



Original: English

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

Date: 1 July 2013

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public

Prosecution's Response to the Defence "Demande d'autorisation d'interjeter appel de la « décision d'ajournement de l'audience de confirmation des charges conformément à l'article 67-7-c-i du Statut » (ICC-02/11-01/11-432-tFRA) du 3 juin 2013"

Source: Office of the Prosecutor

Document 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

Counsel for the Defence

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Me Natacha Fauveau Ivanovic

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Mr Herman Von Hebel

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence seeks leave to appeal¹ ("Defence Application") the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7) (c) (i) of the Rome Statute"² ("Impugned Decision"). It contends that the Decision identifies the following issue:

*l'utilisation faite par la Chambre préliminaire dans sa décision du 3 juin 2013 de l'article 61 (7) (c) (i) conduit-elle à une violation des droits de la défense?*³

2. The Prosecution submits that the Defence Application should be rejected. The Defence has failed to identify "a concrete or specific issue". Moreover, the issue as framed by the Defence does not arise out of the Decision. Even if it did, the issue does not meet the criteria for leave to appeal pursuant to Article 82(1)(d).

Procedural History

3. On 23 November 2011, Pre-Trial Chamber III issued a warrant of arrest for Laurent Gbagbo ("Mr. Gbagbo"), having found reasonable grounds to believe that he was criminally responsible as an "indirect co-perpetrator" pursuant to article 25(3)(a) of the Statute for the crimes against humanity of murder, rape and other forms of sexual violence, other inhumane acts and persecution, committed in Côte d'Ivoire during the period between 16 December 2010 and 12 April 2011.⁴ The decision on the Prosecutor's application for the warrant of arrest was issued on 30 November 2011.⁵ Mr Gbagbo was surrendered to the Court on 30 November 2011.

¹ ICC-02/11-01/11-439.

² ICC-02/11-01/11-432.

³ ICC-02/11-01/11-439, page 1.

⁴ ICC-02/11-01/11-1.

⁵ ICC-02/11-01/11-9-Red.

4. On 2 November 2012, the Chamber issued the "Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court",⁶ finding that Mr Gbagbo was fit to take part in the proceedings." On 29 November 2012, the Chamber rejected the Defence application for leave to appeal this decision.⁷
5. The confirmation hearing was held from 19 until 28 February 2013.⁸ On 3 June 2013, Pre-Trial Chamber issued the Impugned Decision.⁹ The Chamber found, *inter alia*, that "[d]espite [...] difficulties in the evidentiary record of the Prosecutor, the Chamber considers that this does not automatically have to lead to the immediate refusal to confirm the charges".¹⁰ The Chamber considered that the Prosecutor in this case "...may not have deemed it necessary to present all [...] evidence or largely complete her investigation..."¹¹ and that it did not "exclude that the Prosecutor might be able to present or collect further evidence and is therefore, out of fairness, prepared to give [...] a limited amount of additional time to do so."¹²
6. On 10 June 2013 the Prosecution submitted its application for leave to appeal the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute"¹³
7. On 25 June 2013, the Defence submitted the Defence Application.¹⁴

Submissions

⁶ ICC-02/11-01/11-286-Red.

⁷ ICC-02/11-01/11-307.

⁸ ICC-02/11-01/11-432, para.11.

⁹ ICC-02/11-01/11-432.

¹⁰ ICC-02/11-01/11-432, para.37.

¹¹ ICC-02/11-01/11-432, para.37.

¹² ICC-02/11-01/11-432, para.37.

¹³ ICC-02/11-01/11-435.

¹⁴ ICC-02/11-01/11-439.

- (i) *The Issue does not qualify as an “appealable issue” and does not arise out of the Decision*
8. The Defence has failed to identify a concrete “ subject[,] the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”¹⁵ Moreover, the issue as framed by the Defence does not arise out of the Decision.
9. First, the issue, as identified, does not make reference to any particular right of the Defence, but merely makes a generic reference to the defence’s rights (“...*des droits de la defense...*”)¹⁶. Neither does it identify any particular aspect of the use article 61(7)(c)(i), merely referring to the Chamber’s use of article 61 (7) (c) (i) (“...*l’utilisation faite par la Chambre préliminaire...[...] de l’article 61 (7) (c) (i)*”).¹⁷ The Defence, in effect, frames the Chamber’s overall conclusion as ‘an issue’ with the apparent hope of re-litigating the *entire* Impugned Decision before the Appeals Chamber. This is a sufficient basis for rejecting the Defence Application. As recently noted by this Chamber, leave to appeal cannot be granted if the party seeking to appeal, “...instead of identifying appealable issues, seeks leave to litigate *ex novo* before the Appeals Chamber the entire decision.”¹⁸
10. Second, the Defence lists separately a series of alleged errors in the Impugned Decision pertaining to the manner in which the Chamber assessed the conduct of the Prosecution, namely (i) that “[l]es Juges excusent la faillite du Procureur en posant une hypothèse”¹⁹, and (ii) that “[l]’hypothèse retenue par la Chambre n’est pas fondée.”²⁰ In essence, the Defence claims that the Chamber provided the Prosecution with an excuse for its alleged investigative and prosecutorial failures and alleged lack of knowledge of the law, and that the excuse was unjustified in the circumstances. However, these alleged errors do not feature in the issue

¹⁵ ICC-01/04-168 OA3, para.9; ICC-02/11-01/11-307, para.70; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para. 7.

¹⁶ ICC-02/11-01/11-439, page 1.

¹⁷ ICC-02/11-01/11-439, page 1.

¹⁸ ICC-02/11-01/11-307, para.70.

¹⁹ ICC-02/11-01/11-439, para.15-16.

²⁰ ICC-02/11-01/11-439, para.17-20.

identified for appellate review. The Defence makes no effort to link them to the issue or to explain which rights are breached by these alleged errors. In such circumstances, where the party seeking leave cites various alleged errors but "...does not explain their relationship with the issue as defined in the application..."²¹ this Chamber has previously rejected the relevant application.²²

11. Third, the Defence bases the issue identified for appeal on several mischaracterizations. The Defence claims for example that in the Impugned Decision, (i) "...les Juges ont considéré que le Procureur avait entièrement et globalement failli " ;²³ (ii) "[l]es Juges ont souligné que le Procureur n'apportait aucun élément probant au soutien de ses multiples accusations " ;²⁴ and (iii) "[l]e constat fait par les Juges est [...] le Procureur a le devoir d'enquêter, à charge et à décharge, et il n'a pas mené d'enquête."²⁵ The Impugned Decision does not make any of the above findings. Hence, even if it were assumed that the question raised by Defence is a sufficiently concrete or specific issue, it is based on an inaccurate representation of the Impugned Decision.
12. Fourth, the Defence also makes submissions on the merits regarding the alleged errors of the Chamber when assessing "*délai raisonnable*".²⁶ The Prosecution submits that this is a mere disagreement with the findings of the Chamber. The Chamber, in the exercise of its discretionary powers, analysed in detail the right of Mr. Gbagbo to be tried without undue delay.²⁷ The fact that the Pre-Trial Chamber, which is the Chamber most familiar with the facts of the case, assessed all information and arguments about whether the delay was reasonable and came to a different conclusion than the Defence does not create an appealable issue.²⁸

²¹ ICC-02/11-01/11-307, para.72.

²² ICC-02/11-01/11-307, para.72.

²³ ICC-02/11-01/11-439, para.11.

²⁴ ICC-02/11-01/11-439, para.19.

²⁵ ICC-02/11-01/11-439, para.23.

²⁶ ICC-02/11-01/11-439, paras.35-45.

²⁷ ICC-02/11-01/11-432, paras. 38-43.

²⁸ ICC-02/05-02/09-267, para.11-12.

13. Fifth, when discussing the issue of undue delay, the Defence makes reference to matters that have not actually been decided by the Chamber - for example, that “...*détention serait prolongée de près d’une année supplémentaire...*”.²⁹ The Impugned Decision did not make any ruling on the continued detention of the accused. Accordingly, this matter does not arise from the Impugned Decision. It is settled law that the party seeking leave to appeal should identify “...a specific “issue” *which has been dealt with in the relevant decision* and which constitutes the appealable subject.”³⁰
14. Finally, appellate review of the alleged errors cited by the defence would be premature. The Defence has the opportunity to seek leave to appeal the confirmation decision. At that point, there will be more clarity regarding several of the issues raised by the Defence, including the completeness of the Prosecution’s investigation,³¹ the extent of additional evidence already in the possession of the Prosecution (that has not yet been cited / used as incriminating evidence),³² the likelihood of locating additional evidence³³ and the actual extent of the delay occasioned by the adjournment. The current arguments made by the Defence on these issues are, by necessity, only speculation and hence not amenable to appellate review.

(ii) *The Issue does not meet the criteria for leave to appeal under Article 82(1)(d)*

15. Even if, *arguendo*, the Chamber finds that the Defence has identified a concrete and specific issue that arose out of the Impugned Decision, the Prosecution submits that it still does not satisfy the requirements for leave to appeal under Article 82(1)(d).

The Issue does not significantly affect the fair and expeditious conduct of the proceedings

²⁹ ICC-02/11-01/11-439, para.10.

³⁰ ICC-02/05-03/09-428, Para.7. Emphasis added.

³¹ See, for example, ICC-02/11-01/11-439, para.22.

³² See, for example, ICC-02/11-01/11-439, para 18.

³³ See, for example, ICC-02/11-01/11-439, para 18.

16. The Defence claims that the issue of undue delay relates to the broader notion of fair trial, and hence affects the fairness of the trial.³⁴ It adds that the question of the right of Mr Gbagbo to be tried without undue delay arose since the Chamber has decided to extend the current proceedings by nearly a year.³⁵ The Prosecution submits that the mere assertion that the Impugned Decision causes delay is insufficient to justify leave to appeal. *Any* decision issued under Article 61(7)(c)(i) will, *by definition*, feature a period of delay for the purposes of presenting or locating more evidence. It cannot be the case that *all* such decisions are automatically subject to appeal just because they cause some delay and thereby affect the fairness of proceedings.
17. Moreover, it is insufficient for the party seeking leave to appeal to merely establish a link between the issue and the fair conduct of proceedings. The relevant question is whether the identified issue *significantly* affects the fair conduct of the proceedings. The issue must be such as to affect this element of justice "*in a material way*".³⁶ The delay caused by the Impugned Decision does not meet this threshold. Notably, the Chamber took several steps to mitigate the impact of the Article 61(7)(c)(i) decision, ordering that the evidence must be made available to the Chamber the moment it is disclosed between the parties³⁷ and emphasizing the necessity to comply with disclosure obligations without waiting for the deadlines to expire.³⁸ The Prosecution also notes that at least some of the delay occasioned by Impugned Decision is for the purposes of ensuring that Defence can object to the charges, challenge the new evidence presented by the Prosecutor and present new evidence in response to the further evidence submitted by the Prosecutor.³⁹

³⁴ ICC-02/11-01/11-439, para.46.

³⁵ ICC-02/11-01/11-439, para.47.

³⁶ ICC-02/11-01/11-307, para.36.

³⁷ ICC-02/11-01/11-432, para.45.

³⁸ ICC-02/11-01/11-432, para.45.

³⁹ ICC-02/11-01/11-432, para.46.

18. Finally, the Prosecution notes that the Defence does not make submissions regarding the fair trial implications of the other alleged errors cited in the Defence Application or regarding their impact on the expeditious conduct of proceedings. Accordingly, the Defence Application has failed to demonstrate that they meet the criteria for leave to appeal.

The Issue does not significantly affect the outcome of trial

19. The Defence claims that the Issue will have an impact on the outcome of trial since a finding that the Pre-Trial Chamber had breached fair trial rights will likely result in the dropping of charges and the release of Mr. Gbagbo.⁴⁰ It is true that in this context the Pre-Trial Chamber "...must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence."⁴¹ However, the argument advanced by the Defence is entirely speculative. It is not only based on the unsupported assumption that the Decision is erroneous and that the Appeals Chamber will overturn the error, but also on the assumption that the error is such that it cannot be remedied by any other means than by dropping the charges against Mr Gbagbo. The Prosecution submits that a reasonable "forecast of the consequences" of wrongly deciding the issue identified by the Defence is that the same matter can be litigated with greater clarity, and with more relevant information on the record, once a decision on the confirmation of charges is made. Hence there will be minimal, if any, impact on the outcome of any eventual trial.

Immediate resolution by the Appeals Chamber of the Issue will not materially advance the proceedings.

⁴⁰ ICC-02/11-01/11-439, para.48.

⁴¹ ICC-02/11-01/11-307, para.68.

20. The Defence claims that undue prejudice would be avoided if the Appeals Chamber ruled on this matter immediately.⁴² It adds that resolution is necessary in the interests of judicial economy, since the Impugned Decision will lead the parties and the Court to devote significant resources to carry out further investigations, and that these expenditures would be irreversible even if the Impugned Decision were to be reversed at a later stage.⁴³
21. The Prosecution submits that appellate review, now, of the alleged errors cited by the Defence is premature. The Defence has the opportunity to seek leave to appeal the decision under Article 61(7)(a) or (b). At that point, there will be more clarity regarding several matters raised by the Defence, including the completeness of the Prosecution's investigation,⁴⁴ the extent of additional evidence already in the possession of the Prosecution (that has not yet been cited or used as incriminating evidence),⁴⁵ the likelihood of locating additional evidence⁴⁶ and the actual extent of the delay occasioned by the adjournment. In addition, the arguments made by the Defence at this stage on these issues are, by necessity, speculative, both with a view to the outcome of the appeal as well as the fact that the on-going proceedings would be a waste of resources contrary to judicial economy.
22. The Defence states that since there is no appeal as of right from a confirmation decision, "*...la défense devrait présenter une nouvelle demande d'autorisation d'interjeter appel alors que le préjudice aurait déjà été subi.*"⁴⁷ and relies on a decision in the *Katanga* case where leave to appeal was granted even though there was the possibility of resolving the issue via final appeal of the trial judgement. The Prosecution submits that the example cited by the Defence is distinguishable from the current circumstances. In that decision, the Chamber held that waiting

⁴² ICC-02/11-01/11-439, para.51.

⁴³ ICC-02/11-01/11-439, para.52.

⁴⁴ See, for example, ICC-02/11-01/11-439, para.22.

⁴⁵ See, for example, ICC-02/11-01/11-439, para 18.

⁴⁶ See, for example, ICC-02/11-01/11-439, para 18.

⁴⁷ ICC-02/11-01/11-439, para.53.

till the issuance of a final judgement would create the undesirable situation where the Chamber would have ruled on the guilt or innocence of the accused, imposed a sentence and ruled on reparations prior to the assessment of the legality of the decision.⁴⁸ In addition, the Appeals Chamber repeatedly affirmed that the arguments raised by the appellant in that case were placed before it prematurely given the state of the proceeding.⁴⁹ This is also the case for the Issue raised by the Defence in this case. In any event, as discussed above, there will be more clarity on the case record regarding several of the matters raised by the Defence.

Conclusion

23. For the above reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 1st day of July 2013

At The Hague, The Netherlands

⁴⁸ ICC-01/04-01/07-3327, par. 16.

⁴⁹ ICC-01/04-01/07-3363 OA13, paras.56, 95, 96, 98.