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TRIAL CHAMBER I

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

**Response to Mr Gbagbo's request for leave to appeal the "Decision on the
resumption of action applications" (ICC-02/11-01/15-1053)**

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Common Legal Representative of the victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that Mr Gbagbo’s request (the “Request”)² for leave to appeal the “Decision on the resumption of action applications” issued by Trial Chamber I (the “Chamber”) on 11 October 2017 (the “Decision”)³ does not satisfy the requirements of article 82(1)(d) of the Rome Statute and should be rejected.

2. The Request does not demonstrate that the alleged issues identified by the Defence arise from the Decision and merely represents the Defence’s disagreement with and misrepresentation of the Chamber’s ruling. Indeed, the Chamber (i) did address the Defence’s arguments on the alleged tardiness of the applications for resumption of actions and on the redactions contained therein, by recalling the procedure applicable for victims’ participation in the case; (ii) had already addressed and dismissed the Defence’s arguments on the law applicable to the resumption of an action of deceased participating victims; (iii) did provide an explanation on the limits of the resumption of an action and did verify the identity of the applicants.

3. Moreover, the Request fails to demonstrate how each of the issues allegedly arising from the Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In this regard, the Defence only presents hypotheses and mere speculations not sufficient to demonstrate that the alleged issues would significantly affect the fair and expeditious conduct of

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

² See the “Demande d’autorisation d’interjeter appel de la ‘Decision on the resumption of action applications’ (ICC-02/11-01/15-1052)”, No. ICC-02/11-01/15-1053, 17 October 2017 (the “Request”).

³ See the “Decision on the resumption of action applications” (Trial Chamber I), No. ICC-02/11-01/15-1052, 11 October 2017 (the “Decision”).

proceedings or the outcome of the trial; and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

II. Background

4. On 20 July 2017, the Legal Representative filed the “Redacted version of the applications for the resumption of action by the family members of deceased victims a/20116/12, 20136/12, a/20147/12, a/20163/12, a/10228/14 and a/10260/14”.⁴

5. On 31 July 2017, the Defence for Mr Gbagbo filed its response.⁵

6. On 11 October 2017, the Chamber issued the Decision (i) authorising the applicants to resume the actions initiated before the Court by the deceased victims a/20163/12, a/20136/12, a/20147/11, a/10228/14, a/10260/14, and a/20116/12; and (ii) directing the parties and the Registry on how to proceed for any future resumption of action filed in the case.⁶

7. On 17 October 2017, Mr Gbagbo’s Defence filed the Request,⁷ seeking leave to appeal the Decision on the following six issues:

- i) The Chamber made an error of law in failing to address the Defence’s argument on the tardiness of the applications for the resumption of action (the “First Issue”);⁸

⁴ See the “Redacted version of the applications for the resumption of action by the family members of deceased victims a/20116/12, 20136/12, a/20147/12, a/20163/12, a/10228/14 and a/10260/14”, No. ICC-02/11-01/15-994-Red, 20 July 2017.

⁵ See the “Réponse de la Défense à la ‘Redacted version of the applications for the resumption of action by the family members of deceased victims a/20116/12, 20136/12, a/20147/12, a/20163/12, a/10228/14 and a/10260/14’ (ICC-02/11-01/15-994-Red)”, No. ICC-02/11-01/15-997-Conf, 31 July 2017.

⁶ See the Decision, *supra* note 3, para. 17 and p. 11.

⁷ See the Request, *supra* note 2.

⁸ *Idem*, paras. 9-13.

- ii) The Chamber made an error of law in not considering that the redactions in the applications for resumption of action do not allow the Defence to provide a response (the “Second Issue”);⁹
- iii) The Chamber made an error of law in grounding its Decision exclusively on the practice of other Chambers of the Court (the “Third Issue”);¹⁰
- iv) The Chamber made an error of law in failing to apply the Ivorian law regulating the succession rights (the “Fourth Issue”);¹¹
- v) The Chamber made an error of law in failing to explain how the person resuming the action can present views and concerns not contained in the original victim’s application (the “Fifth Issue”);¹²
- vi) The Chamber made an error in not verifying the identity of the persons asking to resume the action and the information contained in the relevant applications (the “Sixth Issue”).¹³

8. Pursuant to regulation 65(3) of the Regulations of the Court, the Legal Representative submits her response to the Request.

⁹ *Ibidem*, paras. 14-16.

¹⁰ *Ibid.*, paras. 17-22.

¹¹ *Ibid.*, paras. 23-30.

¹² *Ibid.*, paras. 31-33.

¹³ *Ibid.*, paras. 34-39.

III. Submissions

9. Preliminarily, the Legal Representative notes the Defence's arguments on the alleged applicability of the Ivorian law,¹⁴ followed by a general criticism towards the applicable law and the procedure implemented by the Decision.¹⁵ The Legal Representative submits that these arguments do not relate to the identification of an issue for the purposes of an appeal under article 82 of the Rome Statute and were either already addressed and dismissed by the Chamber,¹⁶ or go to the substance of the appeal and cannot therefore be addressed in the Request. Consequently, the Legal Representative requests the Chamber to reject *in limine* and to not consider the Defence's submissions in this regard.

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

a. The First and the Second Issues

10. The Legal Representative submits that the First and the Second Issues do not reveal the existence of an appealable "issue" under article 82(1)(d) of the Rome Statute, but a misunderstanding of the Decision, or a mere disagreement therewith.

11. The Defence alleges the existence of an "error" on the contention that the Chamber failed to address the Defence's arguments (i) on the purported tardiness of the applications for resumption of action;¹⁷ and (ii) on the alleged impossibility for the Defence to respond to the applications because of the redactions applied.¹⁸

¹⁴ *Ibid.*, paras. 5-6.

¹⁵ *Ibid.*, paras. 7-8.

¹⁶ See the Decision, *supra* note 3, paras. 13-14.

¹⁷ See the Request, *supra* note 2, paras. 9-13.

¹⁸ *Idem*, paras. 14-16.

12. At the outset, the Legal Representative notes that the Chamber did take into account and summarised the Defence's submissions in this regard.¹⁹ The Legal Representative further submits that the Defence's arguments in relation to the First and Second Issues are ill-founded and lie on the Defence apparent confusion between the application for a new victim to participate in the proceedings and the application for resumption of action of a deceased participating victim. In this regard, the Legal Representative argues that the Chamber, by recalling the Decision on victims' participation of 6 March 2015,²⁰ did address the concerns raised by the Defence and drew a distinction between the procedure for admission of additional victims and the procedure for resumption of action of deceased participating victims.²¹

13. Pursuant to the 6 March 2015 Decision, all victims previously admitted to participate at the confirmation stage were authorised to participate at the trial stage without a *de novo* review of their applications.²² At the time, the Defence agreed that the victims authorised to participate at the confirmation stage of the proceedings should be authorised to participate at trial without having to file a new application;²³ while new applications were to be submitted to the Registry within the peremptory term of 70 days prior to trial.²⁴

14. Accordingly, in the Decision, the Chamber clarified that the resumption of action of a deceased victim is the *"possibility to continue the original legal action of a deceased victim, within the limits of the views and concerns expressed by the deceased victim"*

¹⁹ See the Decision, *supra* note 3, paras. 8-10.

²⁰ *Idem*, para. 11 – referring to the "Decision on victim participation", *supra* note 1.

²¹ *Ibidem*, paras. 11-12.

²² See the "Decision on victim participation", *supra* note 1, para. 41.

²³ *Idem*, para. 40. See also the "Soumissions conjointes de la Représentante légale des victimes et de la Défense de M. Laurent Gbagbo portant sur certaines questions relatives à la participation des victimes au procès", No. ICC-02/11-01/11-748, 19 January 2015, para. 4.

²⁴ See the "Decision on victim participation", *supra* note 1, para. 41.

*in his or her initial application to participate in the proceedings pursuant to Article 68(3) of the Statute and Rule 89 of the Rules”.*²⁵

15. In light of the above, the Legal Representative contends that the Defence plainly misrepresents the Decision. Despite the *verbatim* quotation of the 6 March 2015 Decision in its Request,²⁶ the Defence fails to acknowledge the irrelevance of the peremptory term to submit new applications for participation, in respect to the resumption of action applications. Moreover - given the automatic admission at trial of victims who participated at the confirmation stage - the term of 70 days prior to trial cannot be invoked against applicants resuming the actions of participating victims who had died before the start of the trial.²⁷

16. In the same vein, the Legal Representative submits that the express reference in the Decision to the relevant procedure for victims’ participation also addressed the Defence arguments on the applied redactions in the resumption of action applications. Indeed, the 6 March 2015 Decision also established that the Defence is to receive only redacted version of victims’ applications²⁸ and that the Legal Representative, “*being in contact with the victims represented, is the best placed to advise on any lifting of redactions*”.²⁹

17. The Legal Representative argues that by alleging the Chamber’s failure to address its arguments, the Defence both misrepresents the Decision and dissimulates a mere disagreement with it, by re-litigating matters that have been already adjudicated. Since neither a misinterpretation or a disagreement can amount to an

²⁵ See the Decision, *supra* note 3, para. 14 (Emphasis added).

²⁶ See the Request, *supra* note 2, para. 11 - referring to the “Decision on victim participation”, *supra* note 1, p. 24.

²⁷ *Idem*, paras. 11-13.

²⁸ See the “Decision on victim participation”, *supra* note 1, para. 51.

²⁹ *Idem*, para. 55.

appealable “issue” under article 82(1)(d) of the Rome Statute,³⁰ the fact that the Defence misrepresents the Decision or disagrees with it, as such, does not suffice for leave to appeal to be granted regarding the First and Second Issues.³¹

b. The Third and the Fourth Issues

18. Concerning the Third and Fourth Issues, the Legal Representative contends that they are not appealable “issues” under article 82(1)(d) of the Rome Statute, but represent again a mere disagreement with the Decision.

19. The Defence alleges the existence of an “error” on the contention that the Chamber (i) based the Decision exclusively on the practice of other Chambers;³² and (ii) did not take into account the Ivorian law.³³

20. The Defence’s disagreement with the Decision is revealed by its attempt to re-litigate issues that were already addressed and dismissed by the Chamber. In this regard, the Legal Representative recalls the observations made *supra*,³⁴ and further submits that the Defence merely reiterates arguments regarding both (i) its disagreement with the Court’s jurisprudence in relation to the resumption of action of deceased participating victims; and (ii) the alleged applicability of the Ivorian law.

³⁰ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

³¹ See the transcript of the hearing held on 10 November 2015, No. ICC-02/11-01/15-T-5-ENG ET, p. 15, lines 18-20; and the transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 38, lines 11-13. See also the “Decision on Defence’s requests seeking leave to appeal the ‘Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record’ and seeking suspensive effect of it” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015, para. 9; and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 19. See also the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’” (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-132, 10 July 2015, para. 3 and references contained therein.

³² See the Request, *supra* note 2, paras. 17-22.

³³ *Idem*, paras. 23-30.

³⁴ See *supra*, para. 9.

The two set of arguments were already advanced at length before the Chamber in the Defence's previous submissions.³⁵ In fact, in the Decision, the Chamber considered and expressly disagreed with the Defence's contention that the Ivorian law should be preferred over the ICC applicable framework regulating the procedure for resumption of action of a deceased victim.³⁶

21. Since a disagreement or conflicting opinion cannot amount to an appealable "issue" under article 82(1)(d) of the Rome Statute,³⁷ the fact that the Defence disagrees with the Decision, as such, cannot suffice for leave to appeal to be granted regarding the Third and the Fourth Issues.³⁸

c. The Fifth and the Sixth Issues

22. The Legal Representative submits that the Fifth and the Sixth Issues do not arise from the Decision but again from the Defence's disagreement therewith. As such, these cannot constitute appealable "issues" pursuant to article 82(1)(d) of the Rome Statute.³⁹

23. The Defence alleges the existence of an "error" on the contention that the Chamber failed (i) to explain how the person resuming the action can present views

³⁵ See the "Réponse de la Défense à la 'Redacted version of the applications for the resumption of action by the family members of deceased victims a/20116/12, 20136/12, a/20147/12, a/20163/12, a/10228/14 and a/10260/14' (ICC-02/11-01/15-994-Red)", *supra* note 5, paras. 32-37.

³⁶ See the Decision, *supra* note 3, para. 13-15.

³⁷ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 30, para. 9.

³⁸ See the transcript of the hearing held on 10 November 2015, No. ICC-02/11-01/15-T-5-ENG ET, p. 15, lines 18-20; and the transcript of the hearing held on 28 January 2016, No. ICC-02/11-01/15-T-9-ENG ET, p. 38, lines 11-13. See also the "Decision on Defence's requests seeking leave to appeal the 'Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record' and seeking suspensive effect of it", *supra* note 31, para. 9; and the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 30, para. 19.

³⁹ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 31, para. 19. See also the "Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record'" (Trial Chamber I, Single Judge), *supra* note 31, para. 3 and references contained therein.

and concerns not contained in the original victim's application;⁴⁰ and (ii) to verify the identity of the persons resuming the action of the deceased victims.⁴¹

24. The Legal Representative recalls her submissions *supra*,⁴² and argues that the Defence's contentions in this regard merely reiterate general arguments of principle against the possibility of resuming an action and on the applicable jurisprudence; and in particular towards the criteria foreseen for a person to be authorised to resume the action of a deceased victim.⁴³

25. Indeed, the relevant Court's jurisprudence applied by the Chamber in the present case clearly indicates: (i) the limited purpose of the resumption of action, which is deemed to stay in the boundaries of the original legal action – *i.e.* the claims of the deceased participating victim;⁴⁴ and (ii) the need for the person asking to resume the action to provide evidence of his or her appointment by the deceased victim's family members only when he or she cannot easily be presumed to be entitled to continue the action or represent the family.⁴⁵

26. Consequently, the Defence shows nothing more than a disagreement with the established jurisprudence and further misrepresents the identification documents that were submitted to the Chamber. Indeed, contrary to the Defence's contentions,⁴⁶ the Ivorian identification cards do contain the name of the cardholder's parents – making it relatively easy to establish the kinship between the deceased participating victim and the person asking to resume the action.

⁴⁰ See the Request, *supra* note 2, paras. 31-33.

⁴¹ *Idem*, paras. 34-39.

⁴² See *supra*, para. 9.

⁴³ See the Decision, *supra* note 3, para. 12.

⁴⁴ *Idem*, para. 13. See also the "Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure" (Trial Chamber II), No. ICC-01/04-01/07-1737, 22 December 2009, para. 30.

⁴⁵ See the Decision, *supra* note 3, para. 13. See also the "Fourth decision on victims' participation in trial proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-805, para. 8.

⁴⁶ See the Request, *supra* note 2, para. 35.

27. In light of the above, the Legal Representative contends that the Defence merely disagrees with the Decision by also misrepresenting the documents that were submitted before the Chamber. As such, the Fifth and Sixth Issues cannot constitute appealable “issues” pursuant to article 82(1)(d) of the Rome Statute.⁴⁷

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

28. Since none of the issues identified by the Defence arise from the Decision, the Request should be dismissed on this basis alone. Assuming *arguendo* that any of said issues arises from the Decision, the Legal Representative opposes the Defence’s contention that they significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial.

29. Firstly, and contrary to the requirements of article 82(1)(d) of the Rome Statute,⁴⁸ the Defence does not articulate how each of the alleged issues specifically affects the fairness and expeditiousness of the proceedings or the outcome of the trial. The Defence merely reiterates arguments against the practice of resumption of action stating that said practice “*pervertit la procédure*”, without even trying to explain how it indeed affects the fairness of the proceedings. Therefore, the general assertions by the Defence,⁴⁹ sparse and without any supporting arguments, clearly fall short of proving that the fairness of the proceedings is affected by the alleged issues identified by the Defence.

⁴⁷ See the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 31, para. 19. See also the “Decision on request for leave to appeal the ‘Decision on objections concerning access to confidential material on the case record’” (Trial Chamber I, Single Judge), *supra* note 31, para. 3 and references contained therein.

⁴⁸ See the “Decision on the ‘Prosecution’s Application for Leave to Appeal Oral Rulings on Clarifying Inconsistencies in Prior Statements and Partial Hostility’” (Trial Chamber II), No. ICC-01/04-01/07-1958, 11 March 2010, para. 20. See also the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’” (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 34.

⁴⁹ See the Request, *supra* note 2, para. 40.

30. Secondly, the Request fails to address the alleged impact of each issue on the expeditiousness of the proceedings, in direct violation of article 82(1)(d) of the Rome Statute that requires verifying that each of the issues affects both the fair and the expeditious conduct of the proceedings.⁵⁰

31. The Defence does not provide any argument regarding the alleged impact of the issues on the expeditiousness of the proceedings, but simply indicates that it does not need to prove said impact with absolute certainty.⁵¹ In so doing, the Defence refers to hypothetical and unsupported arguments regarding a theoretical effect of said resumptions of action on an unspecified aspect of the proceedings.⁵²

32. In this regard, the Legal Representative notes that speculative arguments that do not rest upon solid factual foundations are not sufficient to demonstrate that an issue would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.⁵³

⁵⁰ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21; and the “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’” (Pre-Trial Chamber II), No. ICC-01/05-01/08-532, 18 September 2009, para. 16.

⁵¹ See the Request, *supra* note 2, para. 42.

⁵² *Idem*, para. 41.

⁵³ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 8; the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on issues related to the conclusion of the defence’s presentation of oral evidence at trial and on the ‘Defence Request for an Order for Cooperation’”, *supra* note 48, para. 26 and the references contained therein; and the “Decision on ‘Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process’” (Trial Chamber III), No. ICC-01/05-01/08-3273, 24 July 2015, para. 6 and the references contained therein.

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

33. The Defence contends that an immediate resolution by the Appeals Chamber will materially advance the proceedings because it will ensure that the trial follow the right course, and because no adequate remedy can be provided for if the alleged issues are decided in an appeal against the eventual judgement.⁵⁴ Without additional explanations, the Defence further argues that it is not possible to wait to decide on the alleged issues in a hypothetical appeal as they could potentially affect the rights of the Accused.⁵⁵

34. The Defence does not prove that the immediate resolution of the question would materially advance the proceedings. In any case, since the alleged issues identified by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵⁶

⁵⁴ See the Request, *supra* note 2, para. 43.

⁵⁵ *Idem*, para. 44.

⁵⁶ See the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'", *supra* note 31, para. 26.

IV. Conclusion

35. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to reject the Request in its entirety.

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

Paolina Massidda
Principal Counsel

Dated this 23rd day of October 2017

At The Hague, The Netherlands