

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

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

Date: **13 May 2015**

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public Document

Application for leave to appeal the “order setting the commencement date for trial” (ICC-02/11-01/15-58)

Source: Defence team for Laurent Gbagbo

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

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I- Applicable law on leave to appeal

1. On 31 July 2013, the Presiding Judge of the Pre-Trial Chamber stated:

[...] the provisions of article 82(1)(d) of the Statute define the requirements to which not only the parties but also the Chambers must adhere. In light of the nature of these requirements, it can be said that the Chambers are accorded a large margin of appreciation, but they have not been entrusted with an unfettered discretion to decide whether or not to grant an appeal. A decision under article 82(1)(d) of the Statute is not a policy decision but a legal one that needs to be taken on the basis of an impartial and objective assessment of whether the issues raised meet the requirements of the Statute. Therefore, and taking into account that the Chamber concerned will be dealing with a challenge to its own product, it is essential that it makes, and is seen to be making, an impartial and objective assessment of whether the issues proposed for appeal by the parties meet the criteria set forth in the Statute. In particular, the determination of an “issue” within the meaning of article 82(1)(d) of the Statute appears to require a rather simple and straightforward assessment by the Chamber of whether the question identified by the party arises from what is actually said in the impugned decision.¹

2. Otherwise put, a bench which issued an impugned decision cannot avail itself of the opportunity of a party’s application for leave to appeal the decision to flesh out, clarify, interpret or supplement the decision. Nor may a bench dismiss an application for leave to appeal by embarking on a discussion with the appellant so as to give precedence to its viewpoint. For example, where a party seeking leave to appeal considers that the Chamber erred in law, it would not be for the Chamber to seek to show that it had duly applied the law. The bench must confine itself to ascertaining that the point may constitute an error of law. On no account must the bench determine whether an error of law exists, but rather whether it might exist. Otherwise, the bench would be both arbiter and party. That same reasoning must apply irrespective of the basis for seeking leave to appeal. For instance, where the appellant argues lack of legal basis, it is not for the bench to discuss the appellant’s argument, much less state that its ruling had a legal basis; it rests with it only to ascertain whether the absence of legal basis was duly raised.

¹ ICC-02/11-01/11-464-Anx, paras. 5 and 6.

3. In fact, on 31 July 2013, the Single Judge stated further that where the “fairness of proceedings is at the core of the issue proposed for appeal by the Defence, it is in my view self-evident that the issue affects the fair conduct of the proceedings.”²

4. Turning to the manner in which the application was framed, the Presiding Judge stated: “the Defence Application should not be rejected for lack of proper identification of an appealable issue, but should be considered further in light of the substance of the arguments that are advanced therein”.³

5. In this respect, the Presiding Judge’s statement is consistent with the decisions of the Pre-Trial Chamber, which on 31 July 2013 held that an “issue” ill-framed by a movant may be reformulated “with a view to receiving meaningful guidance by the Appeals Chamber.”⁴

6. Accordingly, leave to appeal must be granted where the issue of the fairness of proceedings arises explicitly or implicitly from a decision of the Pre-Trial Chamber or the Single Judge. Furthermore, according to the Presiding Judge, it is the duty of the bench to identify such issues in an application for leave to appeal, and even to recast them so that they may be laid before the Appeals Chamber.

II- Discussion

7. On 7 May 2015, the Chamber set “the trial commencement date” for 10 November 2015, “in order to hear the opening statements of the parties and participants”, and the presentation of Prosecution evidence to start in January 2016, on a date to be confirmed.

8. Of note is that at the status conference of 21 April 2015, the Prosecution commented: “[...] one thing is for sure, January, which may seem more

² ICC-02/11-01/11-464-Anx, para. 71.

³ ICC-02/11-01/11-464-Anx, para. 63.

⁴ ICC-02/11-01/11-464-Anx, para. 36.

practical in the circumstances”,⁵ specifying January as “an appropriate date [...] for all of these reasons”.⁶ In its submissions in prospect of the status conference, the Defence for Charles Blé Goudé stated that “it is reasonable that the Trial against Mr. Blé Goudé ought not to commence within 12 months (counting from 21 April 2015)”.⁷

9. The Defence for Laurent Gbagbo set out in writing and at the hearing of 21 April 2015 a straightforward calculation of the time needed for preparation of the defence using a ratio of work to be accomplished to available resources.⁸

10. It is necessary, the Defence argued, to reckon for:

- Time to analyse and evaluate the material imparted by the Prosecution, including the statements of the 130 witnesses whom the Prosecution is preparing to call, 80 of whom are new as of the confirmation of charges stage. Court practice suggests that two working days per Prosecution witness suffice, amounting to 230 working days. Past practice of the Chambers has on the whole been consistent in this regard: three months for 30 to 40 witnesses.⁹
- Time to analyse, by cross-checking against the pre-trial brief all 8,356 documents disclosed by the Prosecution, that is, 53,176 pages and 298 hours, 47 minutes and 8 seconds of audio- and video-material. The Defence underscored that it would take around 13,294 hours (at a rate of four pages an hour) to read, scrutinise, analyse, cross-check and use the documents in preparation for cross-examination and 597 hours to watch and analyse the audio- and video-material, all of which would amount to six people working full-time for over thirteen months. The Defence team has five full-time positions.

⁵ ICC-02/11-01/15-T-1-CONF-ENG, lines 21-22, p. 88.

⁶ ICC-02/11-01/15-T-1-CONF-ENG, p. 89, lines 1-2.

⁷ ICC-02/11-01/15-33, para. 34.

⁸ ICC-02/11-01/15-32-Conf, para. 99.

⁹ For example ICC-01/04-01/07-999, para. 12 and ICC-01/04-01/07-1174, para. 7.

- Time to analyse and evaluate material from the victims calculated on the basis of Registry documents and the Chamber's decision.
- Time for investigations *in situ*. The Defence pointed out that, given the extent of the preparation necessary, the investigations should require at least three months before trial commenced and it made clear that during those investigations, the team members would be unable to perform other tasks.
- Time to prepare for cross-examination before the commencement proper of the trial.
- Time to negotiate agreements as to evidence.

11. Otherwise put, the preparation time required by the Defence can be quantified by the tasks to be performed, entailing a straightforward calculation of hours, and by the limited resources available to the Defence. The time needed is, therefore, derived from the ratio of tasks to resources.

12. That time cannot be curtailed as it would be inconceivable for one person to analyse over 100 pages a day etc. The time needed to prepare the defence cannot, therefore, be reduced.

13. In this connection, the Prosecution stated in *Ongwen* that its determination of the work required of each member of its staff to read documents was based on an average of 50 pages a day.¹⁰

14. In view of these quantifiable factors, the Defence for Laurent Gbagbo and the Defence for Charles Blé Goudé considered a trial start date of April 2016 as reasonable, provided that the Prosecution disclosed all of its evidence, the pre-trial brief and additional documents by 30 June 2015.¹¹ Moreover, such a

¹⁰ ICC-02/04-01/15-196-Conf-Exp, ICC-02/04-01/15-196-Red2, para. 17.

¹¹ ICC-02/11-01/15-33, para. 34 and ICC-02/11-01/15-T-1-CONF-FRA, lines 18-22, p. 96.

time frame for the Prosecution's disclosure of all of its evidence, including the pre-trial brief, is consistent with Court practice.¹²

15. It would appear, however, that the Trial Chamber has disregarded the Defence's numerical considerations by arbitrarily and groundlessly setting commencement of trial for 10 November 2015 and of the presentation of the Prosecution evidence for January 2015 on a date to be determined, thus depriving the Defence of the time necessary to prepare effectively and efficiently. The Defence is therefore disadvantaged from the outset as the Prosecution will have had four years in which to build its case, which violates the fairness of the proceedings.

16. Upon analysis, it is apparent that:

- Nowhere in the impugned decision does the Bench explain why and how it arrived at 10 November 2015 for the start of trial and January 2016 (date to be confirmed) for the start of the presentation of the Prosecution evidence. It therefore did not provide the grounds for its decision, in violation of the spirit of the Statute, the previous decisions of the Court¹³ and the provisions of international human rights instruments.
- The Bench does not appear to have taken into account the Defence's arguments, which were founded on a straightforward calculation. By making commencement proper of trial too imminent, the Bench is preventing the Defence from duly analysing all of the material imparted and from undertaking the necessary investigations in preparation for cross-examination. By so proceeding, it is in breach of the letter and the spirit of the Statute and article 67 in particular.

¹² ICC-02/11-01/15-32-Anx.

¹³ For example, ICC-01/04-01/07-475, para. 101.

- The Bench has erred in fact by stating that it afforded the Defence six months' total preparation time,¹⁴ whereas it allowed it less than four months before the presentation of the Prosecution evidence.
- The Chamber erred in considering the opening statements as separate from the commencement proper of the trial.

1. Issues founding the appeal

1.1 Absence of grounds in the decision for the date for the commencement proper of the trial

17. The body of arguments advanced by the Defence for Laurent Gbagbo on the time needed to mount an effective and efficient defence, as set out in writing and stated at the hearing of 21 April 2015, was underpinned by a detailed calculation which was based on objective and quantifiable factors and reckoned for at least twelve months. At the hearing of 21 April 2015, the Defence pointed out that were the Prosecution to disclose the body of its evidence, including the pre-trial brief, by 30 June 2015 and were it to confine itself to disclosure of the material referred to in its submissions of 14 April 2015 as new evidence, commencement of trial in April 2016 would be foreseeable. If allowance was made for the Court's move to the new premises (early December 2015 to mid- or late January 2016), preparation time would **in effect** amount to five months.

18. Five months constitutes the minimum for the Defence to prepare and was the time frame accorded to it by the Trial Chamber in its decision of 17 November 2014.¹⁵

¹⁴ ICC-02/11-01/15-58, para. 16

¹⁵ ICC-02/11-01/11-746, para. 14.

19. However, the Chamber has decided, without explanation, to depart from that time frame by setting trial to commence on 10 November 2015. That date leaves the Defence only three months' preparation after judicial recess. The Chamber has tacked on two months after 10 November 2015 – "thereafter, it will have two additional months before the commencement of the presentation of evidence". However those two months in effect leave the Defence only three weeks (from 10 November to 1 December 2015) until the Court's move. Since the Prosecution is due to start presenting its evidence as soon as the Court is in a position to resume activity in January 2016, these three weeks must be taken into account. The Defence is thus effectively left with three months and three weeks of preparation time as of 16 July 2015.

20. The Chamber does not explain why the five months, which it considered reasonable to accord the Defence in November 2014 should now be *curtailed* to less than four, whereas the Defence's workload has since almost doubled as a result of the joinder and the "astronomical" number of witnesses whom the Prosecution intends to call. Nor does the Chamber explain its disregard for the calculations, which were based on the Defence's objective criteria.

21. The lack of grounds means that the decision is unfounded in law. As Judge Ušacka has recalled, "[...] reasoning is at the heart of a judicial decision and an important aspect of the right to a fair trial".¹⁶

22. The duty to state the reasoning, that is, to substantiate, is upheld by all international human rights bodies¹⁷ for one simple reason, on which Judge Ušacka expounds:

providing reasoning is a **requirement of a fair trial that contributes to the acceptance of the decision by the parties and to preserving the rights of the Defence**. It requires that courts indicate with sufficient clarity the grounds upon which they base their decisions [...] the courts must base their reasoning on objective arguments and it must be clear from the decision that the essential

¹⁶ ICC-02/11-01/11-278-Conf, dissenting opinion, para. 8.

¹⁷ *Idem*, para 9.

issues of the case have been addressed. Further, and importantly, reasoning is the basis for raising an appeal and allows the appellate body to review a decision.¹⁸

23. The duty to set out the grounds is the bed-rock of justice. Justice cannot rest on arbitrariness or an impression of arbitrariness. A duty is therefore cast on the courts to explain the grounds in fact and in law for each of their decisions, not only to the parties concerned but also to the community they represent. In that sense, the body of grounds forms not only the substratum of a given decision, but serves also to reaffirm and bolster the intangible principles which form the fabric of any society. By failing to explain why it did not act upon the objective criteria set out by the Defence and, on the contrary, decided to curtail the time which it had been granted, the Bench appeared to give precedence to considerations of expediency over those of principle.

24. The European Court of Human Rights has on a number of occasions recalled the duty of the courts to state the grounds for their decisions as being among the safeguards of the right to a fair trial, enshrined in article 6 of the ECHR¹⁹ (*Hadjianastassiou v. Greece*:²⁰ the national courts must “indicate with sufficient clarity the grounds on which they based their decision”).

25. The Appeals Chamber of the ICTY has likewise confirmed that the right to a reasoned decision forms part of the right to a fair trial and that only such decisions could be duly entertained.²¹ Specifically, it held: “[...] at a minimum, the Trial Chamber must provide reasoning to support its findings regarding [the substantive considerations] relevant to its decision”.²²

¹⁸ *Idem*.

¹⁹ *Higgins and Others v. France*, 19 February 1998 (134/1996/753/952).

²⁰ <http://hudoc.echr.coe.int/fre?i=001-57779>.

²¹ *Nikolić*, 8 March 2006, no. IT-02-60/1-A, para. 96; *Kunarac*, 12 June 2002, No. IT-96-23 and 23/1-A, para. 41.

²² *Milutinović*, No. IT-05-87-AR65.1, para. 11.

26. To simply state that consideration was given to what the Defence said²³ without canvassing its arguments cannot constitute sufficient grounds where there is nothing in the decision to suggest that the Chamber had entertained the Defence arguments in their entirety.

1.2 Nature and calculation of the time needed by the Defence to prepare

27. As the Defence showed in its submissions of 14 April 2015 and at the hearing of 21 April 2015, the time needed for effective and efficient preparation before the Prosecution starts to present its evidence must not be decided arbitrarily but on the basis of quantifiable, objective criteria. The time needed is determined by the tasks to be performed, which were quantified with precision as a function of the resources available to the Defence. Since the time was determined by calculation, it is not for debate. The bases of the calculation are open to debate and dispute, but not the calculation *per se*. Where there is consensus as to the bases of the calculation and the Defence used the quantification criteria set down by the Prosecution, the Court's documents or Court practice, the calculation has only to be performed: as regards the reading and analysis of one document, it is necessary to determine how much work can be performed by one person on a daily or hourly basis, etc.

28. Otherwise put, when the Defence informs the Chamber that all of the requisite tasks can be accomplished only in 12 months at the earliest, it is not a suggestion open to negotiation but the result of calculation. Where the bases and method of calculation are accepted, so must it be concluded that the time frame cannot be reduced. To curtail it would necessarily prevent the Defence from completing all the tasks needed to prepare for cross-examination, and would thus hamstring it: to so proceed before trial has even commenced would infringe the fairness of the proceedings.

²³ ICC-02/11-01/15-58, para. 15.

29. The Chamber has granted a string of applications for extension of time submitted by the Prosecution in recent months.²⁴

30. It is hard to fathom why the Chamber only took note of a series of undertakings given by the Prosecution. When, for example, it told the Bench that it would be ready by 30 June 2015, the time needed was never questioned, whereas, when it comes to the Defence, the Chamber dismisses the detailed calculations put before it, setting arbitrarily and without explanation a very imminent trial date which both Defence teams had rejected from the outset.

31. To accord the Prosecution a certain amount of time for investigation is a matter of course. The same holds true for Defence preparation time, particularly when it is eight months in contrast to the four years which the Prosecution will have taken for its investigations. In other words, the Bench must heed the parties as they alone know their requirements for the presentation their case so that a proper debate can take place and procedural fairness be upheld, particularly as the Defence has put forward objective criteria on which to base a calculation which may be acceptable to all.

32. To frame matters differently still, as regards the Prosecution's investigations, the Chamber must heed, first and foremost, the Prosecution. As regards the Defence's preparation, the Chamber must heed, first and foremost, the Defence and not consider Defence, Prosecution and victims on a par.

33. It would appear, however, that the Chamber has sought to strike a balance between the various movants' positions. Analysis of the impugned decision so suggests. In so doing, it did not rely on the particular nature of the time required by the Defence and or examine the factors which enable an objective evaluation of the determination of the time needed to prepare the Defence.

²⁴ ICC-02/11-01/11-T-25-CONF-FRA, pp. 14, lines 14-16; ICC-02/11-01/11-741, para. 13; ICC-02/11-02/11-T-9-Red-FRA, pp. 50-51.

34. Determination of the time needed to prepare an effective and efficient defence is not and must not be considered from the standpoint of each actor in the trial. It is simply a matter of noting that if it is accepted that the time required for preparation of the Defence cannot be reduced, then that time cannot be curtailed in any way whatsoever.

35. Hence, it is not a matter of discussing two or more proposals on the time which the Defence might require, which would amount to a mere disagreement between the parties. Instead, it is a question of noting that the preparation time cannot be reduced, that the Defence is unable to prepare effectively and efficiently in three to four months and that not to afford it the necessary time sought on the basis on an objective calculation amounts to preventing it from preparing, which violates the spirit and letter of the Statute and article 67 in particular.

36. Otherwise said, the issue at hand arises not from a mere disagreement between the Defence and the Bench on the start date of trial, but is a matter of ascertaining what is understood by the concept of time necessary for preparation of the defence and the calculation methods to be applied. It is therefore a matter of ascertaining whether it is apparent from the decision that the Bench accurately analysed the needs of the Defence with due regard for the fact that the accused's right to prepare effectively for trial is critical to procedural fairness.

37. Lastly, in support of its endeavour to curtail the time available to the Defence, the Chamber ruled that "[...] in light [...] of its duty to ensure a fair and expeditious trial, the Chamber sets the trial commencement date for 10 November 2015".²⁵ Yet, to have sufficient time for the preparation of the defence is an inalienable right of the accused. Nothing can diminish or curb that right, lest the letter and spirit of the Statute be betrayed. To afford the accused **adequate time and facilities for the effective preparation of the**

²⁵ ICC-02/11-01/15-58, paras. 14 and 16.

defence is the foundation of a fair trial. Nothing must diminish or curb that right. In no way must that right, or any right of the accused whatsoever, be weighed against other considerations, especially those of a logistical or administrative nature. Nor can it be fettered by considerations arising from rules binding the Chamber, for example, from those connected to “the expeditiousness” of the proceedings.

38. The question arises as to the concept of “expeditiousness” on which the Chamber relies. In the impugned decision, the Bench in fact appears to advert to the accused’s right to be tried without undue delay. That right vests in the accused and not the Court. Were it to vest in the Court, the exercise of the accused’s rights, and, first and foremost, the right to adequate time and facilities for the preparation of the defence would be denied, or at least weighed against other considerations, which, in effect, amounts to the same.

39. The right to be tried without undue delay was conceived to pre-empt a trial from being used to incarcerate an accused person for years on end with no possibility of mounting a defence. It was not designed to limit the accused’s right to prepare a defence. Yet, the Bench is using the concept of “expeditiousness” **against** the Accused to curtail the time available for preparation, which reduces his room for manoeuvre and capacity to defend himself. In other words, a right which vests in the accused, designed to pre-empt arbitrariness, is now being used in a way that limits full exercise of the Accused’s right to time to be able to defend himself. By definition, the only person who can determine when and how to exercise his or her rights is the holder of those rights. The accused person alone can determine how much time is needed to prepare effectively a defence.

1.3 Error of fact: the Chamber miscalculated time

40. The Chamber

notes that, as a result, the Defence will have more than four months between the date of full disclosure by the Prosecution and the opening statements. Thereafter, it will have two additional months before the commencement of the presentation of evidence, which the Chamber considers will afford the Defence sufficient time to carry out all necessary preparations.

41. In fact, the Defence will have only three months between 10 August 2015 (resumption after recess) and 10 November 2015. If the time available before the move, from 10 November to 30 November 2015, is included, the Defence will have only three additional weeks before the Prosecution proceeds to present its evidence, which, it must be underscored, will happen as soon as the Court resumes activities at its new premises.

42. What is more, the Bench factored the slow-down during the summer and winter court recesses into the preparation time granted to the Defence, even though work cannot be performed under normal conditions at those times.²⁶ The Prosecution has on several occasions said that it has allowed for recess in determining the further time it required.²⁷

43. Therefore, in reckoning the preparation time needed by the Defence, recess must be taken into account, as the Prosecution does.

44. As the Chamber had considered it expedient to afford the Defence six effective months of preparation as stated in the impugned decision,²⁸ it should have chosen 30 March 2016 as the commencement proper of trial and, hence, of the opening statements (taking into account the move).

²⁶ See ICC-02/11-01/11-584.

²⁷ ICC-02/11-02/11-100-Red, para. 6; ICC-02/11-01/11-T-27-CONF-FRA, pp. 6-7, lines 27-7.

²⁸ ICC-02/11-01/15-58, para. 16.

1.4 The Chamber erred in considering that the opening statements could be separated from the commencement proper of trial

45. By scheduling opening statements for 10 November 2015 and the commencement of the Prosecution's presentation of its evidence for a date to be determined in January 2016, late January in all likelihood, the Chamber appears to view the opening statements as *sui generis* and thus "severable" from the subsequent proceedings. To afford the parties the opportunity to voice their views and then to allow the Defence to investigate afresh, as the Chamber expressly put it, would suggest that in the Chamber's view, the opening statements bear little connection with the preparation work. In other words, the Chamber appears to see opening statements as ordinary statements, for example, of a political nature, of no legal import and devoid of legal *raison d'être*.

46. On the contrary, the opening statements are not "severable" from the trial. They are not the prelude but the very start, as, moreover, the Chamber pointed out in specifying 10 November 2015 as the "trial commencement date".²⁹

47. The Supreme Court of the United States has emphasised the nature of an opening statement, defining it thus: "ordinarily intended [...] to inform the jury in a general way of the nature of the action and defense so that they may better be prepared to understand the evidence".³⁰ Furthermore, the importance of opening statements in a criminal trial is generally accepted by practitioners as making it possible to "present a clear picture of the case — its major events,

²⁹ *Idem*.

³⁰ *Best v. District of Columbia*, 291 U.S. 411, 54 S. Ct. 487, 78 L. Ed. 882 [1934].

participants, instrumentalities, disputes and contentions”³¹ and thus as a “first opportunity to present [the case] as **a cohesive whole**”.³²

48. Accordingly, as the opening statement is the start proper it cannot be severed from the commencement of trial, and, in this particular instance, from the beginning of the presentation of the Prosecution’s evidence. From the standpoint of the Prosecution, the opening statement introduces the presentation of its case, whereas, in the eyes of the Defence, the opening statement allows the bench, from the outset, to place the Prosecution’s *modus operandi* in perspective. This has two consequences:

1. The Defence opening statement cannot be contemplated until the Defence has determined its strategy *vis-à-vis* the Prosecution evidence and, therefore, until it has prepared for cross-examination.
2. The opening statement must be immediately followed by the commencement of the Prosecution evidence to take full effect, lest its effectiveness be diluted, from both the Prosecution and the Defence viewpoints.

49. If, as it states in the Impugned Decision, the Chamber considers that the Defence would benefit from six months’ preparation time, it should have set the opening statements for 30 March 2016 (allowing for the move), whereupon the presentation of the Prosecution’s evidence should follow forthwith for the statements to be effective.

50. By scheduling, in accordance with the precise terms of its decision, the opening statements for a date when the Defence is in the midst of its preparation, the Bench disregarded the intrinsic nature of an opening statement, namely that such a statement can be contemplated only once the Defence’s preparation work is complete. Moreover, by scheduling the

³¹ J. Tanford, *The Trial Process: Law, Tactics and Ethics*, Fourth Edition (2009), para. 4.01.

³² *Idem*.

opening statement for a date far off from the presentation of the Prosecution's evidence, the Bench dilutes its effect and relegates it to an ordinary statement with no legal import or *raison d'être*, thus depriving the Defence of a means of being heard just before the presentation of the Prosecution's evidence and thereby violating the fairness of the proceedings.

51. It is all the more important for the Appeals Chamber to be able to ponder this point, since the issue of the nature and *modus operandi* of an opening statement has yet to be canvassed before the Court.

2. Resolution of the issues raised could tangibly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

52. The choice of trial date insofar as it affects Defence preparation time and hence the exercise of a fundamental right of the accused has a profound bearing on the fairness of the trial. Were the person charged not to have the time to prepare adequately his or her defence, he or she would, from the outset, be hamstrung *vis-à-vis* the Prosecution and so the fairness of the trial would be violated.

53. Of note is that the Prosecution has been investigating the case for close to four years and successive Chambers have granted it all of the time it requested to prepare its case; it even enjoyed almost one additional year after the Pre-Trial Chamber found on 3 June 2013 that it had hitherto failed properly to investigate. To maintain the balance between the Prosecution and the Defence, it is paramount, therefore, that the Defence have sufficient preparation time in order to mount a proper and effective defence, so that a fair trial may be held.

54. The courts have consistently taken the view that sufficient time for preparation of the defence forms the cornerstone of a fair trial. International criminal courts and tribunals have consistently drawn a connection between the time accorded to the Defence and procedural fairness and so have consistently

granted leave to appeal on that issue. For example, in *Karadžić* the Defence was, on a number of occasions, granted leave to appeal as regards the trial start date by the Trial Chamber, which held that “the issue of trial readiness pertains directly to the fairness of the proceedings. [...] the consequences for the outcome of the trial of proceeding on the basis of the flawed decision could be extremely serious”.³³

55. Of further note is in this regard is that it was the policy of the ICTY Prosecutor never to object to Defence applications for leave to appeal since matters of preparation time have a profound bearing on a fair trial.

3. Immediate resolution of the issues raised is necessary to materially advance the proceedings

56. It is clear that the choice of trial date has a lasting effect on the subsequent proceedings in that it directly affects the capacity of the accused to prepare a defence. In the present circumstances, it is apparent that immediate resolution of the issue by the Appeals Chamber is of prime importance. Were it to emerge at a late juncture in the proceedings that the right of the accused persons to prepare had not been respected, the entire trial could subsequently be called into question and the rights of the two Accused irremediably affected.

57. The Defence also recalls that the resolution of a *sub judice* issue or principle of law that is of general import may be regarded as a material advancement of the proceedings.³⁴ The issue at hand certainly falls within that category since the Appeals Chamber has yet to adjudge such issues.

³³ *Karadžić*, “Decision on Application for certification to Appeal Decision on Commencement of Trial”, 18 September 2009, para. 5.

³⁴ “Decision on Joseph Nzirorera’s Application for Certification to Appeal”, 9 October 2007.

58. Lastly, the immediate resolution by the Appeals Chamber of the issues raised would, by disposing of them definitively, rid the judicial process of errors which may taint the fairness of the proceedings or mar the outcome of the trial.³⁵

59. The ICTY has acknowledged the importance of bringing without delay the Appeals Chamber to bear upon such issues.³⁶ Further still, the Prosecution did not enter any objection to the Defence motion in this regard.

³⁵ ICC-02/04-177.

³⁶ See footnote 35, para. 6.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

Having regard to article 82, rule 155 and regulation 65,

- **To grant** the Defence leave to appeal the Order of 7 May 2015 (ICC-02/11-01/15-58).

[signed]

Emmanuel Altit
Lead Counsel for Laurent Gbagbo

Dated this 13 May 2015

At The Hague