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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public document

Prosecution's Consolidated Response to the Defence for Mr Blé Goudé and the Defence for Mr Gbagbo applications 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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Introduction

1. On 3 September 2015, Trial Chamber I adopted its “Directions on the conduct of the proceedings”.¹ On 3 February 2016, the Presiding Judge amended the 2015 Directions and introduced, *inter alia*, a confined change relating to the mode of questioning,² which he later clarified.³ Since then, the Trial Chamber has issued several rulings addressing concrete issues which arose in the courtroom and were not foreseen in the 2015 Directions.⁴ The Parties have provided submissions on these issues.⁵ On 4 May 2016, the Trial Chamber revised, clarified and supplemented the 2015 Directions (“Directions”).⁶

2. On 10 and 11 May 2016, the Defence for Mr Blé Goudé and for Mr Gbagbo sought leave to appeal the Directions.⁷ Both Applications should be dismissed *in limine*: while Blé Goudé fails to address all the required criteria of article 82(1)(d), Gbagbo merely lists a set of purported issues without explaining how the article 82(1)(d) criteria are met. In addition, the Applications similarly fail on their merits. With the exception of Gbagbo’s Fourth Issue, which relates to the Trial Chamber’s authority to interfere with the Parties’ discretion to present their case, the issues do not arise from the Directions. Rather, they re-litigate the Chamber’s 3 February 2006 Decision and misunderstand the Directions. Contrary to the Defence’s submissions, the Directions do not introduce major changes to the 2015 Directions; rather, they largely reproduce the old provisions and, in addition, address new matters – not foreseen in the 2015 Directions – which had arisen at trial and to which the Parties provided submissions. In any event, should the Trial Chamber nevertheless find that the Issues arise, neither Gbagbo’s Fourth Issue, nor any of the other Issues meet the remaining criteria of article 82(1)(d).

¹ ICC-02/11-01/15-205 (“2015 Directions”).

² ICC-02/11-01/15-T-13-Red-ENG, page 1, line 19 to page 3, line 8 (“3 February 2016 Decision”).

³ ICC-02/11-01/15-T-15-Red ENG ET (“Transcript of 5 February 2016”), page 14, line 22 to page 15, line 9.

⁴ See below footnotes 19 and 20.

⁵ See below footnote 21.

⁶ ICC-02/11-01/15-498 (“Decision on Directions”) and ICC-02/11-01/15-498-AnxA (“Directions”). Together, the “Impugned Decision”.

⁷ ICC-02/11-01/15-510 (“Blé Goudé Application”) and ICC-02/11-01/15-521 (“Gbagbo Application”). Collectively, “the Applications”.

Submissions

A. The Issues are not appealable issues

3. Blé Goudé raises two issues while Gbagbo raises five issues.⁸ An “issue” is a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.⁹ As set out below, although Gbagbo’s Fourth Issue arises from the Impugned Decision, none of the Defence Issues meets all article 82(1)(d) criteria.

Blé Goudé’s and Gbagbo’s First Issues on the legal uncertainty caused by the amendments

4. Blé Goudé’s and Gbagbo’s First Issues both relate to the alleged legal uncertainty resulting from the Trial Chamber’s amendments to the 2015 Directions (Blé Goudé)¹⁰ and from the Trial Chamber’s indication that new changes may be necessary (Gbagbo).¹¹ Blé Goudé’s First Issue does not arise from the Directions, but from the 3 February 2016’s Decision where the Trial Chamber slightly amended the 2015 Directions for the first time.¹² On 4 February 2016 both Defence teams orally sought leave to appeal an aspect of the ruling (mode of questioning).¹³ On 5 February 2016, the Majority of the Chamber rejected the applications and further clarified the Decision.¹⁴ Thus, Blé Goudé First Issue does not arise from the Directions.

5. Gbagbo’s First Issue does not correctly represent the Directions. The Trial Chamber did not indicate that the Directions would be continuously modified

⁸ Collectively referred to as “Issues”.

⁹ ICC-01/04-168, para. 9.

¹⁰ Blé Goudé Application, paras. 14-20: “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”.

¹¹ Gbagbo Application, paras. 22-30: “La Chambre a erré en droit en posant comme principe la possibilité de changer à tout moment la procédure, remettant ainsi en cause la notion de sécurité juridique”.

¹² 3 February Decision.

¹³ ICC-02/11-01/15-T-14-ENG ET, pages 7-17. The Prosecution supported the applications: ICC-02/11-01/15-417.

¹⁴ Transcript of 5 February 2016, page 6, line 7 to page 7, line 17. The Trial Chamber further clarified that leading questions are not *per se* prohibited but only “those which are framed in a manner which predetermines the answer, unduly directing, manipulating or influencing evidence to be provided by a witness and which, as such, are unfair to the witness”. See Transcript of 5 February 2016, page 14, line 22 to page 15, line 9.

without foundation;¹⁵ rather, it held that the Directions may be subject to modifications to address new issues arising from the proceedings.¹⁶ Indeed, the Trial Chamber has a duty to ensure a fair and expeditious conduct of the proceedings by providing suitable answers to unforeseen questions. Neither the Statutory framework nor the Directions can foresee – and thus be comprehensive and responsive to – every single issue that might arise at trial. Indeed, article 64(6)(f) and rule 134(3) both specifically recognise the authority of the Chamber to rule, during the course of the trial, on relevant matters that may arise, including in relation to the conduct of proceedings.

6. Further, both Applications are premised on a misunderstanding of the Directions. Contrary to the Defence submissions,¹⁷ the Directions do not significantly alter the 2015 Directions. Rather, they largely reproduce the original provisions, but also cover issues that arose at trial and were already addressed by the Parties. Indeed, the Directions reproduce and further clarify the 3 February 2016 Decision regarding the mode of questioning,¹⁸ and other rulings relating to the use of video recordings in the courtroom¹⁹ and the transcripts of these videos, *inter alia*.²⁰ In addition, the Parties have provided submissions on these topics.²¹

¹⁵ *Contra*, Gbagbo Application, paras. 23, 27, 30.

¹⁶ Decision on Directions, para. 10: “by their technical nature and their being directly instrumental to the fundamental need to ensure the fair and expeditious conduct of the trial, directions are subject to modification, including in light of actual developments. Such developments are inherent in the nature of a trial and, as such, not predictable in advance”.

¹⁷ *Contra*, Blé Goudé Application, paras. 16-18 and Gbagbo Application, paras. 27, 30.

¹⁸ Directions, para. 28.

¹⁹ Directions, para. 47. The Trial Chamber addressed this question in ICC-02/11-01/15-T-31-ENG, page 4, lines 1-7 (“Transcript of 16 March 2016”) ; ICC-02/11-01/15-T-32-ENG ET, page 56, lines 7-13 and page 59, lines 4-12 (“Transcript of 17 March 2016”); ICC-02/11-01/15-T-33-ENG ET, page 4, lines 12-20 (“Transcript of 18 March 2016”); and ICC-02/11-01/15-467, para. 10.

²⁰ Directions, para. 45. This topic was decided in Transcript of 16 March 2016, page 66 line 4.

²¹ *Contra*, Blé Goudé’s Application, para. 16 and fn. 10. See submissions on the use of videos and whether the video is considered “submitted” in whole or in part: Transcript of 16 March 2016, pages 1-3; Transcript of 17 March 2016, pp. 55-59; Transcript of 18 March 2016, pages 3-4. See also ICC-02/11-01/15-485 where Gbagbo’s Defence sought clarification on this topic. On the transcripts, Blé Goudé Defence expressly requested to include this topic in the agenda of the status conference held on 26 April 2016. See Parties’ submissions in the Status Conference of 26 April 2016: ICC-02/11-01/15-T-34-CONF ENG ET (“Transcript of 26 April 2016”), page 16, line 11 to page 24, line 25. See also Decision on Directions, para. 10 where the Trial Chamber noted that it “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”.

7. Finally, and contrary to Gbagbo's submissions, the Directions do not contradict other rulings of the Trial Chamber.²² Gbagbo argues that while on 9 March 2016 the Trial Chamber rejected the Prosecution's request to show his statement to a hostile witness, the Directions permit this possibility.²³ This example is misplaced. First, the Prosecution did not intend to declare the witness hostile and, second, the 2015 Directions' silence on this possibility²⁴ did not mean that it was forbidden. Hence, its explicit regulation in the Directions does not contradict the oral ruling.

8. Accordingly, Blé Goudé's and Gbagbo's First Issues do not arise from the Impugned Decision.

Blé Goudé's Second Issue on not permitting the Parties' submissions

9. Blé Goudé Second Issue, namely, whether the Trial Chamber misinterpreted the right to a fair trial in amending the 2015 Directions without the Parties' submissions,²⁵ also fails to correctly represent the Directions. As noted above, the Trial Chamber did not significantly alter the text of the 2015 Directions; rather, it incorporated the 3 February 2016 Decision and addressed other matters not foreseen in the 2015 Directions.²⁶ As such, the Directions "revised, clarified or supplemented" the 2015 Directions.²⁷ Moreover, the Parties have provided submissions on most of the topics amended²⁸ and the Trial Chamber has considered them in issuing the Directions.²⁹ Notably, the Trial Chamber invited the Parties to submit concrete proposals for measures which might be implemented with a view of enhancing the

²² *Contra*, Gbagbo Application, para. 29 referring to ICC-02/11-01/15-T-27-ENG ET, page 3, lines 16-24.

²³ Directions, para. 41.

²⁴ The 2015 Directions however allowed to declare a witness hostile, and to refresh a witness' memory with his or her statement. See paragraphs 40-41 and 47, respectively.

²⁵ Blé Goudé Application, paras. 21-24: "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".

²⁶ See above, para. 6.

²⁷ Decision on Directions, para. 9.

²⁸ See above, footnote 21.

²⁹ Decision on Directions, para. 10.

efficiency and the expeditiousness of the trial when it circulated the agenda of the status conference held on 26 April 2016.³⁰

10. Accordingly, Blé Goudé's Second Issue does not arise from the Impugned Decision.

Gbagbo's Second Issue on the alleged retroactive application of the Directions in detriment of the Parties and the Defence

11. Gbagbo's Second Issue, namely, the alleged retroactive application of the Directions in detriment to the Parties and the Defence,³¹ is premised on a misunderstanding of article 51(4) of the Rome Statute and the Directions. Article 51(4) refers to the retroactive application of the Rules of Procedure and Evidence, and not of the Chamber's directions for the conduct of proceedings issued pursuant to rule 140. The legislator chose not to expressly regulate certain aspects of the proceedings to afford discretion and flexibility to the Chambers and the Parties. In any event, the amendments are not detrimental to the Defence. Indeed, contrary to his contention, Gbagbo has not shown any "disadvantage, loss, damage or harm to the accused including but not limited to, the rights of the person" arising of the Directions.³²

12. Further, the examples provided by Gbagbo are misplaced. First, the 2015 Directions provided no definition of facts of common knowledge.³³ In the Directions, the Trial Chamber provides for the first time a definition of this notion,³⁴ which was addressed by the Parties, upon the Prosecution's request, in the Status Conference of 26 April 2016.³⁵ Second, the 2015 Directions' silence on the possibility of confronting

³⁰ E-mail received from the Trial Chamber on 21 April 2016 at 16h59.

³¹ Gbagbo Application, paras. 31-41: "La Chambre a erré en droit en adoptant une décision aux effets rétroactifs et ce au préjudice des Parties et ici la Défense".

³² Gbagbo Application, para. 37 referring to ICC-01/09-01/11-2024, para. 78.

³³ September 2015 Directions, para. 61. *Contra*, Gbagbo Application, para. 38.

³⁴ Directions, para. 53.

³⁵ Transcript of 26 April 2016, page 25, line 13 to page 38, line 1. The Prosecution requested to introduce this topic on the agenda of the status conference held on 26 April.

adverse witnesses with their prior statements did not entail that this was forbidden.³⁶ As noted above, the Directions now expressly regulate this possibility.³⁷ Third, requiring the Parties' questions to be relevant to the charges is not detrimental to the Accused.³⁸ It is only logical that the Parties' questions address topics related to the charges for which the Accused are at trial. Permitting questions on unrelated and irrelevant topics would not assist the Chamber's determination of the truth, nor the Defence in representing their client. Rather, it would be a waste of this Court's time and resources. Further, rule 140(2)(b) allows the Parties to question witnesses on "relevant matters", which should be understood as questions "relevant to the charges". Article 69(4) also confers discretion upon the Chamber to exclude irrelevant evidence.

13. In conclusion, Gbagbo's Second Issue does not arise from the Impugned Decision.

Gbagbo's Third Issue on the Accused's right to be tried without undue delay

14. In his Third Issue, Gbagbo argues that only the Accused can appeal to his right to be tried without undue delay under article 67(1)(c).³⁹ This is not an appealable discrete issue arising from the Directions, but an abstract question or hypothetical concern. In addition, Gbagbo's submissions are inaccurate. Indeed, the Chambers, in exercise of their duty to ensure the fair and expeditious conduct of the proceedings under article 64(2), can – and must – consider this provision in managing the trial. The Appeals Chamber has confirmed that "[e]xpeditiousness is thus an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial

³⁶ The 2015 Directions separately permitted the Parties to declare a witness hostile, and to refresh a witness memory by showing his or her prior statement. See September 2015 Directions, paras. 40-41 and para. 47, respectively.

³⁷ Directions, para. 41.

³⁸ Gbagbo Application, para. 40 referring to Directions, paras. 22 and 24.

³⁹ Gbagbo Application, paras. 42-48: "La Chambre a erré en droit en interprétant le droit de l'Accusé d'être jugé sans retard excessif comme un outil à sa disposition pour gérer la procédure (la Chambre utilise la formule 'maximise the efficiency of time spent in the courtroom') ce qui conduit en fait à réduire la marge de manœuvre de l'Accusé". Gbagbo refers to Decision on Directions, para. 11 where the Trial Chamber state that "[t]he main principles upon which the revised directions rely on are the following (i) the accused's right to be tried without undue delay and the subsequent need to maximise the efficiency of time spent in the courtroom [...]"

rights of the accused. For this reason, article 64(2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious.”⁴⁰

15. Gbagbo’s Third Issue is thus not an appealable issue under article 82(1)(d) and should therefore be dismissed.

Gbagbo’s Fourth Issue on the Trial Chamber’s authority to “prioritise and bring forward evidence”

16. In its Fourth Issue, Gbagbo disputes the Trial Chamber’s indication that it may “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, subject to adequate notice”.⁴¹

17. The Trial Chamber’s authority to intervene and interfere with the Parties’ right to present their case – and the Prosecution’s duty to establish the truth pursuant to article 54(1)(a) – is a discrete issue arising from the Impugned Decision. However, for the reasons set out below, it does not meet the remaining requirements under article 82(1)(d).

Gbagbo’s Fifth Issue on not permitting the Defence to meaningfully prepare its cross-examinations

18. The Fifth Issue, relating to the Defence’s alleged lack of time to prepare its cross-examinations, is premised on a misunderstanding of the Directions.⁴²

19. In the Directions, the Trial Chamber stated that “the calling party shall provide the Chamber, parties and LRV with a list indicating the following 15

⁴⁰ ICC-01/04-01/07-2259 OA10, para. 47.

⁴¹ Gbagbo Application, paras. 49-52: “la Chambre a erré en droit en s’octroyant le pouvoir d’instruire les Parties sur la façon de ‘prioritise and bring forward evidence’”. Gbagbo refers to Directions, para. 3. See also Decision on Directions, para. 12: “the Prosecutor’s discretion as to the presentation of her evidence is subject to the Chamber’s trial management powers. [...] the Chamber emphasises its power 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, subject to adequate notice, and particularly the rights of the Defence pursuant to Article 67(1)(b) of the Statute”.

⁴² Gbagbo Application, paras. 53-57: “La Chambre a erré en ne permettant pas à la Défense une véritable préparation des contre-interrogatoires”.

witnesses it intends to call and their calling order, sufficiently in advance of the scheduled testimony. This list shall be provided before the start of the questioning of the last ten witnesses of the previous list and no later than 40 days before the questioning of the first witness on the list of their case is scheduled to testify”.⁴³ From this provision, the Defence concludes that the Chamber will not permit court breaks in between blocks of witnesses. This is incorrect and the Trial Chamber will decide on this matter in due course. In fact, although the 2015 Directions did not foresee breaks in between the evidentiary blocks, this has been the practice to date.

20. Accordingly, Gbagbo’s Fifth Issue does not arise from the Impugned Decision.

B. The Issues do not meet the criteria for leave to appeal under article 82(1)(d)

21. As noted above, only Gbagbo’s Fourth Issue arises from the Decision. However, the Gbagbo Application fails to show how this Issue meets the remaining requirements of article 82(1)(d). Gbagbo’s submissions on the article 82(1)(d) criteria are four paragraphs which generally brush through the requirements and recite jurisprudence without referring or linking the criteria to any of the five issues.⁴⁴ Trial Chamber III has recently held that applications may be dismissed *in limine* if the applicant fails “to expressly link the relevant criteria to either the specific issues identified or even the specific Impugned Decision”.⁴⁵ On this basis, the Gbagbo Application should be dismissed *in limine*.

22. Similarly, the Blé Goudé Application only refers to the purported impact of the issues on the fairness of the proceedings and how their resolution by the Appeals Chamber would materially advance the proceedings.⁴⁶ As there is no explanation on

⁴³ Directions, para. 4.

⁴⁴ Gbagbo Application, paras. 58-61.

⁴⁵ ICC-01/05-01/08-3382, para. 12.

⁴⁶ Blé Goudé Application, paras. 25-34.

how the expedition or outcome of the trial would be affected,⁴⁷ the Application should be similarly dismissed.

The Issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

23. In any event, neither Gbagbo's Fourth Issue, nor the remaining Issues raised by both Defence teams, should the Chamber find that they arise, meet the article 82(1)(d) criteria. The Defence did not show how the Issues would significantly – even potentially – affect the fairness of the proceedings, or the outcome of the trial.⁴⁸ Any potential impact will depend on whether the questions regulated in the Directions arise during the trial proceedings and how the Trial Chamber will then apply them in practice.⁴⁹

24. Similarly, and with respect to Gbagbo's Fourth Issue, the Chamber may indicate which evidence should be brought first, due to its relevance to the charges, “*subject to adequate notice and particularly the rights of the Defence under article 67(1)(b)*”.⁵⁰ Thus, the Accused's rights are specifically recognised and, at this stage, there is no indication that Gbagbo's Fourth Issue would significantly curtail the Parties' rights to present their case and affect the fairness of the proceedings or the outcome of the trial. Whether or not the fair and expeditious conduct of the proceedings is affected will depend entirely on how the Chamber will apply this provision in the future.

25. Moreover, it does not suffice to appeal – as Blé Goudé does⁵¹ – to the importance of Directions in application of rule 140 to show how the article 82(1)(d) criteria are met.

⁴⁷ Pursuant to article 82(1)(d) expedition is a cumulative requirement to fairness, and the impact of the issue on the outcome is an alternative requirement to the fairness and expedition.

⁴⁸ *Contra*, Gbagbo Application, para. 59.

⁴⁹ ICC-02/11-01/15-T-15-Red-ENG ET, page 6, lines 14-21.

⁵⁰ Decision on Directions, para. 12.

⁵¹ Blé Goudé Application, paras. 27-28.

26. Further, and as above noted, the Defence arguments are premised on a misunderstanding of the Directions. The Trial Chamber has not set out a general principle of “absolute flexibility” with no regard to the Parties’ rights.⁵² Nor do the Directions imply “a radical change in the conduct of the proceedings without any reason” or are they contradictory to previous oral decisions.⁵³ To the contrary, the Directions do not significantly alter the 2015 Directions in a way which hinders the preparation of the Defence case. Indeed, the prohibition of leading questions, decided on 3 February 2016, was the only apparent modification of the prior Directions. However, the Presiding Judge subsequently clarified his ruling and explained that leading questions were not strictly prohibited, but only questions which unfairly predetermine the witness’ answer.⁵⁴ This clarification is reflected in the Directions which require “neutral questioning” and permit leading questions when “they are conducive to the expeditiousness of the proceedings and the determination of the truth”.⁵⁵ In any event, this matter is inapposite to decide the Applications, as it arose on the 3 February 2016 Decision and has already been litigated. The Directions reproduce the old provisions and add new topics which arose at trial and were largely addressed by the Parties.⁵⁶

The Appeals Chamber’s immediate resolution of the Issues would not materially advance the proceedings

27. Finally, any Application is premature at this stage. Considering the limited impact of the Directions – if any – at the current stage of the proceedings, granting the Applications would only delay the proceedings.⁵⁷

⁵² *Contra*, Gbagbo Application, para. 58.

⁵³ *Contra*, Blé Goudé Application, para. 29.

⁵⁴ Transcript of 5 February 2016, page 14, line 22 to page 15, line 9.

⁵⁵ Directions, para. 28.

⁵⁶ *Contra*, Blé Goudé Application, para. 29.

⁵⁷ *Contra*, Blé Goudé Application, paras. 31-34; Gbagbo Application, paras. 60-61.

Relief Requested

28. For the above reasons, the Prosecution requests the Chamber to dismiss the Applications.



Fatou Bensouda, Prosecutor

Dated this 16th day of May 2016

At The Hague, The Netherlands