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**International
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Court**



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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuca
Judge Bertram Schmitt

SITUATION IN CÔTE D'IVOIRE

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

Public Document

Consolidated response to the “Notice d’information sur le fait que la Défense se réserve la possibilité d’utiliser à l’ouverture du procès le droit d’intervention prévu à la Règle 134(2)” (ICC-02/11-01/15-257) and to the “Defence observations and objections on the conduct of proceedings)” (ICC-02/11-01/15-263)

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. In relation to the Defence of Mr Gbagbo's submissions, the Common Legal Representative of the victims admitted to participate in the proceedings (the "Legal Representative")¹ submits that the objections or observations that the Defence may raise under rules 134(2) of the Rules of Procedure and Evidence (the "Rules") must be limited to issues concerning the conduct of the proceedings that have arisen after 1 October 2015.

2. The Legal Representative contends that the Defence should not be permitted to raise any other type of objections or observations under rule 134(2) of the Rules immediately before the opening statements on 10 November 2015, in order to avoid unnecessary delays to the commencement of the trial.

3. In order to decide whether the Defence may make oral submissions under rule 134(2) of the Rules immediately before the opening statements on 10 November 2015, the Legal Representative submits that the Defence should be directed to file a document within a time frame set by the Chamber, indicating the specific issues it intends to raise and the time it requires to do so.

4. In relation to the Defence of Mr Blé Goudé's submissions, the Legal Representative submits that they should be dismissed because the Defence does not raise objections or observations concerning the conduct of the proceedings in the sense of rule 134(2) of the Rules, but it essentially challenges previous rulings on the conduct of the proceedings which cannot be reconsidered.

¹ See the "Directions on the conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.

II. Background

5. On 7 May 2015, Trial Chamber I (the “Chamber”) issued the “Order setting the commencement date for trial”,² indicating the commencement date for the trial on 10 November 2015 and requesting the parties to file any motion under rule 134 of the Rules by 1 October 2015.³

6. On 1 October 2015, the Defence of Mr Gbagbo filed the “Notice d’information sur le fait que la Défense se réserve la possibilité d’utiliser à l’ouverture du procès le droit d’intervention prévu à la Règle 134(2)” (the “Defence Notice”),⁴ indicating its intention to make observations and raise objections under rule 134(2) of the Rules at the first session of the trial.⁵

7. On the same day, the Defence of Mr Blé Goudé filed the “Defence observations and objections on the conduct of proceedings” (the “*Blé Goudé Request*”).⁶

8. On 14 October 2015, the Prosecutor filed the “Prosecution’s response to the Blé Goudé ‘Defence observations and objections on the conduct of proceedings’ (ICC-02/11-01/15-263)” (the “Prosecution’s Response”),⁷ requesting the Chamber to dismiss the *Blé Goudé Request*.⁸

² See the “Order setting the commencement date for trial” (Trial Chamber I), No. ICC-02/11-01/15-58, 7 May 2015.

³ *Idem*, paras. 16 and 28.

⁴ See the “Notice d’information sur le fait que la Défense se réserve la possibilité d’utiliser à l’ouverture du procès le droit d’intervention prévu à la Règle 134(2)”, No. ICC-02/11-01/15-257, 1 October 2015 (the “Defence Notice”).

⁵ *Idem*, para. 8.

⁶ See the “Defence observations and objections on the conduct of proceedings”, No. ICC-02/11-01/15-263, 1 October 2015 (the “*Blé Goudé Request*”).

⁷ See the “Prosecution’s response to the Blé Goudé ‘Defence observations and objections on the conduct of proceedings’ (ICC-02/11-01/15-263)”, No. ICC-02/11-01/15-291, 14 October 2015 (the “Prosecution’s Response”).

⁸ *Idem*, para. 28.

9. Pursuant to regulation 24(2) of the Regulations of the Court (the “Regulations”), the Legal Representative submits her response to the Defence Notice and to the *Blé Goudé* Request.

III. Submissions

1. On the Defence Notice

10. At the outset, the Legal Representative contends that, if any, further objections or observations by the Defence under rule 134(2) of the Rules must be limited to the conduct of the proceedings that have arisen after 1 October 2015.

11. Indeed, the Defence of Mr Gbagbo and the Defence of Mr Blé Goudé were granted the opportunity to file by 1 October 2015 any objections or observations under rule 134(2) which have arisen since the confirmation hearing.⁹

12. Moreover, during the status conference held on 25 September 2015, the Presiding Judge invited the parties and participants to submit any objections or observations under rule 134(2) in a timely manner, *i.e.* before 1 October 2015,¹⁰ and urged parties and participants to approach any concern they might have as soon as possible and not to make use of rule 134(2) “*in a tactical or last-minute way*”.¹¹

13. The Legal Representative submits that this approach is consistent with the prevalent practice of the Court. Indeed, Trial Chambers have consistently made an open interpretation of the expression “*at the commencement of the trial*” in rule 134(2)

⁹ See the “Order setting the commencement date for trial”, *supra* note 2, para. 28.

¹⁰ See the transcript of the status conference held on 25 September 2015, No. ICC-02/11-01/15-T-4-ENG ET, p. 35, lines 8-13.

¹¹ *Idem*, p. 37, line 25 to p. 38, line 3.

of the Rules, inviting the parties and participants to submit their observations or objections pursuant to this provision before the first trial session.¹²

14. The main reasons adduced in support of this interpretation are avoiding delays in the proceedings,¹³ providing an efficient time management,¹⁴ and having the opportunity for the issues raised to be effectively discussed and solved before the first session of the trial.¹⁵

15. In this regard, the practice of Chambers shows that rule 134(2) of the Rules has been applied bearing in mind the right of the Accused to an expeditious trial, rather than giving the opportunity to the parties and participants to re-litigate issues which were raised before or could have been raised before presenting opening statements.

16. The drafting history of the Rules of Procedure and Evidence supports this interpretation of rule 134(2). The proposed Rules of Procedure and Evidence submitted by Australia to the Preparatory Commission mentioned that “[...] *Either party may move after the trial commences for appropriate relief or ruling by way of motion, not being a preliminary motion [...]*”,¹⁶ whereas France referred to the “*Review of possible issues concerning admissibility and pleas regarding procedural irregularities [...]*”.¹⁷

¹² See the transcript of the status conference held on 22 January 2009, No. ICC-01/04-01/06-T-105-ENG ET, p. 22, lines 18 to p. 23, line 5; the “Order requesting submissions on the conduct of the proceedings” (Trial Chamber V(a)), No. ICC-01/09-01/11-778, 19 June 2013, para. 4; the “Order requesting submissions on the conduct of the proceedings” (Trial Chamber V(b)), No. ICC-01/09-02/11-769, 3 July 2013, para. 4; the “Decision on the Conduct of Trial Proceedings (General Directions)” (Trial Chamber V(a)), No. ICC-01/09-01/11-847-Corr, 16 August 2013 (dated 9 August 2013), para. 7; and the “Decision on the conduct of proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, paras. 7-8.

¹³ See the transcript of the status conference held on 25 September 2015, No. ICC-02/11-01/15-T-4-ENG ET, p. 33, lines 17-23.

¹⁴ *Idem*, p. 35, lines 8-13.

¹⁵ See the transcript of the status conference held on 16 January 2009, No. ICC-01/04-01/06-T-104-ENG ET, p. 54, lines 5-7 (“[i]t would be, on our preliminary view, a patent nonsense if we were to ask this question on the moment when the trial is about to start”).

¹⁶ See the Proposal submitted by Australia, Draft Rules of Procedure and Evidence of the International Criminal Court, doc. PCNICC/1999/DP.1, 26 January 1999, rule 78(a), pp 42-43.

¹⁷ See the Proposal by France, General outline of the Rules of Procedure and Evidence, doc. PCNICC/1999/DP.2, 1 February 1999, Section 4, sub-section 1(69), p. 8.

17. The final wording of rule 134 distinguished motions “prior to the commencement”, “at the commencement” and “after the commencement” of the trial,¹⁸ making more precise the initial proposals by Australia and France. As a consequence, even if the literal tenor of rule 134(2) of the Rules refers to the observations or objections “at the commencement of the trial”, it can be argued that this does not mean *stricto sensu* that such motions must necessarily be submitted during the first trial session, just before the opening statements.

18. The Legal Representative further notes that in its Notice, the Defence of Mr Gbagbo refers to four arguments that would militate in favour of raising objections or presenting observations under rule 134(2) after the Chamber’s deadline of 1 October 2015. In particular, the Defence i) reiterates the difficulty in working with an unofficial translation of the Pre-Trial Brief;¹⁹ ii) vaguely mentions alleged threats suffered by the Defence and its witnesses;²⁰ iii) indicates that an overall picture of the proceedings raised after the confirmation of charges would only be available at the very first hearing of the trial;²¹ and iv) argues that since the “observations” under rule 134(2) do not require a ruling of the Chamber, they do not need to be presented or solved before the start of the trial.²²

19. The Legal Representative contends that none of these arguments provides the Defence with an open-ended possibility to raise objections or observations under rule 134(2) of the Rules after 1 October 2015.

20. Firstly, the Legal Representative recalls that the Chamber already ruled that receiving a draft French translation of the Pre-Trial Brief is indeed sufficient, meets the requirements of article 67(1)(b) and (f) of the Statute and thus does not “*infring[e]*”

¹⁸ See rule 134(1), (2) and (3) of the Rules.

¹⁹ See the Defence Notice, *supra* note 4, para. 5.

²⁰ *Idem*.

²¹ *Ibid.*, para. 6.

²² *Ibid.*, para. 7.

on the right of Mr Gbagbo and Mr Blé Goudé to be informed in detail of the nature, cause and content of the charges within the meaning of Article 67(l)(a) of the Statute”.²³ In this regard, the Legal Representative further recalls the more recent ruling by the Chamber pursuant to which it is an “[i]ncorrect assertion that the Defence team is entitled to work only in French”.²⁴

21. In light of the above, the Legal Representative contends that the Defence’s arguments related to the lack of an official French translation of the Pre-Trial Brief cannot justify its alleged impossibility to make use of rule 134(2) of the Rules and, therefore, objections or observations under said rule should be raised as soon as possible.

22. Secondly, the alleged threats suffered by the Defence team and witnesses have already been raised before the Chamber and a decision in this regard will be issued in due course. In this regard, the Legal Representative refers to her previous submissions in relation to the speculative, unfounded and contradictory nature of these allegations.²⁵ Consequently, these claims cannot prevent the Defence from informing the Chamber, the parties and the participants before 10 November 2015 of any objections and/or observations pursuant to rule 134(2) of the Rules.

23. Thirdly, the Legal Representative submits that the Defence, contrary to its contentions, has repeatedly shown to have an overall and clear picture of the proceedings since the confirmation hearing.²⁶ In fact, in at least four different

²³ See the “Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief”, No. ICC-02/11-01/15-224, 16 September 2015, para. 17.

²⁴ See the “Decision on the Gbagbo Defence request for leave to appeal the ‘Decision on Defence requests relating to the Prosecution’s Pre-Trial Brief’” (Trial Chamber I), No. ICC-02/11-01/15-307, 22 October 2015, para. 11.

²⁵ See the “Response to Mr Gbagbo’s ‘Demande à la Chambre de mesures de protection de façon à permettre le travail d’enquête des équipes de Défense’(ICC-02/11-01/15-223)”, No. ICC-02/11-01/15-271, 6 October 2015, para. 7.

²⁶ See the “Requête de la Défense en report de l’audience de confirmation des charges prévue le 19 février 2013”, No. ICC-02/11-01/11-390, 8 February 2013, paras. 21-33. See also the “Requête urgente afin que soient suspendus les délais durant les vacances judiciaires”, No. ICC-02/11-01/11-584, 20

occasions between February 2013 and September 2015,²⁷ the Defence provided the Chamber with the precise indication of the work performed and to be performed in relation to each single proceeding which arose after the confirmation of charges.

24. As such, the Defence cannot argue the need to wait until the very first day of the trial to have an overall picture of the proceedings and to raise objections or observations under rule 134(2) of the Rules. At most, the Defence could be allowed to raise concrete issues under rule 134(2) provided that it justifies why it has been unable to bring said issues to the Chamber's attention earlier.

25. Fourthly, even if the observations may not require a ruling, the Legal Representative submits that the Defence should not be allowed to present remarks at the eleventh hour on subjects or issues that were known to it by 1 October 2015. Therefore, any observations the Defence intends to raise under rule 134(2) of the Rules should be limited to matters that, on the one hand, are related to proceedings which have arisen after 1 October 2015 and that, on the other hand, were not already addressed and ruled upon by the Chamber.

26. Lastly, the Legal Representative contends that, if the Defence wishes to submit orally objections or observations under rule 134(2) of the Rules immediately before the opening statements, it should provide the Chamber, the other parties and the participants with a written notice – in a time limit set by the Chamber - indicating the content and grounds for any such objection or observation, as well as the amount of time needed to address them.²⁸

December 2013, paras. 36-41; the "Requête urgente afin que soient suspendus les délais durant les vacances judiciaires", No. ICC-02/11-01/11-669, 17 July 2014, paras. 37-45; and the "Réponse de la Défense à la 'Prosecution's Request for Partial Suspension of the 'Order setting the commencement date of the trial and the time limit for disclosure'" (ICC-02/11-01/11-741)", No. ICC-02/11-01/11-745, 9 January 2015, paras. 26-32.

²⁷ *Idem*.

²⁸ In this sense, see the "Decision on the Conduct of Trial Proceedings (General Directions)", *supra* note 12, para. 7.

2. On the *Blé Goudé* Request

27. The Legal Representative shares the Prosecution's arguments on the *Blé Goudé* Request,²⁹ according to which said filing seems to amount to a request for reconsideration of the ruling on the Directions on the conduct of the proceedings³⁰ which cannot be entertained by the Chamber.

28. In accordance with the constant jurisprudence of the Court,³¹ a motion for reconsideration is "[t]o be confined to exceptional circumstances because 'in principle, the statutory framework set out by the Statute and the Rules do not provide for a motion of reconsideration as a procedural remedy against any decision taken by the Pre-Trial Chamber or the single judge'".³²

29. The Defence of Mr Blé Goudé had ample opportunities to present its observations on the conduct of the proceedings and to avail itself of the available remedies to challenge a decision. Moreover, the Defence for Mr. Blé Goudé fails to demonstrate that exceptional circumstances eventually exist warranting the reconsideration by the Chamber of its previous ruling.

30. Furthermore, as also argued by the Prosecution,³³ the *Blé Goudé* Request is not appropriately made on the basis of rule 134(2) of the Rules and of the Order setting

²⁹ See the Prosecution's Response, *supra* note 7, paras. 10-19.

³⁰ See *supra* note 1.

³¹ See the "Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI" (Pre-Trial Chamber I), No. ICC-01/04-01/07-259, 10 March 2008, p. 5 ("*such requests are to be confined to exceptional circumstances*"). See also the "Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010" (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, para. 18 ("*[i]rregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory*"); and the "Decision on the request to present views and concerns of victims on their legal representation at the trial phase" (Trial Chamber V), No. ICC-01/09-01/11-511, 13 December 2012, para. 6.

³² See the "Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI", *supra* note 31, p. 5.

³³ See the Prosecution's Response, *supra* note 7, paras. 20-25.

the commencement date for trial.³⁴ The arguments raised by the Defence concern issues which were already adjudicated by the Chamber and do not refer to objections or observations concerning the conduct of the proceedings in the sense of rule 134(2). Indeed, this provision clearly relates to matters arising after the confirmation hearing, understood as irregularities in the post-confirmation proceedings and not as matters related to the conduct of the trial itself.³⁵

IV. Conclusion

31. For the foregoing reasons, the Legal Representative respectfully requests the Chamber to limit eventual, further objections or observations that may be raised pursuant to rule 134(2) of the Rules to specific issues concerning the conduct of the proceedings that may have arisen after 1 October 2015, and to indicate that said issues should be submitted, in a time limit set by the Chamber, by way of a written notice, indicating the time necessary to address them before the opening statements.

32. The Legal Representative also respectfully requests the Chamber to dismiss the *Blé Goudé* Request.



Paolina Massidda
Principal Counsel

Dated this 23rd day of October 2015

At The Hague, The Netherlands

³⁴ See *supra* note 2.

³⁵ See the references to the drafting history of rule 134 contained in the Prosecution's Response, *supra* note 7, footnotes 31, 32, 33 and 34.