

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: *English*

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 COTE D'IVOIRE**

**IN THE CASE OF  
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE***

**Public**

**Defence request for leave to appeal the “Order setting the commencement date of trial” (ICC-02/11-01/15-58)**

**Source:      Defence of Mr Charles Blé Goudé**

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

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**REGISTRY**

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Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Procedural history

1. On 17 November 2014, Trial Chamber I (“the Chamber”) in the case of *The Prosecutor v. Gbagbo* (“the *Gbagbo* case”) issued the ‘Order setting the commencement date for the trial and the time limit for disclosure,’ in which the Chamber set the commencement date for trial for 7 July 2015.<sup>1</sup>
2. On 11 December 2014, Pre-Trial Chamber I confirmed the charges against Mr. Blé Goudé in the case of *The Prosecutor v. Charles Blé Goudé* (“the *Blé Goudé* case”) <sup>2</sup> while on 20 December 2014, the Presidency referred the case to the Chamber.<sup>3</sup>
3. On 22 December 2014, the Prosecutor requested the Chamber to join the *Gbagbo* and the *Blé Goudé* cases.<sup>4</sup>
4. On 26 January 2015, the Defence of Charles Blé Goudé (“the Defence”) filed the ‘Urgent Defence submissions on the need to have adequate time and facilities to prepare for trial and extension of time to respond to joinder request’.<sup>5</sup>

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<sup>1</sup> Trial Chamber I, “Order setting the commencement date for the trial and the time limit for disclosure”, 17 November 2014, ICC-02/11-01/11-723.

<sup>2</sup> Pre-Trial Chamber I, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186. See also Partly Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-02/11-02/11-186-Anx.

<sup>3</sup> Corrigendum to the “Decision referring the case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I”, ICC-02/11-02/11-193, 20 December 2014 (registered on 22 December 2014), 20 December 2014, ICC-02/1102/11-193-Corr.

<sup>4</sup> Prosecution’s Request to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé*, 22 December 2014, ICC-02/11-02/11-194.

<sup>5</sup> Urgent Defence submissions on the need to have adequate time and facilities to prepare for trial and extension of time to respond to joinder request, 26 January 2015, ICC-02/11-02/11-201.

5. On 13 February 2015, a Status Conference was convened in the *Blé Goudé* case, during which the parties and participants made written and oral submissions on, *inter alia*, the commencement date of trial.<sup>6</sup>
6. On 11 March 2015, the Chamber granted the Prosecution's requests to join the *Gbagbo* and the *Blé Goudé* cases ("the Decision on Joinder"), and scheduled a Status Conference for 21 April 2015.<sup>7</sup>
7. On 14 April 2015, the Defence filed written submissions in view of the scheduled Status Conference related to item (i) of the agenda, i.e. the commencement date of the trial.<sup>8</sup>
8. On 21 April 2015, a Status Conference was held during which the parties supplemented their written submissions on various items ordered by the Chamber, notably the commencement date of trial, the timing of disclosure, the need for any auxiliary documents related to the charges, and the possibility for the parties to reach an agreement on facts under rule 69 of the Rules of Procedure and Evidence ("the RPE").<sup>9</sup>
9. On 7 May 2015, the Chamber issued its 'Order setting the commencement date for trial,' ("the Impugned Order") and set commencement date for trial on 10 November 2015.<sup>10</sup>

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<sup>6</sup> Defence Submissions on "Order scheduling a status conference and setting a provisional agenda", 29 January 2015, ICC-02/11-02/11-204.

<sup>7</sup> Trial Chamber I, Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters, 11 March 2015, ICC-02/11-01/15-1, with public Annex A.

<sup>8</sup> Defence Submissions on Agenda Items for the Status Conference of 21 April 2015, 14 April 2015, ICC-02/11-01/15- 33.

<sup>9</sup> ICC-02/11-01/15-T-I-CONF-ENG ET.

<sup>10</sup> Trial Chamber I, Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58.

## II. Submissions

10. The Defence hereby respectfully requests from the Chamber to be granted leave to appeal the ‘Order setting the commencement date for trial.’ The Impugned Order raises a capital question, which goes beyond a simple disagreement or difference of opinion, but constitutes an issue that meets the criteria set forth in article 82(1)(d) of the Rome Statute (“the Statute”) and, as such, deserves to be ruled on by the Appeals Chamber, in order to ensure the fair conduct of the proceedings without causing serious and irreparable prejudice to Mr. Blé Goudé.

11. The Defence respectfully recalls that Mr. Blé Goudé’s defence team is newly appointed, and has been working on the case for less than five months.<sup>11</sup> Since its inception, the current team has appraised the Chamber of the obstacles that Mr. Blé Goudé faces in exercising his fundamental right under the Statute to have adequate time and facilities to prepare for trial.<sup>12</sup> These obstacles exist for reasons outside Mr. Blé Goudé’s control, and are due to various factors such as the team being newly constituted, the effects of the Decision on Joinder, and the technical problems the current team has experienced.<sup>13</sup>

12. The Defence respectfully maintains that by setting the trial date for 10 November 2015, the Chamber did not give proper weight in its deliberations to Mr. Blé Goudé’s right under article 67 of the Statute to adequate time and facilities given the aforementioned obstacles he faces in addition to the Court being scheduled to move to its permanent premises at the end of 2015.

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<sup>11</sup> See ICC-02/11-01/15-33, para. 15; ICC-02/11-02/11-201 para 24-28.

<sup>12</sup> See ICC-02/11-01/15-33; ICC-02/11-02/11-201; Notification on status quo of Defence access to the software programs of the International Criminal Court, 6 March 2015, ICC-02/11-02/11-220.

<sup>13</sup> See ICC-02/11-01/15-33, paras. 9-13, 15, 20-22.

### III. Applicable law

13. Article 82(1) of the Statute provides that:

“Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

14. Pursuant to rule 155(1) of the RPE:

“When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall [...] make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.”

15. Regulation 65 of the Regulations of the Court further provides that:

“1. An application for leave to appeal under rule 155 shall [...] specify the legal and/or factual reasons in support thereof. [...]

2. An application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons warranting immediate resolution by the Appeals chamber of the matter of the issue.”

### IV. Analysis

16. Article 82(1)(a), (b) and (c) of the Statute provides a list of decisions that may be appealed whereas paragraph (d), as a residual provision, sets forth the legal criteria a decision must meet in order for the parties to seek leave to appeal.

17. The Defence hereby submits that the Impugned Order setting the commencement date for trial meets all the following legal criteria contained in

article 82(1)(d): the decision involves an issue (IV.1.), which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial (IV.2.), and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings (IV.3.). Therefore, the Defence submits that the Impugned Order involves the following appealable issue.

**IV.1. Whether the Chamber by setting the trial date for 10 November 2015 violated Mr. Blé Goudé's fundamental right to have adequate time to prepare his defence under article 67(1)(b) of the Statute.**

18. In a founding decision of 13 July 2006,<sup>14</sup> the Appeals Chamber delivered a definition of the "issue" according to article 82(1)(d):

"An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is a disagreement or conflicting opinion."<sup>15</sup>

19. In the instant case, the subject that justifies resolution is whether the Chamber erred in determining that the Defence would not suffer prejudice in regards to the 10 November 2015 commencement date of trial because in addition to the four months accorded to the Defence from the completion of the Prosecution's disclosure, the Chamber reasoned that, in its calculation, the Defence would have an additional two months to prepare for trial before the commencement of the Prosecution's presentation of evidence.<sup>16</sup>

20. It is the position of the Defence that it must be fully prepared for trial from the moment that the opening statements are scheduled to take place. In order to

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<sup>14</sup> Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9-13

<sup>15</sup> *Ibid.* para 9.

<sup>16</sup> ICC-02/11-01/15-58, para. 16.

make any form of opening statement, the Defence must have reviewed and analysed the totality of the Prosecution's evidence. The Defence respectfully submits that in accordance with its detailed and objective calculations it will not be able to review thousands of items of disclosure before 10 November 2015.<sup>17</sup> Therefore, the cardinal question is whether the Chamber correctly assumed that the Defence would have an additional two months following the opening statements on 10 November 2015. In the event the Chamber wrongly assumed that these two months would effectively exist, the basis of the Chamber's fair trial assessment is moot. This issue arises directly from the Impugned Order as can be derived from the Chamber's reasoning in paragraph 16.

**IV.2. The resolution of the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.**

21. Under article 82(1)(d), not every issue is appealable.<sup>18</sup> The party seeking leave to appeal must present an issue that would "significantly affect", i.e. in a material way, either a) "the fair and expeditious conduct of the proceedings" or b) "the outcome of the trial."<sup>19</sup>

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<sup>17</sup> See ICC-02/11-01/15-33, para. 18.

<sup>18</sup> ICC-01/04-168, para. 10.

<sup>19</sup> *Ibid.*



*IV.2.1. The resolution of the issue would significantly affect the fair and expeditious conduct of the proceedings*

i. The fair conduct of the proceedings

22. In the *Lubanga* case,<sup>20</sup> the Appeals Chamber provided a sound definition of the criteria to be met in order to be granted leave to appeal under article 82(1)(d) of the Statute:

“The term “fair” in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1)) and article 21 (3); making its interpretation and application subject internationally recognized human rights.”

23. The right to a fair trial is of a fundamental nature which is recognized by international<sup>21</sup> and regional<sup>22</sup> instruments of human rights. It is also recognized by article 67 of the Statute, under the rights of the Accused and as the minimum guarantees to which the Accused is entitled. Article 67 provides a very detailed list of all the rights attached to the right to a fair trial. Among these minimum guarantees is the right “[t]o have adequate time and facilities for the preparation of the defence [...]”.<sup>23</sup> The right to have adequate time to prepare the defence is one of the most significant aspects of the whole principle of equality of arms. Therefore, impairing the right to have adequate

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<sup>20</sup> *Ibid.*, para. 11.

<sup>21</sup> Universal Declaration of Human Rights, Adopted and proclaimed by the United Nations General Assembly Resolution 217 A (III) of 10 December 1948, Article 10; International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171, article 14.

<sup>22</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), 213 United Nations Treaty Series 221 et seq., registration no. 2889, article 6; African Charter on Human and Peoples' Rights, signed on 27 June 1981, entered into force on 21 October 1986, 1520 United Nations Treaty Series 26363, articles 7 and 26; The American Convention on Human Rights, "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, article 8.

<sup>23</sup> Article 67(1)(b) of the Statute.

time for the preparation of the defence would endanger the fairness of the proceedings by depriving the Accused of one of his most fundamental rights before the Court.

24. On numerous occasions, the Defence has stressed its urgent and crucial need for time to prepare the trial, whether orally<sup>24</sup> or in writing.<sup>25</sup> The Defence feels it to be superfluous to extensively repeat its arguments. Yet, it provides herewith a concise overview of its main arguments thereto.

25. The new Defence team of Charles Blé Goudé has been appointed in the course of January and February 2015.<sup>26</sup> On 11 March 2015, the Chamber decided to join the cases against Laurent Gbagbo and Charles Blé Goudé.<sup>27</sup> On 21 April 2015, during the Status Conference, the Prosecutor revealed that she would call a large and unusual number of witnesses, i.e. 125 witnesses, emphasizing the fact that even more witnesses could be called to testify.<sup>28</sup>

26. The Defence is now facing a situation where, although recently appointed, it must prepare a joint trial of 125 witnesses to be called by the Prosecutor, more than 50.000 pages of evidence disclosed by the Prosecutor<sup>29</sup> and more than 28.656 pages of documents filed in the *Gbagbo* case.<sup>30</sup> Besides, the Defence emphasizes the fact that, contrary to the Prosecutor, it has not been working on the case for three years and a half.<sup>31</sup>

27. A commencement of the trial scheduled on 10 November 2015 clearly marks a significant and prejudicial imbalance between the rights of the Accused and

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<sup>24</sup> See ICC-02/11-02/11-T-9-CONF-ENG ET 13-02-2015 10/75 NB T, pp. 9-23 ; ICC-02/11-01/15-T-1-CONF-ENG ET 21-04-2015 92/102 NB T, pp. 92-93.

<sup>25</sup> See ICC-02/11-02/11-201; ICC-02/11-02/11-204; ICC-02/11-01/15- 33, para. 7-34.

<sup>26</sup> ICC-02/11-02/11-201, para. 12 and 13.

<sup>27</sup> ICC-02/11-01/15-1, with public Annex A.

<sup>28</sup> ICC-02/11-01/15-T-1-CONF-ENG ET 21-04-2015 92/102 NB T, p. 15, lines 19-20.

<sup>29</sup> ICC-02/11-01/15-33, para. 15.

<sup>30</sup> ICC-02/11-01/15-33, para. 10 and 11.

<sup>31</sup> Pre-Trial Chamber III, Warrant Of Arrest For Charles Blé Goudé, 21 December 2011, ICC-02/11-02-11-1.

the favorable position of the Prosecutor because of the above mentioned features and circumstances. On many occasions, the Defence has highlighted the improbability to be prepared for a trial by the end of this year. The Defence has substantiated every one of its submissions regarding its desperate need for adequate time to prepare for trial. In its written submissions for the Status Conference held on 21 April 2015, the Defence agreed with the Gbagbo Defence that April 2016 would be a reasonable date to begin the trial although, taking into account the Prosecutor's arguments, January 2016, at the very least, would be workable.

28. However, by scheduling the date for commencement of the trial on 10 November 2015, the Chamber has erred in its application of article 67 (1) (b) of the Statute in that it has denied the Accused to have adequate time to prepare for the trial. The fact that the Chamber split the commencement of the trial between November 2015, date of the opening statements, and January 2016, when the Prosecutor will start the presentation of her case, does not rectify the prejudice but, instead, exacerbates it as not only the Accused is deprived of the right to properly prepare his opening statement, but he is also deprived of his right to adequately prepare the presentation of the Prosecutor's case.

29. First, the month of November 2015 to start with the opening statements is not a fair date considering the legal fact that the opening statement is a decisive of the trial's momentum and, as such, it requires a sound and complete knowledge of the case, at least one month before it is scheduled. It would mean that the Defence would have to be ready to prepare the opening statements by the end of October 2015, less than four months after the last disclosure of evidence to be made by the Prosecutor. Second, if the Prosecutor starts the presentation of the case in January 2016, as ordered by the Chamber, it means that the Defence would be deprived of part of its time to adequately prepare for it. Indeed, the Chamber did not properly consider the fact that, in

the course of November and December 2015, the Court will be relocated to the new premises. On top of this relocation, December 2015 also coincides with the recess of the Court. So, in regards to the time between the months of November and December 2015, it appears very unlikely that the Defence will actually benefit from two full months, from the opening statements, to prepare for the presentation of the Prosecutor's case. On the contrary, a reasonable estimation would be that the Defence will have only four weeks to be fully prepared for the first witnesses to be called. Both deadlines appear to be unfair as they seriously impact the right of the Accused to have sufficient time to fully and adequately prepare for the trial and thus, the fair conduct of the proceedings.

#### ii. The expeditious conduct of the proceedings

30. In the *Lubanga* case,<sup>32</sup> the Appeals Chamber held that the "expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial".<sup>33</sup>

31. In the present case, the Impugned Order also affects the expeditious conduct of the proceedings in several ways. First, if the opening statements are held in November 2015, the Defence will not be in a position to make such an opening statement for the above mentioned reasons. Therefore, the Defence will find itself compelled to request a postponement of its opening statement to the presentation of the Defence's case, which may be detrimental to the latter.

32. Second, in regard to the start of the presentation of evidence with prosecution witnesses, Defence cross-examinations will necessarily be made more difficult because, as previously explained, the Defence will not have sufficient time to

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<sup>32</sup> ICC-01/04-168.

<sup>33</sup> *Ibid.*, para. 11.

prepare them. Inevitably, requests for postponements will likely have to be presented, which will result in time-consuming procedural issues. The Defence previously stated that the time it requested to prepare for trial should be seen as a means of conducting the proceedings expeditiously when trial begins. In the Impugned Order, the Chamber did not address this issue, leaving the Defence obliged to consider the whole work of cross-examinations as a day to day task whereas it should be a long, thorough and thoughtful enterprise.

33. As a conclusion, it appears that the Impugned Decision raises an appealable issue the resolution of which clearly and directly impacts the fairness and the expeditiousness of the proceedings for the foregoing reasons, all related to the fundamental right of the Accused to a fair trial.

*IV.2.2. The resolution of the issue would affect the outcome of the trial*

34. In the *Lubanga* case,<sup>34</sup> the Appeals Chamber determined the meaning and the scope of the “outcome of the trial”:

“The outcome of the trial is postulated as a separate and distinct consideration warranting the statement of an issue for consideration by the Appeals Chamber, where the possibility of error in an interlocutory or intermediate decision may have a bearing thereupon. The Pre-Trial or 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.”<sup>35</sup>

35. In the present case, the Impugned Order raises an issue that may be decisive for the outcome of the trial. The date for commencement of the trial is a

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, para. 13.

significant milestone for both the Defence and the Prosecutor. It gives both parties visibility as to the deadline to be ready for the trial. Anticipating this date in regard of the situation of one party ends up influencing the outcome of the trial as the disadvantaged party will find itself in an antagonistic and impossible position to bridge the gap of time. Because of the anticipated date for the beginning of the trial, the Impugned Order directly affects the outcome of the proceedings by tipping the scales to the advantage of one party at trial.

**IV.3. The issue requires an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.**

36. Pursuant to article 82(1)(d) of the Statute, an appealable issue must require “an immediate resolution [of the issue] by the Appeals Chamber may materially advance the proceedings.” In the *Lubanga* case,<sup>36</sup> the Appeals Chamber held that:

“the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”<sup>37</sup>

37. In the same decision, the Appeals Chamber gave concise definitions of the relevant terms composing this condition. “Advance” should be understood as “move forward”;<sup>38</sup> it is governed by the will to ensure that the proceedings follow the right course, while “immediate” refers to the importance of

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, para. 14.

<sup>38</sup> *Ibid.*, para. 15.

avoiding errors through the procedure of leave to appeal by the prompt reference of the issue to the Appeals Chamber.<sup>39</sup>



38. In the present case, the relevant issue at stake is whether the Chamber has affected the rights of the Accused to have adequate time to prepare his defence, setting a date for the commencement of the trial that appears too expedited for the Defence to properly fulfill its obligations to Mr. Blé Goudé. The Impugned Order, as it stands now, would unjustly infringe the rights of the Accused to prepare for an opening statement and thus, for the trial. As such, an immediate resolution of the issue is required from the Appeals Chamber for the parties and participants to “move forward”, i.e. to gain the certainty that the trial will begin in due time, regarding the rights of the Accused.

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<sup>39</sup> *Ibid.*, para. 18.

**RELIEF SOUGHT**

For the foregoing reasons, the defence respectfully requests the honourable Trial Chamber I to grant leave to appeal the Chamber's 'Order setting the commencement date of trial' (ICC-02/11-01/15-58).

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Mr. Knoops, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this 13 May 2015

At The Hague, the Netherlands