

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

No: ICC-02/11-01/15

Date: 10 May 2016

TRIAL CHAMBER I

Before:

**Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson**

SITUATION IN COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE

Public

Request for leave to appeal the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (ICC-02/11-01/15-498)

Source: Defence of Mr Charles Blé Goudé

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

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I. Introduction

1. The Defence hereby respectfully requests from Trial Chamber I (“the Chamber”) to be granted leave to appeal the “*Decision adopted amended and supplemented directions on the conduct of the proceedings*” (“the Impugned Directions” or “the New Directions”) issued on 4 May 2016.

II. Procedural history

2. On 3 September 2015, the Chamber adopted its “Directions on the conduct of the proceedings” (“the Initial Directions”).¹
3. Before the appearance of the first witness and between 3 February and 18 March 2016, the Chamber and the Presiding Judge issued several rulings related to the conduct of proceedings and to the mode of questioning of the witnesses. Some of them contradicted the Initial Directions.²
4. On 4 May 2016, the Chamber issued the Impugned Directions,³ for which Judge Henderson filed a separate opinion.⁴

III. Applicable law

5. Pursuant to article 82(1)(d) of the Rome Statute (“the Statute”) provides that a party may appeal:

“[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the [...] Trial Chamber, an immediate resolution by the Appeals

¹ ICC-02/11-01/15-205.

² See for example ICC-02/11-01/15-T-13-Red-ENG WT 03-02-2016 1-73 NB T, p. 1 line 14 to p. 3 line 18, on the issue of leading questions.

³ ICC-02/11-01/15-498, with amended directions as ICC-02/11-01/15-498-AnxA.

⁴ ICC-02/11-01/15-498-Anx1.

Chamber may materially advance the proceedings.”

6. Pursuant to rule 155(1) of the Rules of Procedure and Evidence (“the Rules”):

“When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall [...] make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.”

7. Regulation 65 of the Regulations of the Court further provides that:

“1. An application for leave to appeal under rule 155 shall [...] specify the legal and/or factual reasons in support thereof. [...]

2. An application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons warranting immediate resolution by the Appeals chamber of the matter of the issue.”

8. On the principle of non-retroactivity, article 24(2) of the Statute states that:

“In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply”.

9. Furthermore, article 51(4) of the Statute specifically provides that:

“The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.”

IV. Submissions

10. Article 82(1)(a), (b) and (c) of the Statute provides a list of decisions that may be appealed whereas paragraph (d), as a residual provision, sets forth the legal criteria a decision must meet in order for the parties to seek leave to appeal.
11. The Defence hereby submits that the Impugned Directions meet all the following legal criteria as set forth in article 82(1)(d): the Impugned Directions involve two appealable issues (IV.1.), which would significantly affect the fair and expeditious conduct of the proceedings (IV.2.), and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings (IV.3.).

IV.1. The Impugned Directions raise two appealable issues

12. In a founding decision of 13 July 2006,⁵ the Appeals Chamber delivered a definition of the “issue” according to article 82(1)(d):

“An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is a disagreement or conflicting opinion.”⁶

13. In the instant case, the Impugned Directions raise the following appealable issues:

⁵ Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9-13

⁶ *Ibid.* para 9.

IV.1.1. Whether the Chamber created legal uncertainty in issuing the New Directions in the absence of changed circumstances, which circumstances had justified the issuance of the Initial Directions.

14. The Defence organized its preparation of the trial on the basis of the Initial Directions because the Chamber had issued them a few months before the beginning of the trial and as such, for the parties and participants they were legitimate. Further, the parties and participants expected to rely on them.

15. In return, the parties could reasonably and legitimately expect that the directions would not change unless the circumstances under which they had been adopted changed. Judge Henderson summarized such expectation:

“[...] those choices were made and the mere fact that the Chamber issued the Directions of 3 September 2015 entitled the parties to expect that the Chamber would stand by its choices, unless there were very serious reasons to diverge from them.”⁷

16. However, the Initial Directions have been amended orally by the Chamber since 3 February 2016,⁸ i.e. just before the actual beginning of the trial. So, it cannot be said that the changes decided at this very moment were virtually based on a change of circumstances as the Initial Directions had not yet been given a chance to be tested in trial. Since then, other amendments have been decided on practical matters that arose in the course of the trial⁹ but The New Directions change provisions of the Initial Directions concerning matters that, to date, have not been addressed by the parties and participants.¹⁰ Thus, it is

⁷ ICC-02/11-01/15-498-Anx1, para. 4.

⁸ ICC-02/11-01/15-T-13-Red-ENG WT 03-02-2016 1-73 NB T, p. 1 line 14 to p. 3 line 18.

⁹ See for example ICC-02/11-01/15-T-20-Red-ENG WT 10-02-2016, p. 53 line 10 to p. 55 line 24; ICC-02/11-01/15-T-22-CONF-ENG ET 12-02-2016, p. 56.

¹⁰ See for example, the provisions on admission of documentary evidence, ICC-02/11-01/15-498-AnxA, paras. 43 to 47.

neither fair nor accurate to say that the changes and amendments brought to the Initial Directions, both the oral decisions of 3 February and the New Directions of 4 May 2016, were justified by *“actual developments [that] are inherent in the nature of the trial.”*¹¹

17. In other words, no concrete reasons emerged from the course of the proceedings that would justify the amendments of the Initial Directions as in fact, such directions had not been yet tested.

18. On the contrary, instead of standing as amendments and replacements, the Impugned Directions consist of a complete reconsideration of the Initial Directions, as Judge Henderson noted.¹² Indeed, it is quite obvious, and the Chamber does not deny it, that it has decided to opt for a different procedural approach than the one that had been retained in the Initial Directions.¹³ Therefore, the Initial Directions are not simply amended due to the actual development of the trial, rather they are fully and deeply reconsidered following a completely different procedural paradigm.

19. As Judge Henderson noticed, if the New Directions are not mere amendments but consist in a reconsideration of the previous Initial Directions, then such reconsideration should have been treated carefully by the Chamber taking into account certain standards found by other Trial Chambers *“[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.”*¹⁴

¹¹ ICC-02/11-01/15-498, para. 10.

¹² ICC-02/11-01/15-498-Anx1, para. 5 and especially footnote No. 2.

¹³ ICC-02/11-01/15-498, para. 11.

¹⁴ See Trial Chamber VI, Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal, 18 March 2015, ICC-01/04-02/06-519, at para. 12; Trial Chamber V(A), The Prosecutor v. William Sarnoei Ruto and Joshua Arap Sang, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, at para. 19.

20. The Defence respectfully opposes the possibility for the Chamber to change the “rules” at the outset of the trial without any concrete change of circumstances being triggered by developments at trial and without receiving the parties’ views.

IV.1.2. Whether the Chamber misinterpreted the right to a fair trial in reconsidering and/or amending the Initial Directions without receiving or even requesting the parties’ views and observations.

21. As a preliminary observation, the Defence would like to recall what took place on 3 February 2016, i.e. during the first hearing dedicated to the presentation of evidence in this trial. For this purpose, the Defence would like to quote Judge Henderson’s separate opinion:

“[...] prior to the first witness giving evidence for the Prosecution, the Presiding Judge, in an oral decision – *proprio motu* and without receiving the parties’ submissions – announced several new rules on how witnesses were to be questioned, which were at variance from the Directions of 3 September 2015.”¹⁵

22. On this occasion, the parties’ views were not solicited. Besides, on the next day, 4 February 2016, the Presiding Judge heard the parties’ requests for leave to appeal the said oral decisions after granting them no more than one hour to prepare and present their arguments related to such leave to appeal,¹⁶ which were all rejected the next day.¹⁷

¹⁵ ICC-02/11-01/15-498-Anx1, para. 7.

¹⁶ ICC-02/11-01/15-T-14-ENG ET WT 04-02-2016, p. 5 line 17 to p. 7 line 20.

¹⁷ ICC-02/11-01/15-T-15-Red-ENG WT 05-02-2016, p.1 line 15 to p. 7 line 17.

23. The Impugned Directions have been issued without consideration of and consultations from the parties' views and observations. Such views and observations have not been requested by the Chamber. If it is true that, during the Status Conference held on 26 April 2016, the parties made oral submissions on the consequences of all the oral decisions issued to date, this was done without knowing that such a change in the conduct of the proceedings was contemplated by the Chamber. If the parties had known the Chamber's intentions, they would have filed substantial and extensive written submissions, since as of 3 February 2016, they have constantly repeated their concerns regarding the amendments affecting the Initial Directions.
24. The Defence would like to emphasize that the present debate is not a mere disagreement on what the conduct of the proceedings and the procedural background of the trial should be or not be. On the contrary, the present debate concerns the fair guarantees on which the parties to a trial may rely when the rules of such trial are to be modified and without which there can be neither fairness nor expeditiousness of the proceedings.

V.2. The resolution of the issue would significantly affect the fair and expeditious conduct of the proceedings

25. In the *Lubanga* case, the Appeals Chamber provided a sound definition of the criteria to be met in order to be granted leave to appeal under article 82(1)(d) of the Statute:

“The term “fair” in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1)) and article 21 (3); making its interpretation and application subject internationally recognized human rights.”

26. In the same decision, the Appeals Chamber held that the *“expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”*.

27. Both the Impugned Directions and Judge Henderson’s separate opinion underline the importance of the directions on the conduct of the proceedings. The Impugned Directions are characterized by their *“technical nature and their being instrumental to the fundamental need to ensure the fair and expeditious conduct of the trial”*¹⁸ while Judge Henderson contemplates them as *“the procedural system [a chamber] has adopted”*.¹⁹

28. The directions on the conduct of the proceedings consist in a set of rules according to which the parties prepare and present their respective cases. As Judge Henderson found:

“[...] the fact of the change itself may negatively affect them. This is because parties prepare, months in advance of the actual trial, with a particular set of rules in mind. [...] If a change to the rules renders some of that preparation useless, this may cause unfairness, because the party could have used its limited resources to better effect otherwise.”

29. In the instant case, unfairness ensues from several factors:

- The legal uncertainty as characterized by the issuance of the New Directions which imply a radical change in the conduct of the proceedings without any reason justifying such change;

¹⁸ ICC-02/11-01/15-498, para. 10.

¹⁹ ICC-02/11-01/15-498-Anx1, para. 5.

- The legal uncertainty as characterized by the contradiction between some of the oral decisions issued in February and March 2016 and the Impugned Directions;²⁰
- The impossibility for the parties to present their observations before the issuance of the Impugned Directions.

30. Hence, the resolution of the issues here is directly related to the fair and expeditious conduct of the proceedings.

V.3. The issue requires an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

31. The Appeals Chamber's immediate resolution of the two above issues would materially advance the proceedings.

32. The Defence draws the Chamber's attention to the definition given by the Appeals Chamber of the terms "immediate" which means avoiding errors by referring the issue to the Appeals Chamber; "advance" which means to move forward by ensuring that the proceedings follow the right course; and "proceedings" which means the proceedings in their entirety.²¹ In this regard, the Appeals Chamber stated that:

"A wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those

²⁰ For example, the Chamber orally banned leading questions to the witnesses on 3 February 2016 (ICC-02/11-01/15-T-13-Red-ENG WT 03-02-2016, p.1 line 22 to p.2 line 5) , before generally allowing such practice for the calling and the non-calling parties in the Impugned Directions (ICC-02/11-01/15-498, para. 16 and ICC-02/11-01/15-498-AnxA, para. 28).

²¹ ICC-01/04-168, paras. 14-19.

circumstances the proceedings will not be advanced but on the contrary they will be set back.”²²

33. The parties have been preoccupied by the Directions on the conduct of the proceedings since 3 February 2016 and the first oral decision amending the Initial Directions. It is clear that a decision from the Appeals Chamber would definitely resolve the issues at stake and allow the Chamber, the parties and the participants to move forward.

34. The directions on the conduct of the proceedings are of such importance for the technical and procedural aspects of a trial that issues attached to their genesis and application should be resolved immediately in order for the trial to be ruled by appropriate and fair rules.

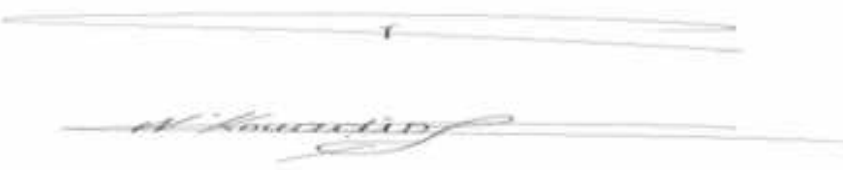
RELIEF SOUGHT

For the fore going reasons, the Defence respectfully requests the Chamber to:

- BE GRANTED leave to appeal the Decision adopting amended and supplemented directions on the conduct of the proceedings.

Respectfully submitted,

²² *Ibid.*, para. 16.



Mr. Knoops, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this

10 May 2016

At The Hague, the Netherlands