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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

Response to the “Prosecution’s application for leave to appeal the ‘Decision on witness preparation and familiarisation’” (ICC-02/11-01/15-363)

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 the Prosecution’s request (the “Request”)² for leave to appeal the “Decision on witness preparation and familiarisation” (the “Decision”)³ satisfies the requirements of article 82(1)(d) of the Rome Statute and must be granted.

2. The Request demonstrates that the issues identified by the Prosecution arise from the Decision and can be the subject of an interlocutory appeal. It further shows that said issues significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and that their immediate resolution by the Appeals Chamber may materially advance the proceedings.

II. Background

3. On 26 February 2015, the *Gbagbo* Defence and the Prosecution jointly proposed a protocol concerning witness preparation (the “Draft Witness Preparation Protocol”).⁴

4. On 6 March 2015, the Legal Representative agreed to the Draft Witness Preparation Protocol.⁵

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 “Prosecution’s application for leave to appeal the ‘Decision on witness preparation and familiarisation’”, No. ICC-02/11-01/15-363, 14 December 2015 (the “Request”).

³ See the “Decision on witness preparation and familiarisation” (Trial Chamber I), No. ICC-02/11-01/15-355, 3 December 2015 (dated 2 December 2015) (the “Decision”).

⁴ See the “Soumissions de l’Accusation et de la Défense relatives à l’adoption du protocole de préparation des témoins”, No. ICC-02/11-01/11-784, 26 February 2015.

⁵ See the “Further submissions of the Common Legal Representative of victims pursuant to the order setting deadlines for the filing of submissions on outstanding protocols”, No. ICC-02/11-01/11-802-Red, 12 March 2015.

5. On 2 December 2015, the Chamber issued the “Decision on witness preparation and familiarisation”,⁶ rejecting the Draft Witness Preparation Protocol and ruling, *inter alia*, that “*witness preparation, as a general rule, is not appropriate in this case*”.⁷

6. On 4 and 11 December 2015, the Chamber granted the requests of the parties for an extension of time to file any request for leave to appeal the Decision until 16 December 2015.⁸

7. On 14 December 2015, the Prosecution filed the Request,⁹ seeking leave to appeal the Decision on the following two issues (the “Issues”):

- i) “*Whether witness preparation, as a matter of principle and practice, is a critical aspect of a Party’s right and ability to present its case in a meaningful, fair and expeditious manner and the Court’s truth finding function*” (the “First Issue”);¹⁰ and
- ii) “*Whether, in the case at hand, the alleged potential risks of witness preparation outweigh the Parties’ right to prepare and present their cases and the substantial benefits of witness preparation to a fair and expeditious trial and the well-being of witnesses*” (the “Second Issue”).¹¹

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

⁶ See the “Decision on witness preparation and familiarisation” (Trial Chamber I), No. ICC-02/11-01/15-355, 3 December 2015 (dated 2 December 2015) (the “Decision”).

⁷ *Idem*, para. 19.

⁸ See the emails received from Trial Chamber I on 4 December 2015 at 14h48 and on 11 December 2015 at 16h54.

⁹ See the Request, *supra* note 2.

¹⁰ *Idem*, para. 2.a).

¹¹ *Ibid.*, para. 2.b).

III. Submissions

1. The issues identified by the Prosecution arise from the Decision

9. It is submitted that both issues for which the Prosecution is seeking leave to appeal arise from the Decision.

10. According to established jurisprudence, an “issue” for the purposes of article 82(1)(d) of the Rome Statute is “[a]n identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”;¹² it is therefore constituted “[b]y a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.¹³ Furthermore, the identified issue must arise from the relevant decision and cannot refer to abstracts legal questions or hypothetical concerns.¹⁴

11. The Legal Representative submits that, as rightly pointed out in the Request,¹⁵ the First Issue “squarely” arises from the Chamber’s ruling that “[w]itness preparation, as a general rule, is not appropriate in this case”;¹⁶ and the Second Issue emanates from the Chamber’s finding that “[t]he risks of witness preparation in this case are [not] outweighed by any other factors”.¹⁷

12. The Issues are linked and address, on the one hand, the Chamber’s findings in relation to the appropriateness of witness preparation as a general rule before the Court and, on the other hand, its specific use in the present case. In this regard, the

¹² 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. 9.

¹³ *Idem.*

¹⁴ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 8.

¹⁵ See the Request, *supra* note 2, paras 10 and 15.

¹⁶ See the Decision, *supra* note 3, para. 19.

¹⁷ *Idem.*

Legal Representative submits that they are both plainly discrete and identifiable subjects the resolution of which was essential for the Decision leading to the rejection of the Draft Witness Preparation Protocol.¹⁸ Indeed, the Chamber essentially made its determination rejecting the Protocol on the specific ground that the practice of witness preparation is inappropriate as a general rule and its risks are not outweighed by any other element.¹⁹

13. It is further submitted that both issues – far from being a mere disagreement of the Prosecution with the Chamber’s rulings mentioned *supra* – identify concrete legal questions and impending concerns that also impact on the rights of the victims and those of the Defence. Indeed, were the Appeals Chamber to find that witness preparation is relevant for a Party’s ability to present its case, the balance between risks and benefits made by the Trial Chamber in the Decision would need to be reconsidered and may lead to a substantial different conclusion.

2. The issues identified by the Prosecution affect the fair and expeditious conduct of the proceedings

14. Moreover, the Legal Representative submits that the Issues “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, in the sense of having “[t]he potential [...] to significantly hinder, limit or otherwise have a considerable bearing on the scope and the exercise of the rights of the parties in pursuing their legitimate interests in the proceedings before the Court”,²⁰ and being “[c]losely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”.²¹

¹⁸ *Ibid.*, para. 19 and p. 12.

¹⁹ *Idem.*

²⁰ See the “Decision on the ‘Request for Leave to Appeal the Pre-Trial Chamber’s Failure to Issue a Decision’ filed by the Defence of Saif Al Islam Gaddafi” (Pre-Trial Chamber I), No. ICC-01/11-01/11-556, 11 June 2014, para. 22.

²¹ *Idem.*, para. 18.

15. As the Request correctly points out, the “fair conduct of the proceedings” is a broad notion that “encompasses fairness to all its participants, including victims and witnesses who testify”.²² In this regard, the Legal Representative wishes to underline that she represents twenty victims that will testify during the proceedings. It must be noted that, among these dual status individuals, there is a considerable number of vulnerable witness, namely victims of sexual violence, elderly and ill persons. None of them has ever before testified before the Court and the issues expected to arise during their testimony are likely to be particularly traumatic and sensitive for them.

16. Accordingly, the Legal Representative submits that depriving these witnesses of a preparation session before their testimony is intrinsically unfair to them and runs against the Court’s obligation pursuant to article 68(1) of the Rome Statute to guarantee the safety and psychological well-being of victims and witnesses.

17. The Legal Representative also concurs with the Request that the issues related to witness preparation have a direct impact on the expeditiousness of the proceedings.²³ Indeed, witness preparation sessions will ensure a more accurate, complete and efficient presentation of the witnesses’ evidence, which in turns “facilitates a fair, effective and expeditious trial”.²⁴ Indeed, as found by Trial Chamber V in the *Ruto* case and underlined in the Request, “[g]iven [...] the large number of potential exhibits, showing witnesses potential exhibits ahead of time will assist in the efficient conduct of proceedings”.²⁵ In other words, more disruptions and delay may be caused if witness preparation is not allowed by the Chamber in the case at hand, since in that case witnesses may not be in a position to give the Chamber the most complete version of their evidence and may need substantially more time to consider and understand documents and exhibits with which they are likely to be confronted for the very first time at trial.

²² See the Request, *supra* note 2, para. 30.

²³ *Idem*, paras. 33-38.

²⁴ See the “Decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-524, 2 January 2013, para. 31.

²⁵ See the “Decision on witness preparation”, *supra* note 24, para. 33; and the Request, para. 35.

3. The issues identified by the Prosecution affect the outcome of the trial

18. The Legal Representative concurs with the Request that the Issues are likely to affect the outcome of the trial.²⁶ In this regard, the Appeals Chamber has stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²⁷

19. In this regard, the Legal Representative submits that the oral testimony of witnesses is likely to constitute the prevalent type of evidence that will be presented at trial by the parties and participants and, as such, it is crucial for the proceedings. As it has been noted by Trial Chamber V, “[a] witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber’s truth finding function”.²⁸

4. The Appeals Chamber’s immediate resolution of the issues identified by the Prosecution may materially advance the proceedings

20. The Legal Representative concurs with the Request that granting the application in respect of the Issues will materially advance the proceedings.²⁹

21. The Appeals Chamber has interpreted the sentence “materially advance the proceedings” as to “move forward” “[b]y ensuring that the proceedings follow the right course”.³⁰ Whether this is the case involves an assessment by the relevant Chamber as

²⁶ See the Request, *supra* note 2, para. 39.

²⁷ 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”, *supra* note 12, para. 13.

²⁸ See the “Decision on witness preparation”, *supra* note 24, para. 31.

²⁹ See the Request, *supra* note 2, paras. 40-43.

³⁰ See “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 12, para. 15.

to whether the authoritative decision by the Appeals Chamber will rid “[t]he judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.³¹

22. In light of the arguments presented *supra* in relation to the likely impact of the Issues on the fairness³² and the outcome of the trial,³³ the Legal Representative submits that the immediate resolution of said Issues would materially advance the proceedings in so far it would avoid that the lack of witness preparation vitiates the fairness of the whole proceedings, potentially constituting a subject of appeal at the end of the trial.

IV. Conclusion

23. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to grant the Request.



Paolina Massidda
Principal Counsel

Dated this 17th day of December of 2015

At The Hague, The Netherlands

³¹ *Idem.*

³² See *supra*, paras. 14-16.

³³ See *supra*, para. 17.