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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION INCÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Public Document

Consolidated response to Mr Blé Goudé's and Mr Gbagbo's requests for leave to appeal the "Decision adopting amended and supplemented directions on the conduct of the proceedings" (ICC-02/11-01/15-510 and ICC-02/11-01/15-521)

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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 Blé Goudé’s request (the “Blé Goudé Request”) and Mr Gbagbo’s request (the “Gbagbo Request”) for leave to appeal the “Decision adopting amended and supplemented directions on the conduct of the proceedings” issued by the Chamber on 4 May 2016 (the “Decision”)² do not satisfy the requirements of article 82(1)(d) of the Rome Statute and must be rejected.

2. Neither the Blé Goudé Request nor the Gbagbo Request demonstrates that the alleged issues identified by the Defence arise from the Decision and can be the subject of an interlocutory appeal. Both Requests merely represent the Defence’s disagreement with and misreading of the ruling because the Decision (i) ensures legal certainty by codifying prior oral decisions in light of the applicable law and the development of the proceedings, (ii) is informed by the submissions received from the parties and participants, (iii) is not operative with respect to past occurrences, (iv) does not empower the Chamber to limit the rights of the Accused or to replace the parties and participants in the selection and presentation of the evidence, and (v) does not prevent the Defence from requesting time to prepare its questioning of the witnesses.

3. Moreover, the Requests fail to show that the issues allegedly arising from the Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In particular, the Requests do not articulate how each of said issues specifically meets the requirements of article 82(1)(d) of the Rome Statute, and are based instead on hypotheses and mere speculations.

¹ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015; and the “Decision on victims’ participation status” (Trial Chamber I), No. ICC-02/11-01/15-379, 7 January 2016, p. 23.

² See the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-498, 4 May 2016 (the “Decision”).

II. Background

4. On 3 September 2015, the Chamber adopted the “Directions on the conduct of the proceedings” (the “3 September 2015 Directions”).³

5. On 26 April 2016, a status conference was held before the Chamber, where the parties and participants made submissions on several issues relating to the conduct of the proceedings, including with a view to enhancing the efficiency and the expeditiousness of the trial.⁴

6. On 4 May 2016, the Chamber issued the Decision, whereby, *inter alia*, it adopted the revised “Directions on the conduct of the proceedings” (the “Revised Directions”),⁵ and decided that the Revised Directions “[s]hall replace and supersede the 3 September 2015 Directions in their entirety, as well as previous oral rulings of the Chamber departing from their content”.⁶

7. On 10 May 2016, Mr Blé Goudé’s Defence submitted its request (the “Blé Goudé Request”),⁷ seeking leave to appeal the Decision on the following two issues:

- i) The Chamber created legal uncertainty in issuing the Revised Directions in the absence of changed circumstances, which circumstances had

³ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015 (the “3 September 2015 Directions”).

⁴ See the transcript of the hearing held on 26 April 2016, No. ICC-02/11-01/15-T-34-CONF-ENG ET (open session), pp. 1-45.

⁵ See the Decision, *supra* note 2, para. 9 and p. 8; and the “Annex A to Decision adopting amended and supplemented directions on the conduct of the proceedings” (Trial Chamber I), No. ICC-02/11-01/15-498-AnxA, 4 May 2016 (the “Revised Directions”).

⁶ See the Decision, *supra* note 2, para. 14 and p. 8.

⁷ See the “Request for leave to appeal the “Decision adopting amended and supplemented directions on the conduct of the proceedings” (ICC-02/11-01/15-498)”, No. ICC-02/11-01/15-510, 10 May 2016 (the “Blé Goudé Request”).

justified the issuance of the 3 September 2015 Directions (the “First Blé Goudé Issue”);⁸ and

- ii) The Chamber misinterpreted the right to a fair trial in reconsidering and/or amending the 3 September 2015 Directions without receiving or even requesting the parties’ views and observations (the “Second Blé Goudé Issue”).⁹

8. On 11 May 2016, Mr Gbagbo’s Defence submitted its request (the “Gbagbo Request”),¹⁰ seeking leave to appeal the Decision on the following five issues:

- i) The Chamber made an error of law in establishing as a principle the possibility to change the Directions at any time, thereby challenging the legal certainty (the “First Gbagbo Issue”);¹¹
- ii) The Chamber made an error of law in adopting a decision with retroactive effects to the prejudice of the parties (the “Second Gbagbo Issue”);¹²
- iii) The Chamber made an error of law in interpreting the accused’s right to be tried without undue delay as a tool to manage the proceedings (the “Third Gbagbo Issue”);¹³
- iv) The Chamber made an error of law in granting itself the power to instruct the parties to prioritise and bring forward evidence (the “Fourth Gbagbo Issue”);¹⁴ and

⁸ *Idem*, paras. 14-20.

⁹ *Ibid.*, paras. 21-24.

¹⁰ See the “Demande d’autorisation d’interjeter appel de la «Decision adopting amended and supplemented directions on the conduct of the proceedings» (ICC-02/11-01/15-498)”, No. ICC-02/11-01/15-521, 11 May 2016 (the “Gbagbo Request”).

¹¹ *Idem*, paras. 22-30.

¹² *Ibid.*, paras. 31-41.

¹³ *Ibid.*, paras. 42-48.

- v) The Chamber made an error of fact in not allowing the Defence a real preparation of the “*contre-interrogatoires*” (the “Fifth Gbagbo Issue”).¹⁵

9. Pursuant to regulation 65(3) of the Regulations of the Court, the Legal Representative submits the following consolidated response to the Blé Goudé Request and to the Gbagbo Request (the “Requests”).

III. Submissions

1. The issues identified by the Defence do not arise from the Decision

a. The First Blé Goudé Issue and the First Gbagbo Issue

10. The Legal Representative submits that the First Issue identified in the Requests does not arise from the Decision, but from prior oral decisions for which leave to appeal was not requested or was not granted.

11. In fact, the Blé Goudé Defence heavily relies on the oral amendments of the Directions allegedly made by the Presiding Judge on 3 February 2016 and thereafter.¹⁶ The Gbagbo Defence equally relies on several instances where the Chamber allegedly made oral amendments in the past.¹⁷ However, if the Defence disagreed with any of said amendments, it should have submitted a request for leave to appeal the relevant rulings within the five-day deadline provided for interlocutory appeals in rule 155(1) of the Rules of Procedure and Evidence.

¹⁴ *Ibid.*, paras. 49-52.

¹⁵ *Ibid.*, paras. 53-57.

¹⁶ See the Blé Goudé Request, *supra* note 7, para. 16, referring to ICC-02/11-01/15-T-13-Red-ENG WT, p. 1, line 14 to p.3, line 18.

¹⁷ See the Gbagbo Request, *supra* note 10, para. 26, referring to ICC-02/11-01/15-T-8-Red-FRA, pp. 1-3, lines 13-24 [sic].

12. In addition, the Defence's mere contentions that "[l]e principe de la sécurité juridique, interdit tout changement des règles du jeu en cours de partie"¹⁸ and that "[n]o concrete reasons emerged from the course of the proceedings that would justify the amendments of the Initial Directions"¹⁹ do not reveal the existence of an appealable "issue" under article 82(1)(d) of the Rome Statute, but a mere disagreement with the Decision.

13. Since a disagreement or conflicting opinion cannot amount to an appealable "issue" under article 82(1)(d) of the Rome Statute,²⁰ the fact that the Defence disagrees with the Decision, as such, does not suffice for leave to be granted regarding the First Issue.²¹

14. The Legal Representative submits that the Defence also misunderstands or misrepresents the Decision and, as such, the First Issue cannot constitute an appealable "issue" pursuant to article 82(1)(d) of the Rome Statute.²²

15. Contrary to the Blé Goudé Defence's submissions, the Decision is not a "[c]omplete reconsideration of the Initial Decisions, as Judge Henderson noted",²³ but a "[m]odification or additions to the current directions [...] in light of actual developments".²⁴

¹⁸ See the Gbagbo Request, *supra* note 10, para. 27.

¹⁹ See the Blé Goudé Request, *supra* note 7, para. 17.

²⁰ 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.

²¹ See the transcript of the hearing held on 10 November 2015, No. ICC-02/11-01/15-T-5-ENG ET, p. 15, lines 18-20; and the transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 38, lines 11-13. See also the "Decision on Defence's requests seeking leave to appeal the 'Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record' and seeking suspensive effect of it." (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015, para. 9; and the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 19.

²² See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 21, para. 19. See also the "Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record'" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-132, 10 July 2015, para. 3 and references contained therein.

²³ See the Blé Goudé Request, *supra* note 7, para. 18.

²⁴ See the Decision, *supra* note 2, para. 10. See also, *idem*, paras. 9-10.

16. Judge Henderson did not qualify the Decision as a “complete reconsideration” of the 3 September 2015 Directions,²⁵ but merely addressed *in abstracto* the “[c]riteria that must be met before a Chamber may start amending the procedural system it has adopted”.²⁶ In fact, Judge Henderson expressly left it “[f]or the parties and the LRV to assess whether and, if so, to what extent, such changes that are being made have any beneficial or adverse impact on the way they conduct their respective cases”.²⁷

17. Moreover, contrary to the Blé Goudé Request, the Legal Representative submits that the Chamber has not “[d]ecided to opt for a different procedural approach than the one that had been retained in the Initial Directions [...] following a completely different procedural paradigm”.²⁸

18. In support of this contention, the Blé Goudé Defence merely mentions the “[m]ain principles upon which the revised directions rely”, referring to the part of the Decision identifying (i) the accused’s statutory right to be tried without undue delay, (ii) the Chamber’s statutory mandate to ascertain the truth, (iii) the applicable law pursuant the Rome Statute, and (iv) the Chamber’s trial management powers.²⁹

19. All the above mentioned “principles” are provided for in the Rome Statute (articles 67(1)(c), 69(3), 21 and 64 thereof, respectively). As such, the Legal Representative submits that they inform not only the Decision, but also the 3 September 2015, and cannot be argued to be a “different procedural approach”.

20. The Gbagbo Defence, in turn, claims that the Decision infringes the principle of legal certainty because it fails to provide actual reasons for amending the 3

²⁵ Cf. the Blé Goudé Request, *supra* note 7, para. 18.

²⁶ See the “Separate Opinion of Judge Henderson”, No. ICC-02/11-01/15-498-Anx1, 4 May 2016, para. 5.

²⁷ *Idem*, para. 12.

²⁸ Cf. the Blé Goudé Request, *supra* note 7, para. 18.

²⁹ See the Blé Goudé Request, *supra* note 7, footnote 13, referring to the Decision, *supra* note 2, para. 11.

September 2015 Directions³⁰ and because it contradicts an oral ruling issued by the Chamber on 9 March 2016.³¹

21. In this regard, the Legal Representative submits that the Gbagbo Defence fails to notice that the Decision expressly states that “[i]n shaping the revised text of the directions, the Chamber has considered the submissions made by the parties both in the filings listed in paragraph 7 above and during the status conference held on 26 April 2016 and has deliberately refrained from restating what is explicitly provided for in the applicable law pursuant to Article 21 of the Statute”.³² Accordingly, the Decision cannot be said to lack reasoning.

22. When it comes to the contradiction alleged by the Gbagbo Defence, the Legal Representative submits that the Decision is perfectly consistent with the oral ruling issued by the Chamber on 9 March 2016.

23. Said ruling granted an objection made by the Gbagbo Defence against the Prosecution’s intended use of Witness P-625’s prior statement during the latter’s testimony. The Chamber’s finding on that occasion that “[i]t may be legitimate to first consider inviting a witness to refresh his [the witness’s] memory before considering whether such a witness has become adverse or not appearing desirous of providing the evidence expected”³³ is almost *verbatim* reproduced in paragraph 41 of the Revised Directions (“The Chamber may allow the parties to use an earlier statement during the questioning to the extent that the reference to the earlier statement is aimed at either (i) refreshing the witness’s memory or at (ii) confronting the witness with earlier statements that appear to contradict or are inconsistent with the witnesses’ sworn testimony”).³⁴

³⁰ See the Gbagbo Request, *supra* note 10, paras. 25, 28 and 30.

³¹ *Idem*, para. 29.

³² See the Decision, *supra* note 2, para. 10.

³³ See the transcript of the hearing held on 9 March 2016, No. ICC-02/11-01/15-T-27-ENG ET (open session), p. 3, lines 21-23.

³⁴ See the Revised Directions, *supra* note 5, para. 41.

b. The Second Blé Goudé Issue and the Second Gbagbo Issue

24. Regarding the Second Issue, the Defence's submissions do not reveal the existence of an appealable "issue" under article 82(1)(d) of the Rome Statute but a mere disagreement with the Decision.³⁵

25. The Blé Goudé Defence's contention that "[v]iews and observations have not been requested by the Chamber"³⁶ prior to the issuance of the Decision is inaccurate, since the Chamber invited the parties to submit concrete proposals for measures which might be implemented with a view of enhancing the efficiency and the expeditiousness of the trial when it circulated the agenda of the status conference held on 26 April 2016.³⁷

26. Moreover, during said status conference, the Presiding Judge hinted at the possible issuance of the Decision, when he reassured the Defence "[t]hat the Chamber is working all these issues and questions which have been posed to the Chamber, clarifications and all these things. We're working on these things, so it's not that we are – it's new to us, all these requests for clarifications [...] the Chamber is working also in light of paragraph 17 of the conduct of the proceedings and based on the experience of these first two months to try to find solutions to expedite proceedings".³⁸

27. In this regard, the Blé Goudé Defence argues that "[i]f the parties had known the Chamber's intentions, they would have filed substantial and extensive written submissions".³⁹ However, on 26 April 2016 the Chamber expressly encouraged the parties and participants "[i]f you have proposals to submit to the Chamber for measures

³⁵ See *supra* note 21.

³⁶ See the Blé Goudé Request, *supra* note 7, para. 23.

³⁷ See the e-mail received from the Trial Chamber on 21 April 2016 at 16h59.

³⁸ See the transcript of the hearing held on 26 April 2016, No. ICC-02/11-01/15-T-34-CONF-ENG ET (open session), p. 20, lines 3-6 and p. 25, lines 16-19.

³⁹ See the Blé Goudé Request, *supra* note 7, para. 23.

which might be implemented in order to enhance the proceedings, also according to paragraph 17 of the conduct of the proceedings. I think we should be also in this sense proactive”.⁴⁰

28. In these circumstances, the complaints made by the Blé Goudé Defence only demonstrate its disagreement with the Decision.

29. In turn, the Gbagbo Defence argues that “[e]n adoptant des directives aux effets rétroactifs qui portent préjudice à la Défense, la Chambre a donc commis une erreur de droit qui invalide la Décision attaquée”.⁴¹ The Legal Representative submits that this contention does not reveal the existence of an appealable “issue” under article 82(1)(d) of the Rome Statute, but only another disagreement with the Decision.

30. The Gbagbo Defence wrongly relies on a judgement by the Appeals Chamber in the *Ruto and Sang* case to conclude that “[t]out changement du cadre procédural après le début du procès sera considéré comme rétroactif”.⁴² By contrast, in said judgment the Appeals Chamber only ruled that “[a]mendments to the Rules of Procedure and Evidence [...] are governed by the specific provisions of article 51 (4) of the Statute”.⁴³

31. Even assuming *arguendo* the validity of the Gbagbo Defence’s contention referred to in the preceding paragraph, the Legal Representative submits that it is not applicable to the Decision.

32. None of the three instances mentioned by the Defence, namely the Revised Directions on the use of prior statements during the course of the testimony, judicial notice and questioning on issues “relevant to the charges”, have a “retroactive” effect, *i.e.* are operative with respect to past occurrences.

⁴⁰ See the transcript of the hearing held on 26 April 2016, No. ICC-02/11-01/15-T-34-CONF-ENG ET (open session), p. 38, line 25 to p. 39, line 3.

⁴¹ See the Gbagbo Request, *supra* note 10, para. 41.

⁴² *Idem*, para. 36.

⁴³ See the “Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’” (Appeals Chamber), No. ICC-01/09-01/11-2024 OA10, 12 February 2016, paras. 1 and 73 (emphasis added).

33. The Defence merely expresses its disagreement with the Chamber's findings⁴⁴ and/or refers to hypothetical considerations,⁴⁵ which cannot be the subject of an interlocutory appeal under article 82(1)(d) of the Rome Statute.⁴⁶

c. The Third Gbagbo Issue

34. The Legal Representative submits that the Third Gbagbo Issue does not arise from the Decision but from the Defence's misrepresentation thereof. As such, this Issue cannot constitute an appealable "issue" pursuant to article 82(1)(d) of the Rome Statute.⁴⁷

35. The Defence takes issue with the Chamber's finding in the Decision that one of the "[m]ain principles upon which the revised directions rely on [...] [is] the accused's right to be tried without undue delay and the subsequent need to maximise the efficiency of time spent in the courtroom".⁴⁸

36. However, the Defence's disagreement with this finding stems from a misrepresentation thereof. The Defence concludes that on the basis of this finding "[l]a Chambre distribuerait [le temps] à volonté selon son propre agenda et notamment en fonction de raisons administratives [sic]",⁴⁹ whereas "[l]a notion de célérité de la procédure [...] ne peut être utilisée [...] par les Juges pour limiter la marge de manœuvre de l'Accusé et l'empêcher de faire valoir ses autres droits".⁵⁰

⁴⁴ See the Gbagbo Request, *supra* note 10, paras. 38 and 39.

⁴⁵ *Idem*, para. 40.

⁴⁶ 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; the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'" (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 26 and the references contained therein; and the "Decision on 'Defence Request for Leave to Appeal the 'Decision on Defence Request for Relief for Abuse of Process'" (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6 and the references contained therein.

⁴⁷ See *supra* note 22.

⁴⁸ See the Gbagbo Request, *supra* note 10, para. 42, referring to the Decision, *supra* note 2, para. 11.

⁴⁹ See the Gbagbo Request, *supra* note 10, para. 43.

⁵⁰ *Idem*, para. 44.

37. The Legal Representative submits that the Decision nowhere makes reference, either expressly or impliedly, to the abovementioned criteria or to the Chamber's intention to limit the rights of the accused. Accordingly, the Decision cannot be said to lack a valid legal reason.⁵¹

d. The Fourth Gbagbo Issue

38. The Legal Representative submits that the Fourth Gbagbo Issue does not arise from the Decision but from another misrepresentation thereof by the Defence. As such, this Issue cannot constitute an appealable "issue" pursuant to article 82(1)(d) of the Rome Statute.⁵²

39. The Defence argues that with the Revised Directions, "[l]es Juges s'octroient ici le pouvoir de se substituer aux Parties dans leurs choix",⁵³ whereas articles 64(3)(a) and 67(1)(b) of the Rome Statute "[n]e perme[nt] à l'évidence pas à la Chambre de se substituer aux Parties dans la sélection et la présentation des éléments de preuve qu'elles comptent utiliser".⁵⁴

40. However, the Legal Representative submits that the Revised Directions only make reference to "[t]he power [of the Chamber] to identify issues critically relevant to its determination of the charges and to instruct the parties to prioritise and bring forward evidence relating to such issues first"⁵⁵ and to "[a]lter the order of witnesses to the extent required for trial management purposes".⁵⁶ These powers stem from a plain reading of articles 64(3)(a) and 64(6)(f) of the Rome Statute.

⁵¹ Cf. the Gbagbo Request, *supra* note 10, para. 48.

⁵² See *supra* note 22.

⁵³ See the Gbagbo Request, *supra* note 10, para. 50.

⁵⁴ *Idem*, para. 51.

⁵⁵ See the Revised Directions, *supra* note 5, para. 3..

⁵⁶ *Idem*, para. 4.

e. The Fifth Gbagbo Issue

41. Regarding the Fifth Gbagbo Issue, the Defence's submissions do not reveal the existence of an appealable "issue" under article 82(1)(d) of the Rome Statute but a mere disagreement with the Decision.⁵⁷

42. The Defence argues that with the Decision, "[s]ans prévoir de périodes sans audience entre les différents blocs de témoins, la Chambre porte atteinte au droit de l'Accusé de bénéficier du temps nécessaire à la préparation de sa Défense".⁵⁸

43. However, the Legal Representative submits that the Decision cannot be said to prevent the Defence from requesting an extension of time to prepare its questioning of a witness, if deemed necessary. The mere fact that the Decision does not expressly contemplate the periods of time argued by the Defence to be necessary to prepare its questioning of the witness called by the Prosecution, the Chamber or the Legal Representative does not necessarily imply that the Decision denies the Defence the time for said preparation.

44. The Legal Representative submits that the fact that the Decision is silent on an issue deemed important by the Gbagbo Defence does not mean *per se* that an appealable "issue" under article 82(1)(d) arises from the Decision. In this regard, the Gbagbo Request can only be read as a disagreement with the Decision.⁵⁹

2. The issues identified by the Defence do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

45. Since it is clear that none of the Issues identified by the Defence arise from the Decision, the Request must be dismissed on this basis alone. Assuming *arguendo* that

⁵⁷ See *supra* note 21.

⁵⁸ See the Gbagbo Request, *supra* note 10, para. 56.

⁵⁹ *Idem*, paras. 54-55.

any of said issues arises from the Decision, the Legal Representative opposes the Defence's contention that they significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial for the following three reasons.

46. Firstly, contrary to the requirements of article 82(1)(d) of the Rome Statute,⁶⁰ the Defence does not articulate how each of the alleged Issues specifically affects the fairness and expeditiousness of the proceedings or the outcome of the trial.

47. The Gbagbo Defence simply refers to the principle of legal certainty, the allegedly retroactive effect of the Revised Directions and an undefined limitation in the accused's margin to prepare and present his defence.⁶¹ Similarly, the Blé Goudé Defence refers to the importance of the directions on the conduct of the proceedings in the abstract,⁶² and merely states that the Revised Directions "[i]mply a radical change in the conduct of the proceedings".⁶³ These submissions, sparse and without any supporting arguments, do not explain how each of the alleged Issues affects the fairness of the proceedings or the outcome of the trial. Therefore, they cannot suffice for granting leave to appeal the Decision.

48. Moreover, the Blé Goudé Defence wrongly claims that the parties could not present their observations before the Chamber issued the Revised Directions,⁶⁴ and refers to a non-existent contradiction between the latter and previous oral decisions on the use of leading questions.⁶⁵

⁶⁰ See the "Decision on the 'Prosecution's Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility" (Trial Chamber II), No. ICC-01/04-01/07-1958, 11 March 2010, para. 20. See also the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'", *supra* note 46, para. 34.

⁶¹ See the Gbagbo Request, *supra* note 10, para. 58.

⁶² See the Blé Goudé Request, *supra* note 7, para. 22.

⁶³ *Idem*, para. 29.

⁶⁴ *Ibid.*, para. 29.

⁶⁵ *Ibid.*, footnote 20.

49. In this regard, as argued *supra*,⁶⁶ the parties and participants were indeed allowed to present oral and written submissions before the Chamber issued the Decision. Moreover, the Legal Representative submits that the alleged contradiction regarding the use of leading questions does not exist because the Chamber clarified on 4 February 2016, upon request by the Defence, that “[i]t is not considered to be *“leading” the challenge/confrontation -- or to confront a witness with facts or circumstances (such as documents, prior statements of the witness or other persons, et cetera) which are or appear to be in contradiction with the testimony given by the witness while in the stand casting doubts on his or her credibility, and to ask questions and/or clarifications on these contradictory facts or circumstances*”.⁶⁷ This decision was ratified when the Chamber rejected the Defence’s request for leave to appeal,⁶⁸ and is included, with a different wording, in the Revised Directions.⁶⁹

50. Secondly, both Requests fail to address the alleged impact of each Issue on the expeditiousness of the proceedings. Article 82(1)(d) of the Rome Statute requires verifying that each of the issues affects both the fair and the expeditious conduct of the proceedings.⁷⁰

51. Lastly, the Requests are largely based on hypotheses and mere speculations on the application of the Revised Directions. The Defence constantly refers to abstract

⁶⁶ See *supra* paras. 25-27.

⁶⁷ See the transcript of the hearing held on 4 February 2016, No. ICC-02/11-01/15-T-14-ENG ET (open session), p. 3, lines 15-20.

⁶⁸ See the redacted transcript of the hearing held on 5 February 2016, No. ICC-02/11-01/15-T-15-Red-ENG WT, p. 1, line 15 to p. 7, line 17.

⁶⁹ See the Revised Directions, *supra* note 5, paras. 28 and 41.

⁷⁰ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21; and the “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’” (Pre-Trial Chamber II), No. ICC-01/05-01/08-532, 18 September 2009, para. 16.

considerations,⁷¹ which as such cannot be the subject of an interlocutory appeal under article 82(1)(d) of the Rome Statute.⁷²

52. In this regard, the Chamber has already clarified, regarding the manner in which the parties and participants are to question the witnesses, that “[w]hether the decision impacts on the fairness and expeditiousness of the proceedings or the outcome of the trial cannot be predetermined in the abstract but will depend on how the impugned decision is implemented on a case-by-case basis in the sense of how this control [by the Chamber] will be exercised”.⁷³

3. The Appeals Chamber’s immediate resolution of the issues identified by the Defence will not materially advance the proceedings

53. The Defence contends that an immediate resolution by the Appeals Chamber would materially advance the proceedings because the trial must be ruled by appropriate and fair rules,⁷⁴ and because no adequate remedy could be provided for if the alleged Issues were to be decided in an appeal against the eventual judgement.⁷⁵

54. In this regard, since the Issues identified by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁷⁶

⁷¹ See, for instance, the Gbagbo Request, *supra* note 10, paras. 38-40, 43, 51 and 54.

⁷² See *supra* note 46.

⁷³ See the transcript of the hearing held on 5 February 2016, No. ICC-02/11-01/15-T-15-Red-ENG WT, p. 6, lines 16-19.

⁷⁴ See the Blé Goudé Request, *supra* note 7, para. 34.

⁷⁵ See the Gbagbo Request, *supra* note 10, para. 60.

⁷⁶ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 21, para. 26.

IV. Conclusion

55. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to reject the Requests.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 16^h day of May of 2016

At The Hague, The Netherlands