

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: French

No.: ICC-02/11-01/15

Date: 11 May 2016

TRIAL CHAMBER I

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

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND
CHARLES BLÉ GOUDÉ***

Public Document

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 Team for Laurent Gbagbo

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence of Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for the Defence of Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'Dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Background

1. On 3 September 2015, the Chamber, composed of Judge Henderson (Presiding Judge), Judge Carbuccia and Judge Schmitt, unanimously adopted the Directions on the conduct of the proceedings.¹
2. On 21 December 2015, the President assigned Judge Tarfusser to replace Judge Schmitt.²
3. On 11 January 2016, Judge Tarfusser was elected as Presiding Judge of the Chamber.³
4. On 3 February 2016, the recomposed Chamber rendered an oral decision on the conduct of proceedings, including an amendment of the manner of questioning the witnesses by the parties.⁴
5. Between 29 January 2016 and 4 May 2016, the Chamber rendered 14 decisions relating to the conduct of proceedings.
6. On 4 May 2016, the Chamber rendered a decision on the conduct of the proceedings⁵ replacing the Directions of 3 September 2015.

II. Discussion

7. An adversarial trial should determine whether the Prosecution has satisfactorily performed its duty of establishing that an accused person is guilty beyond reasonable doubt, failing which the accused should benefit from the presumption of innocence and be acquitted.
8. Proper conduct of a trial requires that the Parties – i.e. the Defence and the Prosecution – should be on an equal footing in order to present their cases

¹ ICC-02/11-01/15-205.

² ICC-02/11-01/15-372.

³ ICC-02/11-01/15-384.

⁴ ICC-02/11-01/15-T-8-Red-ENG, pp. 1-3, lines 13-24.

⁵ ICC-02/11-01/15-498.

with equality of arms. Both parties must therefore have equal room for manoeuvre, determined on the basis what each of them needs to present their respective cases. Hence, the rules governing the conduct of proceedings must ensure an equitable adversarial presentation of arguments such that the facts can be ascertained from this confrontation of divergent viewpoints.

9. Accordingly, the process must perforce be organized in two stages: the examination of witnesses by the Prosecution in a manner that enables them to give the most accurate account of what they witnessed; and the possibility for the Defence to test the Prosecution's evidence under the best conditions. In other words, the conduct of proceedings is not a mere formality, considering that it concerns modalities for the presentation and examination of Prosecution evidence. The conduct of proceedings must ensure that Prosecution evidence is tested under the most appropriate conditions. Hence, a discussion on the conduct of proceedings is, indeed, a discussion on the organisation of the dialogue between the parties, and on the prerequisites for that dialogue to be held and to yield an indisputable outcome.
10. Organising the conduct of proceedings is tantamount to ensuring a consistent balance of arms between the Defence and the Prosecution. That is the *sine qua non* for guaranteeing the fairness of proceedings.
11. This consistent balance does not stem from the parties having identical roles in criminal proceedings. On the contrary, it should be noted that the Prosecution is the prosecutorial arm of the International Criminal Court. The Prosecution, and not the Bench, determines the charges and their content. The Prosecution bears the burden of proof, which is a corollary to the presumption of innocence, and has to prove its allegations beyond reasonable doubt. Meanwhile, the Defence plays a completely different role: it should be afforded the necessary means to test Prosecution evidence and create doubt, above all by presenting its own case.
12. The Bench, however, stated that one of the principles which guided its decision: "the Chamber's statutory mandate to ascertain the truth pursuant

to Article 69(3) of the Statute, [...] makes it unnecessary to refer to the case as being either “the Prosecutor’s” or “the Defence’s.”⁶ By claiming that there is no difference between the Prosecution’s case and the Defence’s, the Chamber misconstrues the logic which underpins the Statute. There is, obviously, a Prosecution case, considering that the Prosecution determines the charges and has a duty to prove them. There is also a clear Defence case, since the Defence has a duty to challenge the Prosecution’s case.

13. Invoking the abstract notion of “truth” is irrelevant to the matter. In making the above statement, the Bench confuses the **outcome** of the trial, which entails determination of *a* truth – the legal truth which the Bench will have a duty to determine – and the **process** by the means of which that truth is determined and which depends essentially on the parties.
14. Similarly, the Bench’s view that “the applicable law pursuant to Article 21 of the Statute, [...] creates a unique criminal procedure, independent and distinct from any other national or international jurisdiction”⁷ is not sufficient justification for it to disregard the Statute’s clear stipulations on the respective roles of the parties (see above). The issue is not about comparing International Criminal Court proceedings with those of national courts, but rather about determining whether the procedure applied at the International Criminal Court is conducive to fair adversarial proceedings. This notion of harmonious and fair proceedings that are respectful of the rights of the Defence, which is central to the Statute, underpins the distinction between the respective roles of the Defence and the Prosecution.
15. In the instant case, failure to make the distinction between the respective roles of the Prosecution and the Defence has numerous consequences.
16. Firstly, by disregarding the fundamental difference between the respective roles of the Prosecution and the Defence in proceedings, the Chamber loses sight of the fact that, at various stages of the proceedings,

⁶ ICC-02/11-01/15-498, para. 11.

⁷ ICC-02/11-01/15-498, para. 11.

each party uses the tools at its disposal differently. For example, during the examination of Prosecution witnesses – i.e. the Prosecution case – the Prosecution, as the calling party, must do its utmost to ensure that witnesses testify freely without any interruption. Meanwhile, the role of the Defence is to test the evidence of witnesses called by the Prosecution. Conversely, during the examination of Defence witnesses, the Prosecution, not being the calling party – and just as the Defence did during the Prosecution’s case – will use the tools at its disposal to challenge the evidence and credibility of Defence witnesses. Both parties therefore rely on different means at various stages of the proceedings because they have different objectives – at each stage their viewpoints must be different if there has to be dialogue – and consequently, each party examines witnesses differently.

17. Secondly, by failing to differentiate between the respective roles of the Defence and Prosecution at various stages of the proceedings, and consequently failing to accept that they concurrently rely on different tools, the Chamber deprives them of some of these tools and takes over the roles of the parties. Consequently, the Bench arrogates to itself an exorbitant role in the proceedings. Hence, it states, without any legal basis (see below), that:

[p]ursuant to Article 64(3)(a) and having due regard to Article 67(l)(b) of the Statute, the Chamber shall have the 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.⁸

The Bench therefore considers that it can take over the role of the parties when it comes to presentation of their cases and testing of the evidence of the opposing party.

18. Thirdly, in making such a statement, and considering that it can intervene at any time either during the parties’ presentation of evidence or their testing of the evidence of the opposing party, the Chamber is narrowing and even denying any room for manoeuvre available to the parties. In fact, the

⁸ ICC-02/11-01/15-498-AnxA, para. 3.

consequences of such potential interference are more serious for the Defence than for the Prosecution, because the Prosecution logically maintains control of the presentation of its case, including the choice of charges and the modes of responsibility, whereas any interference from the Chamber is marginal since it cannot reduce the scope of the charges, and can only affect the manner in which the Prosecution presents them. Meanwhile, any interference in the Defence's work is tantamount to taking the risk of destroying its strategy and, consequently, narrowing its room for manoeuvre. Such a move is bound to affect the fairness of the trial. In other words, any interference in the Defence's work will ultimately tip the scales in favour of the Prosecution and represent a disregard of all the principles on which any defence is founded, including the freedom of the accused and his or her counsel to choose the defence strategy which they deem most appropriate. It is a basic tenet of modern and democratic criminal justice that accused persons be allowed to give their version of the facts and to present their defence against the Prosecution case, as they deem fit.

19. In the light of the above, the Defence is filing this request for leave to appeal a decision which, in its view, is grounded on a misconstruction of the procedure intended by the authors of the Rome Statute. The Defence contends that failure to differentiate between the respective roles of the parties at various stages of the trial would ultimately lead to a violation of the rights of the Defence and undermine the fairness of the trial.
20. Each point below hereunder, and which arises from the impugned Decision, is appealable because it challenges the Defence's right to a fair trial, a principle which must be observed as a *sine qua non* for the legitimacy of international criminal justice.
21. As a preliminary remark, it should be noted that, in its Decision, the Bench almost never provided any justification for its determination, especially when it reconsidered matters already settled in previous decisions. Such failure to provide a justification makes it difficult for the parties to

understand the Chamber's Decision, and by extension, to identify the errors in law or in fact committed in it.

1. Appealable points

1.1. The Chamber erred in law by adopting as a principle the possibility of changing procedures at any time, thereby jeopardizing the notion of legal certainty

22. Legal certainty is a core principle which allows the parties and, in particular, the Defence to prepare adequately for proceedings and organize themselves efficiently. Since the rules are not expected to change in the course of trial, each party is therefore aware of its room for manoeuvre. The Defence, which has fewer means and must respond to charges determined solely by the Prosecution, stands to suffer the most should the rules change in the course of trial.

23. In the impugned Decision, the Bench considered that:

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.⁹

24. This statement by the Chamber raises a number of issues.

25. Firstly, whereas the Bench considers that changes in the directions on the conduct of proceedings are essentially prompted by “actual developments,” it seems that, in reality, they are solely based on assumptions about the best theoretical way of conducting proceedings, with no attempt made to establish that the rules of 3 September 2015 are ill-adapted. In a separate opinion, Judge Henderson, points out that, “I note, in this regard, that my colleagues point to requests for clarification/leave to appeal, but [...] these relate, without exception, to unsolicited changes that were made to the Directions of 3 September 2015 *proprio motu* by the Chamber, after it was reconstituted and a new Presiding Judge was elected on 11th January 2016.”¹⁰

⁹ ICC-02/11-01/15-498, para. 10.

¹⁰ ICC-02/11-01/15-498-Anx1, para. 6.

Judge Henderson further states that “[i]n my respectful view, it is those changes in the rules after the trial had begun, that unhelpfully led to the need for clarification and not the Directions of 3 September 2015 themselves.”¹¹

26. As soon as the trial started, and before most of the provisions of the first decision on the conduct of proceedings were implemented and their applicability tested in practice, the Chamber rendered a decision modifying a number of them.¹² It subsequently decided after a short lapse of time to modify more provisions of the first decision, even though they had not been challenged by the parties.¹³ These examples show that the desire to modify the rules governing the conduct of proceedings was not in any way prompted by the manner in which the proceedings were conducted on a daily basis.
27. Secondly, the principle of legal certainty prohibits the modification of any rule in the course of trial. No modern and democratic system of justice allows the Bench to modify at will, and in the course of a trial, the procedural framework applicable to such sensitive issues as the manner in which the Parties may present evidence or put questions to witnesses. It is therefore impossible to change the applicable procedure during a trial. Considering that the ICC is still a young court, it may be logical for lawmakers who have more experience to vary the rules of procedure to ensure more efficiency. However, legal certainty must prevail over all other considerations, and the procedural framework of a given case should not be disrupted in the course of a trial.
28. In this regard, Judge Henderson notes that there is a limit to the flexibility of rules of procedure applicable to the conduct of proceedings:

¹¹ ICC-02/11-01/15-498-Anx1, para. 7.

¹² ICC-02/11-01/15-T-8-Red-ENG, pp.1-3, lines 13-24.

¹³

It is no response to say that the parties are aware of the open-textured nature of the Court's procedural framework. It is neither reasonable nor realistic to expect parties to prepare for every eventuality. [...] 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. After all, if decisions by a Trial Chamber of this Court are no more reliable than Dutch weather, then parties may legitimately complain of a breach of the principle of legal certainty.¹⁴

29. Thirdly, a review of the decision and its annex shows that the Bench not only modified the Decision of 3 September 2015, taken by an erstwhile composition of the Chamber different from the current one, but also modified recent decisions made by the current recomposed Bench. The parties are therefore left in a situation of total uncertainty. For example, on 9 March 2016, the Chamber prohibited the Prosecution from testing the reliability of one of its own witnesses using the witness' previous statements;¹⁵ yet, in the impugned Decision, the Chamber states the exact opposite.¹⁶ It follows therefore that the parties can no longer rely on the recomposed Chamber for any form of certainty even in the implementation of its own decisions. This constitutes yet another factor of uncertainty which further undermines the legal certainty to which the Parties are entitled. In this regard, the Defence notes that, although nothing in the proceedings justified such a change in attitude, one of the judges of the Chamber adopted two radically different positions successively, by initially adopting the Directions on the conduct of proceedings of 3 September 2015 in their entirety, and subsequently adopting all the new Directions on the conduct of proceedings of 4 May 2016. This is a contradictory stance that has not been justified by any explanations from the Judge concerned.
30. Under these circumstances, the impugned Decision, which substantially modifies the decision of September 2015 on the conduct of proceedings, seems to be based solely on theoretical assumptions about how proceedings should be conducted. By establishing the principle that it is possible to

¹⁴ ICC-02/11-01/15-498-Anx1, para. 4.

¹⁵ ICC-02/11-01/15-T-27-FRA, p.3, lines 19-23.

¹⁶ ICC-02/11-01/15-498-AnxA, para.41.

change the rules of procedure at any time, the impugned Decision violates the fundamental principle of legal certainty and is devoid of any legal basis.

1.2. The Chamber erred in law by adopting a decision which is applicable retroactively and is, consequently, detrimental to the parties and the Defence in particular

31. The uncertainty is aggravated by the Chamber's adoption of directions which are applicable retroactively and are, consequently, detrimental to the Defence.

32. The Defence points out that according to article 51(4) of the Statute:

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.

It follows therefore that any modification in the Court's procedural framework cannot be applied retroactively if it is detrimental to the rights of the accused.

33. Although the Directions on the conduct of proceedings are not contained in the Rules of Procedure and Evidence, they are, technically speaking, rules. They apply to procedural issues such as the admission of evidence. It would be unusual for the authors of the Statute and the Rules of Procedure and Evidence, namely the States Parties to the Rome Treaty, to be prohibited from retroactively applying new rules of procedure that are detrimental to parties, while the judges, in the exercise of the duties entrusted to them by these same States Parties, are held to a less rigorous standard regarding respect for the rights of the accused.

34. In other words, the Bench's discretionary powers in managing the conduct of proceedings are not unlimited and should respect the rights of the accused as enshrined in the Statute. Furthermore, its discretionary powers are limited by

article 51(4) of the Statute, which should logically apply to the rules on the conduct of proceedings adopted by the Bench.

35. Yet, in adopting the impugned Decision, the Bench effectively adopted rules of procedure that are applicable retroactively to the detriment of the accused.
36. Firstly, it should be noted that the issue of retroactivity with respect to the rules of procedure is addressed at the start of the trial, as clearly stated by the Appeals Chamber in *Ruto and Sang*.¹⁷ Any change in the procedural framework after the commencement of proceedings is considered to be retroactive. In the instant case, the impugned Decision was, indeed, adopted after the start of the trial.
37. Secondly, the notion of “detriment” to the accused must be interpreted broadly. In that regard, the Appeals Chamber has explained that

the Appeals Chamber considers that the term ‘detriment’ should be interpreted broadly and not be limited to violation of the rights of the person who is being prosecuted. The Appeals Chamber notes that article 51(4) of the Statute concerns amendments to the Rules, which relate to proceedings before the Court, including the admission of evidence. The Appeals Chamber therefore finds that ‘detriment’ within the meaning of article 51(4) of the Statute **is disadvantage, loss, damage or harm to the accused including, but not limited to, the rights of that person.**¹⁸

On the basis of this standard, it is clearly evident that some of the provisions of the impugned Decision place the Defence in a worse position than it was in before the Decision was adoption.

38. For example, the Chamber adopted a definition of facts “of common knowledge” for the purposes of judicial notice which is at variance with international case-law as it considers that source of information alone is sufficient to render facts “reliable”.¹⁹ Such a definition obviously violates human rights, as it relieves the Prosecution of the onus of proving what it

¹⁷ ICC-01/09-01/11-2024, para. 81.

¹⁸ ICC-01/09-01/11-2024, para. 78.

¹⁹ ICC-02/11-01/15-498-AnxA, para. 53.

claims to be facts “of common knowledge”, thereby preventing the Defence from discussing or challenging them.

39. Furthermore, the Chamber allowed the calling party to test the credibility of its own witness by reading out extracts of the witness’s previous statement.²⁰ In allowing the Prosecution to proceed in that manner, the Chamber went against the logic of the Statute by providing the Prosecution with tools that rid the examination-in-chief of its prime purpose since such tools allow the calling party to lead the witness to a certain extent. Such an approach is obviously detrimental to the Defence.
40. A last example is the Chamber’s invention of the notion of “relevant to the charges”, in connection with the Decision of 3 September 2015, which it repeatedly raises in the impugned Decision. Hence, paragraph 22 of the Directions for the conduct of Proceedings states: “[i]n principle, questions shall be clear and directly **relevant to the charges**”. Paragraph 24 states that “the Chamber may at any time request the questioning party to state the purpose behind a given line of questioning and explain how the evidence sought is **relevant to the charges**.” Paragraph 30 states that “the questioning by the non-calling party is not limited to issues raised during the questioning by the calling party insofar as it is **relevant to the charges**.” This notion of “relevant to the charges” is bound to be prejudicial to the Defence. Firstly, its use allows the Bench, in the course of the trial, to choose the aspects of the Defence’s strategy, including cross-examination, that are purportedly relevant or irrelevant to the charges, on the basis of the appreciation of the judges. This is tantamount to empowering the Judges to rely on their own vision of the case as a basis for preventing the Defence from asking questions which it deems relevant and from developing a real strategy. Secondly, since the Prosecution chooses the charges, it cannot technically be challenged on the basis of the notion, of “relevant to the charges.” Only the Defence will suffer from the adoption of such a notion which is a dangerous tool as its sole

²⁰ ICC-02/11-01/15-498-AnxA, para. 41.

impact is to limit the Defence's room for manoeuvre and curb its capacity for action.

41. By adopting directions which are applicable retroactively and detrimental to the Defence, the Chamber therefore committed an error in law which vitiates the impugned Decision.

1.3. The Chamber erred in law by interpreting the Accused's right to be tried without delay as a tool at its disposal for managing proceedings (the Chamber uses the expression "maximise the efficiency of time spent in the courtroom"), which in fact amounts to narrowing the room for manoeuvre available to the Accused

42. In the impugned Decision, the Chamber stated that it had relied on the following principle: "the accused's right to be tried without undue delay and the subsequent need to maximise the efficiency of time spent in the courtroom."²¹
43. By reducing the accused's right to be tried without delay to a mere issue of time allocated to a given trial and, more precisely, to time which the Chamber may allocate at its discretion for its own purposes including administrative concerns, the Chamber errs in law by misinterpreting what is, in fact, a basic and exclusive right of the accused.
44. The notion of "speedy trial" was intended to protect the rights of the accused. The aim was to avoid endless trials which, by definition, violate human rights. Hence, it is therefore the accused who may rely on the notion of speedy trial to demand trial without delay. However, the accused may logically make such a demand only if his or her other rights, including the right to cross-examine, are respected. In other words, only an accused person may rely on the notion of speedy trial, which should not be used by the

²¹ ICC-02/11-01/15-498, para. 11.

Prosecution or the Chamber to limit the accused's room for manoeuvre or prevent him or her from exercising his or her other rights.

45. In other words, the accused's exercise of his or her rights cannot be considered as causing "undue delay," as that would amount to compelling him or her to choose among his or her fundamental rights.
46. Lastly, therefore, only the accused may allege undue delay. Trial without undue delay is the exclusive right of the accused, and may not, under any circumstances, be assimilated to a bureaucratic time management objective.
47. The fairness of proceedings must be construed as applicable exclusively to the accused. What is at stake is the freedom of the accused who, alone, constitutes the focus of the trial. In fact, it is worth noting that the Prosecution, as the prosecuting arm of the Court, obviously has no right to a fair trial. That would make no sense. In essence, human rights are designed to protect individuals against risk of abuse by a State or Authority. In criminal proceedings, human rights are the framework within which the duties and roles of the various parties and stakeholders are organised. Judicial dialogue is possible only when the weaker party can express itself on the same footing as the Authority. The guaranteed rights of the accused make him or her a free party in the judicial process; they are intended to protect the weaker party, namely the accused. No human rights instrument has ever provided that the Prosecution or the Bench can claim the same rights as the accused – or worse still, against the accused – in criminal proceedings.
48. By founding its decision on a misinterpretation of the accused's right to be tried without delay, the Chamber deprived that decision of any basis in law.

1.4. The Chamber erred in law by arrogating to itself the power to direct the parties on how to "prioritise and bring forward evidence"

49. In the new directions on the conduct of proceedings, the Chamber states that:

Pursuant to Article 64(3)(a) and having due regard to Article 67(1)(b) of the Statute, the Chamber shall have the 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.²²

50. This directive is contrary to the principle that parties are free to present their case as they desire. The Bench arrogates to itself the power to make such decisions in lieu of the parties, thereby reducing their room for manoeuvre.
51. Furthermore, the directive has no legal basis. Although the Chamber cites articles 64(3)(a) and 67(1)(b) of the Statute, neither of them constitute grounds for the directive. Article 64(3)(a) states in general terms that the Chamber shall “[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.” It is evident that this article does not authorize the Chamber to take over the role of the parties in selecting and presenting the evidence they intend to rely on. Similarly, article 67(1)(b) relates to the accused’s right to have adequate time and facilities to prepare his or her defence; it provides no grounds for the power which the Chamber has arrogated to itself.
52. Consequently, it follows that paragraph 3 of the new directions on the conduct of proceedings has no basis in law, and this vitiates the impugned Decision.

1.5. The Chamber erred in not allowing the Defence to properly prepare its cross-examination

53. In the impugned Decision, the Chamber states that:
the calling party shall provide the Chamber, parties and LRV with a list indicating the following 15 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

²² ICC-02/11-01/15-498-AnxA, para. 3.

last ten witnesses of the previous list and no later than 40 days before the questioning of the first witness on the list is scheduled to start.²³

54. This provision seems to address the Defence's expressed desire to be afforded sufficient time to organize and prepare its cross-examination in advance. Its aim, therefore, is to protect the non-calling party from the being pressurized into preparing in only a few hours. If this is indeed the Chamber's intention, then something fundamental is missing in the Decision, namely: the time required by the non-calling party to prepare. In fact, there is no point in obtaining the list of the next 15 witnesses no later than 40 days before the questioning of the first of the 15 witnesses, if the non-calling party is not afforded sufficient time to prepare and if the said 40 days are wholly devoted to cross-examination of the previous witnesses. Furthermore, it should be noted that the Defence cannot afford the means to simultaneously conduct cross-examination and prepare future cross-examinations.
55. The key issue in the instant case is about matching the deadlines with the means available to the parties. While the Prosecution – thanks to the large number of staff on whom it can rely – can simultaneously examine witnesses in Court and prepare the following week's examination, the entire Defence team – which is limited to four positions, excluding that of case manager – must completely focus on ongoing hearings. In other words, the Defence cannot afford to deploy part of its small team to preparation of the following week's cross-examination.
56. In making this ruling, without providing for periods when there are no hearings after each batch of witnesses, the Chamber violates the accused's right to be afforded sufficient time to prepare his defence.
57. The Chamber therefore committed a manifest error of fact in the impugned Decision in considering that it afforded the Defence the means to prepare, whereas it did not actually give it the time to do so, thereby jeopardizing the

²³ ICC-02/11-01/15-498-AnxA, para. 4.

accused's capacity to defend himself and, consequently, the fairness of the trial.

2. An appeal is justified at this stage

2.1. The resolution of this issue could significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial

58. The Defence has noted how each of the appealable points could affect the fairness of the proceedings or the outcome of the trial. By focusing on absolute flexibility in the rules of procedure applicable to the conduct of proceedings as its guiding principle, the impugned Decision utterly disregards the principle of legal certainty. Furthermore, being retroactively applicable to existing rules of procedure, the Decision is detrimental to the Defence. Lastly, the Decision seriously narrows the accused's room for manoeuvre in preparing and presenting his defence.

59. These risks are real and not hypothetical. It should be noted that "absolute certainty about how a decision will affect the expeditiousness of the proceedings is not a precondition under Article 82(l)(d)."²⁴ The Defence is not bound to prove with absolute certainty – which is impossible – that the expeditiousness, fairness or outcome of the trial might be affected. It suffices for it to demonstrate the "potential" for this to happen, and that is the case here.

2.2. The immediate resolution of the issue is required to advance the proceedings materially

60. If the matter were not brought before the Appeals Chamber immediately, the trial would be conducted in accordance with directives that might harm the fairness of proceedings. Were the Appeals Chamber to concur with the Defence on these points in the event of an appeal of a judgment, the whole

²⁴ ICC-01/04-01/07-3327, para. 14.

trial would be challengeable, and there might be no satisfactory remedy for the accused.

61. The immediate resolution of the above-mentioned matters by the Appeals Chamber will cure the judicial process of defects that could affect either the fairness or the outcome of the trial.²⁵ Should the impugned Decision be found to have no legal basis and justification, only a prompt decision by the Appeals Chamber could ensure that the trial does not proceed in violation of the fundamental rights of the accused.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I, to:

Considering article 82(1)(d), rule 155(1) and regulation 65;

- **Grant** the Defence leave to appeal the impugned Decision.

[signed]

Emmanuel Altit
Lead Counsel for Laurent Gbagbo

Dated this 11 May 2016

At The Hague, Netherlands

²⁵ ICC-02/04-177.