/>.

³⁴ PCNICC/1999/DP-2, General Outline of the Rules of Procedure and Evidence: Proposal submitted by France, 2 February 1999, Rules 69 and 73. Available at <http://www.legal-tools.org/doc/d88229/>.

³⁵ ICC-02/11-01/15-263, para. 2.

Conclusion

28. For the reasons set out above, the Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 14th day of October 2015

At The Hague, The Netherlands