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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 Gbabo's request to declare the Prosecutor's Pre-Trial Brief
inadmissible (ICC-02/11-01/15-260)**

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 to declare inadmissible the Prosecution’s Pre-Trial Brief (the “Pre-Trial Brief”) because of its lack of compliance with the Chamber’s instructions (the “Request”)² must be dismissed.

2. The Request must be dismissed *in limine* because all Defence’s complaints have already been ruled upon by Trial Chamber I (the “Chamber”) in its decisions on the nature and purpose of the Pre-Trial Brief, and are premised on contentions already adjudicated by the Chamber.

3. In this regard, the Chamber has repeatedly ruled that the Pre-Trial Brief cannot be identified with the charges faced by Mr Gbagbo, which are established in the Confirmation Decision and remain unchanged. Consistent with this finding, the Chamber has indicated that, contrary to the Defence’s contentions, the submission of the Pre-Trial Brief is not necessary and compulsory, but is left at the discretion of the Prosecution. Consequently, the use of cross-references, the mention only of part of the Prosecution’s evidence and the lack of precision alleged by the Defence cannot as such amount to a violation of the Chamber’s rulings regarding the Pre-Trial Brief.

4. Assuming *arguendo* that the Request is not dismissed *in limine*, the Legal Representative submits that the three contentions in the Request must be rejected because they lack any merit.

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 “Requête afin que le mémoire préliminaire déposé par le Procureur soit déclaré irrecevable”, No. ICC-02/11-01/15-260, 1 October 2015 (the “Request”).

5. Firstly, the request for more detailed cross-references or a different structure in the Pre-Trial Brief is unfounded because in its present form said document accomplishes the purpose indicated by the Chamber when inviting the Prosecution to submit it.

6. Secondly, the contention that the Pre-Trial Brief must refer to all items of evidence and all witnesses in the Prosecution's list of evidence is equally unfounded because it arises from a misunderstanding of the nature of the Pre-Trial Brief as a summary of the evidence provided before the start of the trial.

7. Lastly, the arguments on the impossibility to identify in the Pre-Trial Brief the facts and circumstances relevant to article 28 of the Rome Statute (the "Statute") are inconsistent with the Defence's submissions on the issue currently pending before the Appeals Chamber, regarding the possible legal re-characterisation of facts and circumstances pursuant to regulation 55 of the Regulations of the Court (the "Regulations"). In this scenario, the Chamber should not address these arguments before the Appeals Chamber rules on the pending appeal.

II. Background

8. On 21 April 2015, during the first status conference in the *Gbagbo and Blé Goudé* case (the "First Status Conference"),³ the filing by the Prosecution of a pre-trial brief and other "*auxiliary documents in relation to the charges*"⁴ was discussed.

9. On 24 April 2015, the Prosecution requested the Chamber to give notice to the parties and participants pursuant to regulation 55(2) of the Regulations that the legal characterisation of the facts and circumstances in the Confirmation Decision may be

³ See the transcript of the status conference held on 21 April 2015, No. ICC-02/11-01/15-T-1-CONF-ENG ET, 22 April 2015 (the "First Status Conference").

⁴ *Ibid.*, p. 57, line 14 to p. 63, line 1; p. 64, line 2 to p. 74, line 18; and p. 78, line 6 to p. 80, line 3 (open session).

subject to change to include the mode of liability under article 28(a) and (b) of the Statute (the “Regulation 55 Request”).⁵

10. On 7 May 2015, the Chamber issued the “Order setting the commencement date for trial” (the “Trial Commencement Order”),⁶ ruling, *inter alia*, that the Prosecution should file its pre-trial brief by 16 July 2015 and that all motions requiring resolution prior to the commencement of the trial and not already before the Chamber should be submitted by 1 October 2015.⁷

11. On 16 July 2015, the Prosecution filed the Pre-Trial Brief,⁸ acknowledging, *inter alia*, that the Pre-Trial Chamber I (the “Pre-Trial Chamber”) declined to confirm charges under article 28 of the Statute, noting the pending Regulation 55 Request and addressing, in the alternative, Mr Gbagbo’s responsibility under article 28 of the Statute.

12. On 31 July 2015, the Defence of Mr Gbagbo filed a request, *inter alia*, for the time limit of its response to the Pre-Trial Brief to start running upon notification of the French translation of said brief (the “Pre-Trial Brief Request”).⁹

13. On 20 August 2015, the Chamber issued the “Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court” (the “Regulation 55 Decision”),¹⁰ *inter alia*, notifying the parties and participants that the legal characterisation of the

⁵ See the “Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)”, No. ICC-02/11-01/15-43, 24 April 2015 (the “Regulation 55 Request”).

⁶ See the “Order setting the commencement date for trial” (Trial Chamber I), No. ICC-02/11-01/15-58, 7 May 2015 (the “Trial Commencement Order”).

⁷ *Ibid.*, paras. 26 and 28.

⁸ See the “Prosecution Pre-Trial Brief”, No. ICC-02/11-01/15-148, 16 July 2015 (the “Pre-Trial Brief”).

⁹ 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 “Pre-Trial Brief Request”).

¹⁰ 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 (dated 19 August 2015) (the “Regulation 55 Decision”).

facts and circumstances set out in the Confirmation Decision may be subject to change to include Mr Gbagbo's liability under article 28(a) or (b) of the Statute.¹¹

14. On 26 August 2015, the Defence of Mr Gbagbo filed a request for leave to appeal the Regulation 55 Decision,¹² which was granted in part on 10 September 2015.¹³

15. On 16 September 2015, the Chamber rejected the Pre-Trial Brief Request (the "Pre-Trial Brief Decision").¹⁴

16. On 21 September 2015, the Defence of Mr Gbagbo filed his document in support of the appeal against the Regulation 55 Decision (the "Regulation 55 Appeal").¹⁵

17. On 22 September 2015, the Defence of Mr Gbagbo filed a request for leave to appeal the Pre-Trial Brief Decision.¹⁶

18. On 25 September 2015, the Chamber held the second status conference in the *Gbagbo and Blé Goudé* case (the "Second Status Conference"),¹⁷ during which, *inter alia*,

¹¹ *Idem*, p. 11.

¹² See the "Demande d'autorisation d'interjeter 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-02/11-01/15-193, 26 August 2015.

¹³ See the "Decision on request for leave to appeal the 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'" (Trial Chamber I), No. ICC-02/11-01/15-212, 10 September 2015.

¹⁴ 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 "Pre-Trial Brief Decision").

¹⁵ 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 (the "Regulation 55 Appeal").

¹⁶ 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.

¹⁷ See the transcript of the status conference held on 25 September 2015, No. ICC-02/11-01/15-T-4-ENG ET, 28 September 2015 (the "Second Status Conference").

several issues concerning the Pre-Trial Brief were discussed at the proposal of the Defence of Mr Gbagbo and the Defence of Mr Blé Goudé.¹⁸

19. On 1 October 2015, the Defence filed the Request.

20. On 19 October 2015, the Prosecution filed its response to the Request (the “Prosecution’s Response”).¹⁹

21. On 22 October 2015, the Chamber rejected the Defence’s request for leave to appeal the Pre-Trial Brief Decision (“the Pre-Trial Brief Leave to Appeal Decision”).²⁰

22. Pursuant to regulation 24(2) of the Regulations, the Legal Representative submits her response to the Request.

III. Submissions

1. Preliminary submissions

23. The Defence’s complaints about the Pre-Trial Brief are premised on its misunderstanding of the nature and purpose of said document and on contentions already rejected by the Chamber. The Request should, therefore, be dismissed *in limine*.²¹

¹⁸ *Idem*, p. 39, line 1 to p. 48, line 15.

¹⁹ See the “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)”, No. ICC-02/11-01/15-300, 19 October 2015 (the “Prosecution’s Response”).

²⁰ See the “Decision on the Gbagbo Defence request for leave to appeal the ‘Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief’ (Trial Chamber I), No. ICC-02/11-01/15-307, 22 October 2015 (the “Pre-Trial Brief Leave to Appeal Decision”).

²¹ See the “Order on the organisation of common legal representation of victims” (Trial Chamber II), No. ICC-01/04-01/07-1328, 22 July 2009, para. 10(b). See also the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. ICC-01/09-01/11-373, 23 January 2012, para. 34.

24. The Defence identifies the Pre-Trial Brief with the charges faced by Mr Gbagbo at trial.²² In fact, the Defence understands the Pre-Trial Brief as a document that “[v]ient compléter la Décision de confirmation des charges en indiquant à la Défense ce qui a changé”,²³ thereby amounting to “[u]ne actualisation de la teneur des charges”.²⁴ However, the Chamber has repeatedly clarified that the Pre-Trial Brief does not set out the facts and circumstances described in the charges against Mr Gbagbo (“the parameters of the charges at trial”), but that only the Confirmation Decision does so and that it can be modified neither by a subsequent decision of the Chamber to join the cases nor by the Pre-Trial Brief submitted by the Prosecution.²⁵

25. The Pre-Trial Brief is only “[a] summary of the relevant evidence to be relied on, explaining how the evidence relates to the charges, as confirmed by the Pre-Trial Chamber”.²⁶ Consistent with this understanding, the Chamber has recently reminded the parties and participants that the facts and circumstances underlying the charges against Mr Gbagbo remain unchanged “[r]egardless of whether the evidence to be relied on at trial by the Prosecution was used at the pre-trial stage”.²⁷

26. Against this background, the Legal Representative submits that, contrary to the Defence’s contentions,²⁸ the Pre-Trial Brief is not a compulsory and necessary document to understand the nature, cause and content of the charges against Mr Gbagbo, by reference to article 67(1)(a) of the Statute.

²² See the Request, *supra* note 2, para. 17.

²³ *Idem*, para. 10.

²⁴ *Ibid.*, para. 11.

²⁵ See the Pre-Trial Brief Decision, *supra* note 14, para. 14; and the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015, para. 52, referring to the “Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 124. See also the “Decision on Defence requests for leave to appeal the ‘Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters’” (Trial Chamber I), No. ICC-02/11-01/15-42, 22 April 2015, para. 16.

²⁶ See the Trial Commencement Order, *supra* note 6, para. 26 (emphasis added). See *idem*, para. 19.

²⁷ See the Pre-Trial Brief Decision, *supra* note 14, para. 14, referring to the Trial Commencement Order, *supra* note 6, para. 18.

²⁸ See the Request, *supra* note 2, paras. 12-16.

27. Regardless of the number of witnesses and the pieces of evidence expected to be examined during the trial, the Pre-Trial Brief has been submitted “*at the invitation of the Chamber*” because the Chamber found that it may be beneficial for the preparation of the Defence.²⁹ The Chamber never ordered the Prosecution to submit the Pre-Trial Brief, referring to it as the “*invited document*”.³⁰

28. This practice is consistent with the understanding of the pre-trial brief by other Trial Chambers as a discretionary document. In fact, a pre-trial brief was not filed in the *Katanga* case,³¹ and more recently, Trial Chamber VII in the *Bemba et al.* case has ruled that “[a] *pre-trial brief could be beneficial to the Defence in the preparation for trial. That said, the Chamber highlights that the submission of such document is left at the discretion of the parties and that it is not binding on the Chamber*”.³²

29. The Legal Representative submits that the Prosecutor’s exercise of the discretion granted to her in submitting the Pre-Trial Brief can only be subject to the review of the Chamber if the Prosecutor has not complied with a decision or order of the Chamber. However, the Request does not advance any argument of this nature, addressing instead difficulties allegedly arising from the format and structure of the document.³³

30. At most, the Request appears to challenge the sufficiency of the very Confirmation Decision to provide notice of the charges to Mr Gbagbo.³⁴ In this regard, the Chamber has recently ruled that “[t]he *Gbagbo Defence itself has not raised*

²⁹ See the Pre-Trial Brief Decision, *supra* note 14, paras. 12 and 19.

³⁰ See the Trial Commencement Order, *supra* note 6, para. 26.

³¹ See the “*Décision relative au dépôt d’un résumé des charges par le Procureur*” (Trial Chamber II), No. ICC-01/04-01/07-1547, 22 November 2009.

³² See the “*Decision on the Submission of Auxiliary Documents*” (Trial Chamber VII), No. ICC-01/05-01/13-992, 10 June 2015, para. 21 (emphasis added).

³³ See the Request, *supra* note 2, para. 17.

³⁴ *Idem*, para. 12.

any formal legal challenges concerning whether the accused has received adequate notice of the charges".³⁵ Accordingly, the Request cannot be considered on this ground either.

31. In conclusion, since the Request does not argue that the Pre-Trial Brief is inconsistent with a ruling of the Chamber, it should be dismissed without addressing its content. However, assuming *arguendo* that the Chamber finds the Request to be admissible, the Legal Representative argues *infra* that the three contentions made in the Request must be rejected because they lack any merit.

2. On the allegedly repetitive, imprecise and unnecessary use of cross-references in the Pre-Trial Brief

32. Regarding the contention that a higher degree of detail in the cross-references or a different structure in the Pre-Trial Brief is necessary,³⁶ the Legal Representative submits that this argument is unfounded because in its present form the Pre-Trial Brief accomplishes the purpose indicated by the Chamber when inviting the Prosecution to submit it.

33. The Legal Representative sees no difficulty with the particular manner in which the Prosecution has provided the summary of the evidence it intends to rely on, based on the charges as confirmed by the Pre-Trial Chamber.³⁷ As argued by the Prosecution,³⁸ the use of cross-references is a necessary and usual practice to summarise the evidence without constantly repeating it. In these circumstances, should the Chamber grant the Request, it would unnecessarily limit the Prosecutor's discretion as to the format of the Pre-Trial Brief.³⁹

³⁵ See the Pre-Trial Brief Leave to Appeal Decision, *supra* note 20, para. 10.

³⁶ See the Request, *supra* note 2, paras. 18-33.

³⁷ See *supra* note 26.

³⁸ See the Prosecution's Response, *supra* note 19, paras. 9, 18 and 23.

³⁹ See *supra* para. 27.

34. In this regard, the contention that the Appeals Chamber has already criticised the Prosecution's similar use of cross-references in this case is not accurate. Contrary to the Defence's submission, the Appeals Chamber did not censure the use of cross-references as a violation of article 67(1)(a) of the Statute. Instead, the Appeals Chamber found that the Prosecution's reference to four incidents in the original document containing the charges was not enough *per se* to provide notice of the context of the crimes against humanity alleged against Mr Gbagbo, and that they could only be understood as such if they were considered together with the other 41 incidents mentioned in the same document.⁴⁰

3. On the alleged need to mention all evidence in the Pre-Trial Brief

35. Regarding the contention that the Pre-Trial Brief must refer to all items of evidence and all witnesses in the Prosecution's list of evidence,⁴¹ the Legal Representative submits that the Defence misunderstands the nature of the Pre-Trial Brief as a summary of the evidence provided before the start of the trial.

36. As noted above, the Pre-Trial Brief is a "*summary of the relevant evidence to be relied on*" that cannot change the facts and circumstances underlying the charges against Mr Gbagbo, "*regardless of whether the evidence to be relied on at trial by the Prosecution was used at the pre-trial stage*".⁴²

37. Therefore, the Pre-Trial Brief does not need to refer to all the evidence in the Prosecution's list, but to the items which provide an overview of the Prosecution's case – the facts and circumstances underlying the charges – before said case is

⁴⁰ Cf. the Request, *supra* note 2, para. 18, with the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'" (Appeals Chamber), No. ICC-02/11-01/11-572 OA5, 16 December 2013, paras. 41-43.

⁴¹ See the Request, *supra* note 2, paras. 34-37.

⁴² See *supra* para. 24.

contrasted with the submissions made by the Defence and the participants during the trial.

38. During the trial, the strategy of the parties and participants may change and result in differences between the quantity and/or nature of the evidence planned for submission before the start of the trial, on the one hand, and that of the evidence eventually presented in the course of the trial, on the other hand. This reading is consistent with the Chamber's interpretation of the applicable legal framework,⁴³ and with its authority under article 64(3) of the Statute to request the submission of all evidence it considers necessary for the determination of the truth.

39. Against this background, the Legal Representative contends that the request for a higher degree of detail or a different structure in the Pre-Trial Brief should be dismissed. In its present form the Pre-Trial Brief accomplishes more than sufficiently the purpose indicated by the Chamber when inviting the Prosecution to submit it. In fact, the Defence can only refer to 11 witnesses listed by the Prosecution and not mentioned in the Pre-Trial Brief.⁴⁴

40. Moreover, to grant the Request would contravene in practice the Chamber's prior ruling according to which there is no need to provide the Defence with in-depth analysis charts and other auxiliary documents.⁴⁵

4. On the alleged lack of precision in the Pre-Trial Brief concerning Mr Gbagbo's liability under article 28 of the Statute

41. The complaint regarding the impossibility to identify in the Pre-Trial Brief the facts and circumstances relevant to article 28 of the Statute is related to the Defence's

⁴³ See the Pre-Trial Brief Decision, *supra* note 14, paras. 15-17.

⁴⁴ See the "Annex 3 to the Requête afin que le mémoire préliminaire déposé par le Procureur soit déclaré irrecevable", No. ICC-02/11-01/15-260-Anx3, 1 October 2015.

⁴⁵ Cf. the Request, *supra* note 2, para. 37 *in fine* with the Trial Commencement Order, *supra* note 6, para. 20.

criticism on the use of cross-references addressed *supra*. In this regard, the Legal Representative reiterates her contention that, contrary to the Defence's submissions,⁴⁶ the use of cross-references is a necessary and usual practice to summarise the evidence. This practice does not prevent a clear understanding of the Pre-Trial Brief and, as explained by the Prosecution during the Second Status Conference,⁴⁷ is simply meant to avoid repetition.⁴⁸

42. Moreover, the Defence presents its arguments on this issue as related to the legal re-characterisation of the facts and circumstances confirmed by the Pre-Trial Chamber, which is a matter currently *sub judice* before the Appeals Chamber.

43. In fact, the Defence refers to an alleged lack of relevant information regarding a "*nouvelle charge*" under article 28 of the Statute,⁴⁹ whereas in the Regulation 55 Decision the Chamber only notified the parties and participants of the "[p]ossibility 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".⁵⁰

44. The Legal Representative notices that the Defence's arguments on this issue in the Request are inconsistent with its submissions on the matter currently pending before the Appeals Chamber. Indeed, in the appeal proceedings, the Defence has argued that the Chamber could not provide notice of the possible re-characterisation of the facts and circumstances under regulation 55 of the Regulations not because of the lack of clarity of the facts and circumstances relevant to article 28 alleged in the Request, but because of the timing of the notice of re-characterisation.⁵¹

⁴⁶ See Request, *supra* note 2, para. 41.

⁴⁷ See the Second Status Conference, *supra* note 17, p. 46, line 19 to p. 48, line 12.

⁴⁸ See *supra* paras. 32-33.

⁴⁹ See the Request, *supra* note 2, para. 42.

⁵⁰ See the Regulation 55 Decision, *supra* note 10, p. 11.

⁵¹ See the Regulation 55 Appeal, *supra* note 15.

45. Notwithstanding the inconsistency in the Defence's arguments identified *supra*, the Legal Representative submits that these contentions should not be addressed before the Appeals Chamber rules on the appeal against the Regulation 55 Decision, following the approach recently adopted by the Chamber in similar circumstances.⁵²

IV. Conclusion

46. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to dismiss the Request.



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Principal Counsel

Dated this 23rd day of October of 2015

At The Hague, The Netherlands

⁵² See the "Decision on the Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules" (Trial Chamber I), No. ICC-02/11-01/15-303, 21 October 2015, para. 7.