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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 response to Gbagbo Defence's "*Requête afin que le mémoire préliminaire déposé par le Procureur soit déclaré irrecevable*" (ICC-02/11-01/15-260)

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Introduction

1. The Prosecution requests that the Chamber reject the Gbagbo Defence motion entitled “*Requête afin que le mémoire préliminaire déposé par le Procureur soit déclaré irrecevable*”¹ in its entirety.
2. The Prosecution’s Pre-Trial Brief² is an auxiliary document filed upon the invitation of the Chamber, and fulfils the Chamber’s request for “a summary of the evidence to be relied on by the Prosecution”.³ The Gbagbo Defence claims that it has not been sufficiently notified of the content of the charges⁴ or the use to be made of the incriminatory evidence at trial.⁵ This argument lacks any logical foundation, as the Pre-Trial Brief is a document intended to provide additional notice to the Defence of the content of the charges pursuant to article 67(1)(a) of the Rome Statute (“Statute”). It complements the charging documents already filed, the Prosecution’s List of Evidence,⁶ the Prosecution’s Witness Summaries Covering Main Facts (“Witness Summaries”),⁷ and the disclosure process, including the elements-based charts that are provided upon disclosure of incriminatory evidence. Because the Pre-Trial Brief is an instrument of notice, striking it from the record would defeat its intended purpose.
3. Furthermore, the Pre-Trial Brief does not limit the Prosecution’s use of its evidence at trial. The scope of the List of Evidence filed by the Prosecution before the Trial Chamber is similar to that provided by rule 121(3) of the Rules of Procedure and Evidence (“Rules”) for the purposes of the confirmation of charges hearing. Whereas the pre-confirmation List of Evidence must contain all items “which [the Prosecution] intends to present at the hearing”, similarly, the

¹ ICC-02/11-01/15-260 (“Request”).

² ICC-02/11-01/15-148-Conf-Anx2; corrected version filed on 28 July 2015 (ICC-02/11-01/15-148-Conf-Anx2-Corr); amended version of section V.10 filed on 26 August 2015 (ICC-02/11-01/15-192-Anx2) (together, “Pre-Trial Brief”).

³ ICC-02/11-01/15-58, para. 19.

⁴ ICC-02/11-01/15-260, paras. 17, 40-41.

⁵ ICC-02/11-01/15-260, paras. 14-15, 34-35.

⁶ ICC-02/11-01/15-114-Conf-AnxC (“List of Evidence”).

⁷ ICC-02/11-01/15-114-Conf-AnxB-Corr.

Prosecution may submit and rely on during trial⁸ all items of evidence included in its trial List of Evidence, regardless of whether these items are referred to in the Pre-Trial Brief. In addition, irrespective of the manner in which the Prosecution proposes its evidence be used in the Pre-Trial Brief, the Chamber is free to assess the relevance, admissibility and weight of the evidence presented, and to request the submission of further evidence it considers necessary for the determination of the truth.⁹

Background

4. On 7 May 2015, the Chamber invited the Prosecution to file a Pre-Trial Brief (“Order of 7 May 2015”). In doing so, it described the Pre-Trial Brief as “a summary of the evidence to be relied on by the Prosecution, based on the charges as confirmed by the Pre-Trial Chamber.”¹⁰
5. On 16 July 2015, the Prosecution filed its Pre-Trial Brief, in conformity with the Chamber’s order.¹¹
6. On 31 July 2015, the Gbagbo Defence requested that i) the response deadline to the Pre-Trial Brief run from its translation into French; and ii) the commencement date of trial be postponed to six months after notification of the French translation.¹² The Chamber rejected both requests by decision of 16 September 2015 (“Decision of 16 September 2015”).¹³ Following the Chamber’s dismissal of this motion, the Gbagbo Defence sought a finding from the Chamber that the Prosecution had not complied with its order (“*les instructions de la Chambre*”) and

⁸ Article 74(2) of the Statute.

⁹ Articles 64(6)(d) and 69(3) of the Statute; rule 63(2) of the Rules.

¹⁰ ICC-02/11-01/15-58, para. 19 (*see also* para. 26). The Chamber continued, at para. 19: “In light of the joinder and the two Confirmation Decisions, such a document explaining 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 would be beneficial to the Defence in preparation for trial.”

¹¹ ICC-02/11-01/15-148-Conf-Anx2-Corr. A corrected version was filed on 28 July 2015 (ICC-02/11-01/15-148-Conf-Anx2-Corr), and an amended version of section V.10 was filed on 26 August 2015 (ICC-02/11-01/15-192-Anx2).

¹² ICC-02/11-01/15-174.

¹³ ICC-02/11-01/15-224.

consequently requested that the Pre-Trial Brief be declared “*irrecevable*” and that the Prosecution be ordered to file a new Pre-Trial Brief.¹⁴

Submissions

7. The Prosecution notes at the outset that the Chamber invited the Prosecution¹⁵ to file a Pre-Trial Brief, as it considered that such a document “would be beneficial to the Defence in preparation for trial,” in light of the joinder and the two confirmation decisions.¹⁶ It is apparent that in this case, the clarity and level of detail of the Document Containing the Charges (“DCC”) was sufficient to provide adequate notice to the Accused and that, therefore, a Pre-Trial Brief was not strictly necessary. The Prosecution submits that the provision of a Pre-Trial Brief enhances that right beyond the minimum threshold required by the law.
8. In addition, the Prosecution highlights the Pre-Trial Brief’s status as an auxiliary document,¹⁷ and not a charging document, contrary to the Gbagbo Defence argument that “*seul un mémoire préliminaire présentant le dernier état détaillé de la réflexion du procureur peut donner à voir à l’accusé la ‘nature’, la ‘cause’ et la ‘teneur’ des charges.*”¹⁸ In its Decision of 16 September 2015, the Chamber referred to the confirmation of charges framework provided by the Statute, Rules and Regulations of the Court and stated that this framework “ensures that an accused receives adequate notice of the nature, cause and content of the charges.”¹⁹ The Gbagbo Defence expresses its disagreement with the Chamber’s Decision and the Defence argument – from which its subsequent submissions and requests for relief flow – merely amount to an attempt to re-litigate an issue already ruled

¹⁴ ICC-02/11-01/15-260, p. 13-14.

¹⁵ See ICC-02/11-01/15-224, paras. 1, 12, 19 and 22. At para. 12, the Chamber describes the Pre-Trial Brief as “a document provided by the Prosecution at the invitation of the Chamber.” Cf ICC-01/09-01/11-440, para. 15, in which Trial Chamber V stated “The prosecution *shall* provide a document explaining its case with reference to the evidence it intends to rely on at trial.” (emphasis added)

¹⁶ ICC-02/11-01/15-58, para. 19. See also para. 26.

¹⁷ ICC-02/11-01/15-58, para. 26.

¹⁸ ICC-02/11-01/15-260, para. 12.

¹⁹ ICC-02/11-01/15-224, para. 13.

upon by the Trial Chamber, outside the proper appellate avenue.²⁰ The Prosecution refers to and relies upon its previous submissions on the nature of the Pre-Trial Brief.²¹

9. The Prosecution's Pre-Trial Brief responds to the purpose as expressed by the Trial Chamber.²² It explains the Prosecution's case theory, by summarising the relevant evidence to be relied upon for each count²³ and by explaining how the evidence relates to the charges.²⁴ It follows a logical structure whereby the facts and circumstances alleged are set out in Parts III and IV and sourced to the underlying evidence, and the Prosecution's legal analysis of those facts is set out in Part V. In order to avoid repetition of the underlying evidence, the Prosecution opted to cross-reference the relevant factual allegations to the legal analysis applied to them in Part V,²⁵ which includes Mr Gbagbo's responsibility under article 28 of the Statute. The specific deficiencies alleged by the Gbagbo Defence are addressed in turn below.

The Pre-Trial Brief does not refer to all items on the Prosecution's List of Evidence

10. There is no requirement to source all documents on the Prosecution's List of Evidence in the Pre-Trial Brief. In this respect, the Prosecution recalls that the Chamber expressly rejected the Gbagbo Defence's proposal of an in-depth analysis chart.²⁶ Furthermore, it has not been the practice of this Court, in cases such as *Ruto and Sang*,²⁷ *Bemba et al.*²⁸ and *Ntaganda*,²⁹ to source all documents on the List of Evidence. Documents may properly appear on the List of Evidence, without being sourced in the Pre-Trial Brief, because they are not directly relevant

²⁰ On 22 September 2015, the Gbagbo Defence sought leave to appeal the Chamber's Decision of 16 September 2015, based on the identical argument that "*seul un mémoire préliminaire présentant le dernier état détaillé de la réflexion du procureur peut donner à voir à l'accusé la 'nature', la 'cause' et la 'teneur' des charges.*" (ICC-02/11-01/15-233, para. 25.)

²¹ See ICC-02/11-01/15-181, paras. 17, 19 and 21; ICC-02/11-01/15-249, paras. 2 and 3.

²² See ICC-02/11-01/15-58, paras. 19 and 26.

²³ See ICC-02/11-01/15-148-Conf-Anx2-Corr, section IV.B (in particular, paras. 308, 331, 343, 350, 355).

²⁴ See ICC-02/11-01/15-148-Conf-Anx2-Corr, section V.

²⁵ See ICC-02/11-01/15-T-4-ENG, pp. 46-47, l.19-25.

²⁶ ICC-02/11-01/15-58, para. 20.

²⁷ See ICC-01/09-01/11-625, para. 5.

²⁸ See ICC-01/05-01/13-1089, para. 16.

²⁹ See ICC-01/04-02/06-503, para. 3.

to the factual narrative contained therein. Citing all documents in the Pre-Trial Brief which appear on the List of Evidence would produce an unwieldy document and would include material that is not necessary for purposes of understanding the nature of the Prosecution's case. It would require the inclusion of all chain of custody documents, all annexures to witness statements, all photos taken during the preparation of expert reports, and all portions of witness interview transcripts.

11. This Chamber has rejected the concept of the in-depth analysis chart ("IDAC")³⁰ in its Order of 7 May 2015, when, considering the parties' submission, it decided that a Pre-Trial Brief was sufficient.³¹ Gbagbo's Request amounts to a thinly veiled attempt at re-introducing the concept an IDAC when it claims that it is "*indispensable et crucial que le Procureur vise tous les elements de preuve qu'il a divulgués*".³² Contrary to Gbagbo's argument that unless this is done, the Defence would be left in the dark, it is submitted that the Prosecution has provided ample information relating to the issues in the case. Indeed, in addition to detailed DCCs, every disclosure of incriminating evidence has been accompanied by an elements-based chart specifying the relevance of the disclosed material. Through the analysis of the disclosed evidence and the evidence it has gathered by its own initiative, the Gbagbo Defence is fully cognisant of the issues to which it needs to focus in order to prepare for trial, including for cross-examination of witness and in written submissions. To suggest that it is left in the dark would mean that the Gbagbo Defence is unable to apply its own critical analysis to each single piece of evidence. This argument is not tenable.
12. It is accordingly submitted that the Prosecution may rely on a piece of evidence at trial even if it is not referred to in the Pre-Trial Brief, as long as it is included in the List of Evidence.

³⁰ The *Pre-Trial Practice Manual* (September 2015) now provides, at page 9, that "[n]o submission of any 'in-depth analysis chart', or *similia*, of the evidence disclosed can be imposed on either party." See also page 13 of the Manual for a similar conclusion.

³¹ Order of 7 May 2015, para. 20.

³² Gbagbo Request, para. 37 *in fine*.

The Pre-Trial Brief does not refer to all witnesses on the Prosecution's List of Witnesses

13. For the same reason, there is no requirement for the statements of all Prosecution witnesses appearing on its List of Witnesses to be sourced in the Pre-Trial Brief. Of the eleven witnesses not referred to in the Pre-Trial Brief,³³ seven³⁴ are members of the Investigations Division of the OTP and will testify primarily on the chain of custody and other investigative matters. The reports or notes of three of these members are cited in the Pre-Trial Brief.³⁵ The evidence of two further witnesses focuses primarily on chain of custody.³⁶ Witness P-0524 is an insider witness who describes the structure of the *Centre de Planification et de Coordination des Opérations* and the transcripts of his interview are on the List of Evidence.³⁷ Witness P-0088, was the cameraman to freelance reporter P-0087, the latter's evidence being cited in the Pre-Trial Brief. The main facts about which each witness is expected to testify are set out in the Prosecution's Witness Summaries.

14. The Prosecution reiterates its previous submissions³⁸ on the sufficiency of the notice of its case provided to the Gbagbo Defence. In this case, the Gbagbo Defence has been provided with an initial DCC,³⁹ an amended DCC,⁴⁰ and with a Confirmation Decision defining the parameters of the charges at trial.⁴¹ Further,

³³ P-0087, P-0380, P-0428, P-0524, P-0531, P-0532, P-0533, P-0534, P-0541, P-0542, P-0550.

³⁴ P-0531, P-0532, P-0533, P-0534, P-0541, P-0542, P-0550.

³⁵ For P-0532, see CIV-OTP-0007-0231, sourced at footnotes 944, 961, 964, 1068, 1089, 1090 and 1092 of the Pre-Trial Brief; CIV-OTP-0007-0235, sourced at footnotes 868, 870, 887, 1006, 1007 and 1008 of the Pre-Trial Brief; CIV-OTP-0084-4446, sourced at footnotes 26, 29, 32, 41, 47, 52, 63, 64, 68, 69, 76, 79, 100, 106, 115, 116, 121, 127, 191, 197, 198, 199, 382, 386, 445, 500, 502, 533, 534, 537, 538, 539, 557, 563, 565, 567, 895 and 896 of the Pre-Trial Brief. For P-0533, see CIV-OTP-0084-0252, sourced at footnotes 100, 114, 115, 139, 189, 190, 198, 199, 354, 356, 362, 364, 365 and 445 of the Pre-Trial Brief; CIV-OTP-0084-0319, sourced at footnotes 146, 182, 190, 198, 375 and 445 of the Pre-Trial Brief; CIV-OTP-0084-3902, sourced at footnotes 290, 1066, 1067 of the Pre-Trial Brief. For P-0550, see CIV-OTP-0076-0952, sourced at footnote 1030 of the Pre-Trial Brief; CIV-OTP-0084-4305, sourced at footnote 962 of the Pre-Trial Brief; CIV-OTP-0084-4361, sourced at footnote 1068 of the Pre-Trial Brief.

³⁶ P-0380 and P-0428.

³⁷ See CIV-OTP-0076-1768; CIV-OTP-0076-1789; CIV-OTP-0076-1815; CIV-OTP-0076-1843 and annexes: CIV-OTP-0074-0009, CIV-OTP-0074-0010, CIV-OTP-0074-0011, CIV-OTP-0074-0012.

³⁸ ICC-02/11-01/15-181, paras. 18-19; ICC-02/11-01/15-249, paras. 2-3.

³⁹ ICC-02/11-01/11-124.

⁴⁰ ICC-02/11-01/11-357 and ICC-02/11-01/11-592.

⁴¹ ICC-02/11-01/11-656-Conf. See ICC-02/11-01/15-58, para. 17, citing ICC-01/04-01/06-3121-Red (A5), para. 124; ICC-02/11-01/11-T-25-CONF-ENG CT, p. 54-55.

the Gbagbo Defence was also given access to the DCC, the confirmation decision from the *Blé Goudé* case,⁴² and has received disclosure of all material disclosed by both parties in that case.

15. In its Order of 7 May 2015, the Chamber explicitly found that the filing of an updated DCC was not necessary for the two Accused to be in a position to prepare effective defences.⁴³ Moreover, in the same Order, the Trial Chamber invited the Prosecution to file a Pre-Trial Brief, as this would be “beneficial to the Defence in preparation for trial,” in light of the joinder and the two confirmation decisions.⁴⁴ However, the Prosecution submits that the Chamber did not find that the Pre-Trial Brief was a necessary tool to meet the Defence rights of notice under article 67(1)(a) of the Statute.

16. In addition to the filing of the DCC and the Pre-Trial Brief, the Prosecution has also alerted the Defence to the intended use of its evidence through the filing of its Witness Summaries. Moreover, as mentioned above in paragraph 11, the disclosure process conducted on a rolling basis since February 2012,⁴⁵ provided to the Defence, for each incriminatory document disclosed, an elements-based chart indicating which element(s) of the Prosecution case the individual document relates to. The Gbagbo Defence’s claim that it is unable to prepare for trial⁴⁶ is not credible.

17. Finally, the Prosecution emphasises the non-binding nature of the Pre-Trial Brief in terms of the Prosecution’s – but more importantly, the Chamber’s – use of the evidence at trial.⁴⁷ Under articles 64(6)(d) and 69(3) of the Statute and rule 63(2) of the Rules, the Chamber has the ability to freely assess the relevance, admissibility and weight of the evidence presented, and to request the submission of further evidence it considers necessary for the determination of the truth.⁴⁸ The Pre-Trial

⁴² ICC-02/11-01/15-1, p. 33.

⁴³ ICC-02/11-01/15-58, para. 17 (emphasis added).

⁴⁴ ICC-02/11-01/15-58, para. 19. *See also* para. 26.

⁴⁵ *See* ICC-02/11-01/11-34.

⁴⁶ Gbagbo Request, para.37 *in fine*.

⁴⁷ ICC-01/05-01/13-992, para. 21.

⁴⁸ Articles 64(6)(d) and 69(3) of the Statute; rule 63(2) of the Rules.

Brief was provided to assist the Defence as a summary or roadmap of the Prosecution's case theory, but it was not meant to exhaustively identify all possible uses to which all individual items of evidence may be put. Consequently, the Prosecution can expand on the use of the evidence referred to in the Pre-Trial Brief during trial, inasmuch as they relate to the topics and issues forecasted in the DCC. Similarly, the Pre-Trial Brief cannot confine the possible use that the Chamber may make of that evidence, and cannot anticipate any additional evidence that the Chamber may seek.

The practice of cross-referencing between sections of the brief is necessary

18. Cross-references are necessary in lengthy filings. They avoid repetition and follow a logic, where previously described concepts are referred to for information. No reader expects entire sections to be repeated each time a concept is referred to. Cross-references provide an aide, reminding the Defence and the Chamber which sections of the brief to consult in order to find an explanation of any particular concept.
19. The Gbagbo Defence argues that the practice of including cross-references, referring to other sections of the brief, in footnotes affect the clarity of the Pre-Trial Brief.⁴⁹ The Defence claim that the Prosecution should have organised the brief following a structure whereby evidence relating to the common plan would have been placed elsewhere.⁵⁰
20. The arguments regarding cross-referencing again misapprehend the scope of the Pre-Trial Brief, which is a mere tool to provide the Defence with additional notice under article 67(1)(a) of the Statute. Even if the Defence would prefer the Pre-Trial Brief to be structured differently, this does not mean that its rights to notice are not fully protected. The Defence arguments should therefore be rejected.
21. In any event, as the Prosecution explained during the 25 September 2015 status conference in response to the Accused Blé Goudé's remarks relating to Section V

⁴⁹ Gbagbo Request, paras. 18-33.

⁵⁰ Gbagbo Request, paras. 30-33.

of the brief,⁵¹ cross-references were used to avoid repetition and save space.⁵² The Gbagbo Defence now claims that this practice appears in every section of the brief.⁵³ Here, a distinction must be made between Section V, where cross-referencing is used almost exclusively in the footnotes, and Section I to IV of the brief, where cross-referencing appears side-by-side with witness and documentary evidence. Therefore, this argument should be rejected.

22. Further, the Gbagbo Defence argues that, contrary to the Prosecution's explanation during the last Status Conference, references in footnotes do not point to specific sections, but rather to more general sections of the brief, encompassing several sub-sections. To support this argument, the Gbagbo Defence cites one example, footnote 367, which refers to Section III.C.2. However, the Request is misleading, as it fails to inform the Chamber that along with this cross-reference, footnote 367 also contains references to two different witness interviews. Hence, while the general section refers to a general concept, it is accompanied by specific witness evidence.

23. The Prosecution notes that the Gbagbo Defence made similar arguments before Pre-Trial Chamber I.⁵⁴ While the Pre-Trial Chamber never addressed the issue directly, it did adopt the same cross-referencing practice in both the *Gbagbo* and *Blé Goudé* confirmation decisions.⁵⁵

⁵¹ See ICC-02/11-01/15-T-4-ENG, pp. 42-44, l.1-2.

⁵² See ICC-02/11-01/15-T-4-ENG, pp. 46-47, l.19-25.

⁵³ Gbagbo Request, para. 23.

⁵⁴ See for instance ICC-02/11-01/11-637-Conf-Anx2-Corr2-Red, paras. 48 and 59 and ICC-02/11-01/11-603, paras. 43-45 and 52.

⁵⁵ ICC-02/11-01/11-656-Red, section 3.III; and ICC-02/11-02/11-186, section 3.III.

Conclusion

24. For the foregoing reasons, the Prosecution requests that the Gbagbo Defence Request be dismissed.



Fatou Bensouda, Prosecutor

Dated this 19th day of October 2015

At The Hague, The Netherlands