

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **7 June 2016**

**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**

**Decision on requests for leave to appeal the 'Decision adopting amended and supplemented directions on the conduct of the proceedings' (ICC-02/11-01/15-498)**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Eric MacDonald

**Counsel for Laurent Gbagbo**

Mr Emmanuel Altit  
Ms Agathe Bahi Baroan

**Counsel for Mr 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/Reparation**

**The Office of Public Counsel for  
Victims**

Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber I** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to article 82(1)(d) of the Rome Statute of the International Criminal Court ('the Statute'), rule 155 of the Rules of Procedure and Evidence ('the Rules'), and regulation 65 of the Regulations of the Court ('the Regulations'), hereby issues the following decision.

## **I. Procedural background**

1. On 3 September 2015, the Chamber adopted its 'Directions on the conduct of the proceedings' (ICC-02/11-01/15-205: '3 September 2015 Directions').
2. On 4 May 2016, the Chamber issued the 'Decision adopting amended and supplemented directions on the conduct of the proceedings' (ICC-02/11-01/15-498: 'Decision'), to which the new directions ('Directions') were attached as Annex A.
3. On 10 May 2016, the Defence for Mr Blé Goudé filed its 'Request for leave to appeal the "Decision adopting amended and supplemented directions on the conduct of the proceedings" (ICC-02/11-01/15-498)' (ICC-02/11-01/15-510: 'Blé Goudé Application').
4. On 11 May 2016, the Defence for Mr Gbagbo filed its '*Demande d'autorisation d'interjeter appel de la «Decision adopting amended and supplemented directions on the conduct of the proceedings» (ICC-02/11-01/15-498)*' (ICC-02/11-01/15-521: 'Gbagbo Application').
5. On 16 May 2016, the Office of Public Counsel for Victims and the Prosecutor submitted consolidated responses to the Blé Goudé and the Gbagbo Applications (respectively, filing ICC-02/11-01/15-545 and filing ICC-02/11-01/15-546).

## II. Submissions

### *Blé Goudé Defence Application*

6. The Blé Goudé Defence identifies the following two appealable issues which would arise from the Decision:
  - a. “Whether the Chamber created legal uncertainty in issuing the New Directions in the absence of changed circumstances, which circumstances had justified the issuance” of the Directions adopted by the Chamber on 3 September 2015 (‘Mr Blé Goudé’s First Issue’); and,
  - b. “Whether the Chamber misinterpreted the right to a fair trial in reconsidering and/or amending the Initial Directions without receiving or even requesting the parties’ views and observations” (‘Mr Blé Goudé’s Second Issue’).

### *Gbagbo Defence Application*

7. The Gbagbo Defence identifies the following five appealable issues which would arise from the Decision:
  - a. The Chamber erred in law by adopting the principle that it is possible to change the directions on the conduct of the proceedings at any moment, thereby violating the notion of legal certainty<sup>1</sup> (‘Mr Gbagbo’s First Issue’);

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<sup>1</sup> Unofficial translation of sub-heading 1.1 of the Gbagbo Application: “*La Chambre a erré en droit en posant comme principe la possibilité de changer à tout moment la procédure, remettant ainsi en cause la notion de sécurité juridique.*”

- b. The Chamber erred in law by adopting a decision with retroactive effect, thereby prejudicing the parties and, in this case, the Defence<sup>2</sup> ('Mr Gbagbo's Second Issue');
  - c. The Chamber erred in law by interpreting the accused's right to be tried without undue delay as a tool to manage the proceedings, thereby reducing the accused's room for manoeuvring<sup>3</sup> ('Mr Gbagbo's Third Issue');
  - d. The Chamber erred in law by assuming the power to instruct the parties to prioritise and bring forward evidence<sup>4</sup> ('Mr Gbagbo's Fourth Issue'); and,
  - e. The Chamber erred by not giving the Defence an opportunity to properly prepare its cross-examinations<sup>5</sup> ('Mr Gbagbo's Fifth Issue').
8. Both the Blé Goudé Application and the Gbagbo Application submit that each of the issues which they respectively identify would have a significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial, and that their immediate appellate resolution would materially advance the proceedings.
9. The OPCV and the Prosecutor submit that none of the issues identified in either the Blé Goudé Application or in the Gbagbo Application satisfy the

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<sup>2</sup> Unofficial translation of sub-heading 1.2 of the Gbagbo Application: *"La Chambre a erré en droit en adoptant une décision aux effets rétroactifs et ce au préjudice des Parties et ici la Défense."*

<sup>3</sup> Unofficial translation of sub-heading 1.3 of the Gbagbo Application: *"La Chambre a erré en droit en interprétant le droit de l'Accusé d'être jugé sans retard excessif comme un outil à sa disposition pour gérer la procédure [(la Chambre utilise la formule «maximise the efficiency of time spent in the courtroom»)] ce qui conduit en fait à réduire la marge de manœuvre de l'Accusé."*

<sup>4</sup> Unofficial translation of sub-heading 1.4 of the Gbagbo Application: *"La Chambre a erré en droit en s'octroyant le pouvoir d'instruire les Parties sur la façon de «prioritise and bring forward evidence»"*

<sup>5</sup> Unofficial translation of sub-heading 1.5 of the Gbagbo Application: *"La Chambre a erré en ne permettant pas à la Défense une véritable préparation des contre-interrogatoires."*

requirements set out in article 82(1)(b) of the Statute and that, accordingly, they should both be rejected.

10. More specifically, the OPCV argues that the issues either represent mere disagreements with or rely on misinterpretations of the Decision and that both Applications, being based on “hypotheses and mere speculations”, fail to substantiate the alleged impact of said issues on the fair and expeditious conduct of the proceedings or the outcome of the trial.
11. In a similar vein, the Prosecutor argues that both Applications should be dismissed *in limine*. With regard to the Blé Goudé Application, the Prosecutor argues that it fails to address all the required criteria of article 82(1)(d) of the Statute. Regarding the Gbagbo Application, the Prosecutor is of the view that, with the exception of Mr Gbagbo’s Fourth Issue, none of the other issues arise from the Decision. The Prosecutor contends that the issues would rather “re-litigate the Chamber’s 3 February 2006 Decision and misunderstand the Directions”. Moreover, the Prosecutor avers that the Gbagbo Application “merely list[s] [...] a set of purported issues without explaining how the article 82(1)(d) criteria are met”. Even if the Chamber would consider one of the issues raised to amount to an issue within the meaning of article 82(1)(d) of the Statute, the Prosecutor submits that none of the issues satisfies the further requirements set out by that provision.

### III. Applicable law

12. The Chamber recalls the applicable law relating to article 82(1)(d) of the Statute, as set out in previous decisions.<sup>6</sup> For its request for leave to appeal to

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<sup>6</sup> Most recently in the ‘Decision on request for leave to appeal the ‘Fourth decision on matters related to disclosure and amendments to the List of Evidence’ and other issues related to the presentation of evidence by the Office of the Prosecutor”, 13 May 2016, ICC-02/11-01/15-524.

be successful, the Defence must satisfy this Chamber that the criteria of article 82(1)(d) of the Statute have been met.

13. As basis for its consideration on whether to grant leave to appeal, the Chamber will first determine whether the issues identified by the Defence qualify as 'issues' pursuant to article 82(1)(d) of the Statute. In line with established jurisprudence, an appealable issue must arise from the operative part of the Decision.<sup>7</sup> The Chamber furthermore notes the Appeals Chamber's definition of an issue as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion."<sup>8</sup>
14. Pursuant to article 82(1)(d) of the Statute, the Chamber must determine whether the issue has a significant impact on "the fair and expeditious conduct of the proceedings or the outcome of the trial". A right of appeal will also arise only if, in the Chamber's opinion, the impugned decision must receive the immediate attention of the Appeals Chamber.
15. The Chamber recalls that in deciding on a request for leave to appeal, it does not address the correctness of the decision, *per se*. Determination of whether the Trial Chamber erred is a matter for the Appeals Chamber to decide, should leave be granted.<sup>9</sup>

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<sup>7</sup> See, e.g., Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial', 2 July 2015, ICC-02/11-01/15-117.

<sup>8</sup> Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

<sup>9</sup> Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial', 2 July 2015, ICC-02/11-01/15-117.

#### IV. Analysis

16. As will be explained in the following, the Chamber finds that none of the issues raised by the Defence of Mr Blé Goudé and the Defence of Mr Gbagbo meets the requirements pursuant to article 82(1)(d) of the Statute.

##### **A. Whether the Trial Chamber erred in law by creating legal uncertainty in issuing the decision (Mr Blé Goudé's First Issue and Mr. Gbagbo's First Issue)**

17. The Chamber considers that the matters raised in Mr Blé Goudé's First Issue and Mr Gbagbo's First Issue can appropriately be considered together as both raise the question as to whether the Trial Chamber erred in law by creating legal uncertainty as a result of issuing the Decision.

18. The First Issues of both Defence teams misrepresent the Decision. First, as the trial proceedings have shown after the Decision was rendered, it did not fundamentally change the way in which the trial is being conducted. Second, even if there were changes, these were already made in previous oral decisions. In fact, the parties filed requests for leave to appeal such oral rulings, which were rejected. The Defence cannot now again seek leave to appeal these same issues, as they do not arise from the present Decision, which only reaffirms what had already been decided earlier.

19. Accordingly, no significant issue of legal certainty arises. To the extent that the Defence may be of the view that the Chamber has no right to make *any* changes to the directions on the conduct of the proceedings, this argument is not clearly developed in the respective applications and no legal error is identified in this regard. The Chamber also notes that neither the Gbagbo Defence nor the Blé Goudé Defence argue that the Trial Chamber abused its discretion in issuing the new Directions.



20. As regards the Defence's submission that the Directions will be amended again in the future, regardless of whether there is a specific need for a particular adjustment, this amounts to mere speculation, and therefore does not constitute an appealable issue pursuant to article 82(1)(d) of the Statute.
21. The Chamber therefore finds that the matters identified by the Blé Goudé and the Gbagbo Applications in their respective First Issues do not constitute appealable issues pursuant to article 82(1)(d) of the Statute.

**B. Whether the Trial Chamber erred by failing to request submissions from the parties on the revision of the directions (Mr. Blé Goudé's Second Issue)**

22. Mr Blé Goudé's Second Issue avers that the Chamber erred by failing to receive "or even request" the parties' views and submissions before adopting the Decision and the annexed Directions. It submits that the Chamber did not request submissions on either the oral ruling on 3 February 2016 or the new directions. The Defence of Mr Blé Goudé emphasizes that the parties did not know at that time "that such a change in the conduct of the proceedings was contemplated by the Chamber". The Defence then contends, in general terms, that this would affect the fair trial guarantees of the parties.
23. The Chamber recalls that it invited the parties to make submissions on "concrete proposals for measures which might be implemented with a view of enhancing the efficiency and the expeditiousness of the trial" at the status conference held on 26 April 2016.<sup>10</sup> In deciding on the Decision, the Chamber took into account the parties' submissions made during said status conference

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<sup>10</sup> Email of Thursday 21 April 2015, sent by Mrs Federica Gioia, Legal Officer in Trial Chamber I, on behalf of the Presiding Judge.

as well as those made in the filings mentioned in paragraph 7 of the Decision and all other previous occasions in which the aforesaid oral rulings on conduct of proceedings were rendered by the Chamber.

24. Although not requesting prior submissions could amount to abuse of discretion by the Chamber, this cannot be said to be an absolute requirement.<sup>11</sup> Moreover, the Defence of Mr Blé Goudé does not formulate the Second Issue as an alleged abuse of discretion. Instead, the Defence alleges that, by issuing the Decision, the Chamber “misinterpreted” the right to a fair trial. Accordingly, the Blé Goudé Application fails to sufficiently delineate a cognisable appealable issue in the sense of article 82(1)(d) of the Statute.

**C. Whether the Chamber erred by applying new directions retroactively to the detriment of the Defence (Mr Gbagbo’s Second Issue)**

25. Relying on article 51(4) of the Statute, the Defence of Mr Gbagbo argues that changes to the rules on the conduct of proceedings cannot be applied retroactively. According to the Defence, the Appeals Chamber decided in the case against Ruto and Sang<sup>12</sup> that any change to the procedural framework after the start of the trial must be considered as retroactive. The Defence also refers to the Appeals Chamber’s broad interpretation of the notion of ‘detriment’, which includes “disadvantage, loss, damage or harm to the

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<sup>11</sup> Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 17 June 2015, ICC-02/04-01/15-251.

<sup>12</sup> Appeals Chamber, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, 12 February 2016, ICC-01/09-01/11-2024.

accused”.<sup>13</sup> It is argued that the Impugned Decision places the Defence in a less advantageous position on a number of points.

26. The Chamber notes that the Defence for Mr Gbagbo does not explain how the Decision could result in a retroactive application of the law. Indeed, the Gbagbo Application does not give a single example of how the Decision could have any impact on or be impacted by anything that occurred between the start of the trial and 4 May 2016, when the Decision was issued by the Chamber.
27. In terms of the Defence’s allegation that the Decision would be detrimental to the Accused, the Chamber is of the view that the three examples provided – the definition of facts of common knowledge, the notion of ‘relevant to the charges’, and the possibility for the calling party to test the credibility of its own witnesses - are based on the Defence’s own interpretation of the provisions in question. It is therefore premature and speculative to maintain that the application of the Decision will have any detrimental effect on the rights of the accused.
28. The Chamber therefore finds that Mr Gbagbo’s Second Issue does not constitute an appealable issue pursuant to article 82(1)(d) of the Statute.

**D. Whether the Trial Chamber erred in law by relying on the accused’s right to an expeditious trial as a basis to manage the proceedings (Mr Gbagbo’s Third Issue)**

29. Under this issue, the Defence raises the objection that the right to be tried without undue delay cannot be used against the accused. In the view of the

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<sup>13</sup> Ibid., at para. 78.

Defence of Mr Gbagbo, the Decision would reduce the right of the accused to be tried without undue delay to a simple issue of time management. It further avers that only the accused could invoke the right to be tried without undue delay and neither the Prosecutor nor the Chamber may use it to limit the Defence.

30. The Gbagbo Application fails to identify any specific passage from the Decision in support of its allegation that the Chamber would exercise its trial management powers solely on the basis of 'administrative reasons' or that it would equate the accused's right to be tried without undue delay to a bureaucratic issue of time management. The allegation according to which the Chamber would have given precedence to expeditiousness over other defence rights, including the accused's right to question witnesses called by the other party, is similarly unsubstantiated on the basis of any specific part of the Decision.
31. For these reasons, the Chamber finds that Mr Gbagbo's Third Issue does not arise from the Decision and, moreover, does not constitute an appealable issue for the purposes of article 82(1)(d) of the Statute.

**E. Whether the Trial Chamber erred in law by claiming the power to instruct the parties on the way in which they should present their case (Mr Gbagbo's Fourth Issue)**

32. Mr Gbagbo's Fourth Issue challenges the content of paragraph 3 of the Directions, in which the Chamber asserts to 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". According to the Defence, this aspect of the new Directions violates the "principle according to which the parties are

completely free to present their case as they wish". The Defence also claims that the asserted power lacks any legal basis and points out that articles 64(3)(a) and 67(1)(b) of the Statute, which were mentioned by the Chamber in this context, cannot justify it. The Chamber first notes that the Defence does not mention any legal basis in support of the alleged "principle" that parties are entirely free to present their case as they see fit. It is therefore unclear how the Chamber could have erred in law by violating such putative 'principle'. The Chamber, far from failing to distinguish among the various actors of trials before the Court, is aware and mindful of the specific roles of those actors.

33. Nevertheless, the Chamber considers that the issue whether article 64(3)(a) of the Statute provides a sufficient legal basis for the Trial Chamber's interpretation of the scope of its powers to direct the presentation of evidence is an issue that arises from the Decision. The Chamber notes, in this context, that the Chamber's power to instruct the parties as to the presentation of their evidence was not expressly mentioned in the 3 September 2015 Directions. It was a deliberate decision of the Chamber to refer to this power in the new Directions.
34. However, the Chamber is of the view that the interlocutory appeals process is not designed for answering abstract legal questions. As the Chamber has not yet made use of its power to intervene in the presentation of evidence by the parties, the issue is hypothetical and, as such, an immediate resolution by the Appeals Chamber would not be required at this time. As this is one of the preconditions for granting leave to appeal under article 82(1)(d) of the Statute, the Chamber cannot certify Mr Gbagbo's Fourth Issue for appeal.

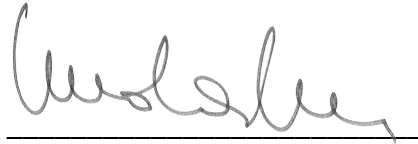
**F. Whether the Chamber erred by not giving the Defence a real opportunity to prepare its cross-examination (Mr. Gbagbo's Fifth Issue)**

35. In its Fifth Issue, the Defence for Mr Gbagbo takes issue with the instruction that the Prosecutor should notify the parties of the next list of 15 witnesses at least 40 days before the first witness on that list is scheduled to start testifying. The Defence notes that it is possible that this notification will come when the Prosecutor is still examining witnesses from a previous batch and that the Defence does not have the means to simultaneously cross-examine Prosecution witnesses of the current list of 15 witnesses and conduct investigations necessary to prepare the cross-examination of the next batch of 15 witnesses. The Defence further submits that paragraph 4 of the Directions fails to give sufficient weight to the difference in the amount of resources that are available to the Defence as compared to the Prosecutor. Specifically, the Defence for Mr Gbagbo complains that the Directions fail to provide for adequate pauses between the blocks of hearings.
36. The scenario described by the Defence has not materialised yet and it is therefore highly hypothetical and premature to assume that the Chamber would not take the necessary measures to accommodate the Defence's right under article 67(1)(b) of the Statute, in case the deadline of 40 days established by the Decision would be insufficient for the Defence to have adequate time to prepare.
37. As the Fifth Issue is premised entirely on speculation, the Chamber considers that it does not arise from the Decision for the purposes of article 82(1)(d) of the Statute.

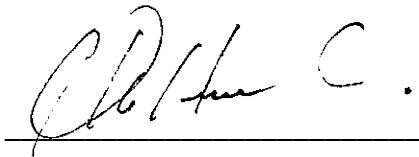
**FOR THE FOREGOING REASONS, THE CHAMBER, HEREBY**

**REJECTS** the Blé Goudé and the Gbagbo Defence Applications.

Done in both English and French, the English version being authoritative



**Judge Cuno Tarfusser, Presiding Judge**



**Judge Olga Herrera Carbuccion**



**Judge Geoffrey Henderson**

Dated 7 June 2016

At The Hague, The Netherlands