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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
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

**Prosecution's response to Mr Gbagbo's applications for leave to appeal the
decision concerning the suspension of the time limit to respond to the
Prosecutor's Trial Brief (ICC-02/11-01/15-1144)**

Source: Office of the Prosecutor

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

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Introduction

1. The Trial Chamber should reject the Defence of Mr Gbagbo's application for leave to appeal¹ its Decision² in which it rejected the Defence's request seeking a suspension of the time limit to respond to the Prosecution's Trial Brief pending a translation of said brief into French.³ The two issues⁴ referred to in the Application do not qualify as appealable issues within the meaning of article 82(1)(d). In addition, they are based on misinterpretations of the Decision and do therefore not arise from it. Even if, *arguendo*, the Chamber considers that the issues are appealable issues and that they do arise from the Decision, it should nonetheless reject the Application as the Defence does not demonstrate how the issues meet the remaining criteria for leave to appeal.

2. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under article 82(1)(d). The sole question is whether an issue meets the criteria set out in that provision.⁵ Reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of article 82(1)(d).

Submissions

A. The Issues are not appealable issues and do not arise from the Decision

The first issue regarding the importance of the Trial Brief is not an appealable issue arising from the Decision

3. As its first issue, the Defence argues that the Chamber erred in law in not recognising the importance of the Trial Brief for the Defence.⁶

¹ ICC-02/11-01/15-1144 ("Application").

² ICC-02/11-01/15-1141 ("Decision").

³ ICC-02/11-01/15-1137 ("Defence Request").

⁴ "Issues".

⁵ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

⁶ Application, paras. 8-19.

4. When portraying the Trial Brief as an “*extrêmement important*” document,⁷ the Defence misunderstands the Trial Chamber’s prior order on the further conduct of the proceedings.⁸ This misunderstanding is compounded by the Defence’s perception that the Trial Brief will clarify alleged uncertainties with respect to the “*détails des charges*”.⁹ The charges are already laid out in the confirmation decision.

5. The Trial Chamber held in its Order¹⁰ and reiterated in its Decision¹¹ that the Trial Brief is an auxiliary tool. The Trial Brief does not amend the charges or clarify uncertainties in the charges.¹² The Defence ignores this central ruling and insists on the importance of the Trial Brief. As presented by the Defence, the issue is “merely a question over which there is disagreement or conflicting opinion”.¹³ That alone does not constitute an appealable issue.

6. Further, the Defence also misrepresents the Chamber’s ruling. Citing paragraph 9 of the Decision, the Defence claims that the Chamber is now reversing its initial rationale by attempting to minimise the importance of the Trial Brief.¹⁴ This is not the case. The Chamber remained consistent with its initial position and, at paragraph 9, it merely establishes the distinction between a charging document and an auxiliary document.

7. The Defence also claims that in its Order, the Chamber considered that, without the Trial Brief, the Defence would not be in a position to make submissions on a “no case to answer” and would not be in a position to state whether it wishes to

⁷ Application, para. 8.

⁸ ICC-02/11-01/15-1124 (“Order”).

⁹ Application, para.10.

¹⁰ ICC-02/11-01/15-1137, para. 11.

¹¹ Decision, para. 9.

¹² According to the Appeals Chamber, auxiliary documents may serve the purpose of informing an accused person of “further details of the charges”, provided that they are filed prior to the commencement of the trial. To the extent that further information is provided in the course of the trial, this can only go towards assessing whether prejudice caused by the lack of detail of the charges may have been cured (ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 124, 129).

¹³ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27; ICC-02/11-01/11-99-Conf, para. 21.

¹⁴ Application, para. 13.

present evidence.¹⁵ First, this arises out of the Order, not the Decision. Second, the Defence misstates the Order and overreaches in its argument. The Order, at paragraph 14, merely establishes the sequence of events: once the Trial Brief is filed, the Defence will then be in a position to make their observations on the continuation of the trial. The Chamber has never qualified the Trial Brief as a *condition sine qua non* to enable the Defence to submit its observations. On the contrary, paragraph 9 of the Order rejects the Defence's claim that it is still at the starting line when it comes to assessing the evidence in this case. This argument would suggest that the Defence has not been following the examination of witnesses in court, that it has failed to analyse the evidence as it has been submitted, that it has not anticipated defence lines in its questioning of Prosecution witnesses and has not already developed a case theory. As the Trial Chamber correctly points out, this cannot be the case.

8. The Defence is also re-litigating a matter that the Trial Chamber had already ruled upon, namely that the jurisprudence does not support the position that the Accused is entitled to an official translation of any relevant material providing information concerning the charges.¹⁶ In this previous ruling, the Chamber cited the European Court of Human Rights (ECHR) which stated that the law "does not go so far as to require a written translation of all items of written evidence or official documents in the procedure", but rather that the "the accused is entitled to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events".¹⁷ At the time, the Chamber had concluded that it was not convinced that the rights of the Accused were infringed upon as a result of the filing of the Pre-Trial Brief in English.¹⁸ Hence, the matter of the language of a brief filed in addition to a decision confirming the charges, as an auxiliary tool, has already been disposed of.

¹⁵ Application, para. 14, citing the Order at para. 14.

¹⁶ ICC-02/11-01/15-224, para. 18.

¹⁷ ICC-02/11-01/15-224, para. 18.

¹⁸ ICC-02/11-01/15-224, para. 17.

9. Accordingly, the first issue is misconceived and does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute. In addition, it also does not arise out of the impugned Decision. Accordingly, the Defence's Application in this respect should be rejected.

The second issue concerning the Defence's working language does not arise from the Decision

10. As its second issue, the Defence argues that the Trial Chamber erred in failing to respond to the Accused's request that his Defence team use French as working language, and thereby "forced" the Defence to work in English.¹⁹

11. The Defence's working language is not a "subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination",²⁰ and therefore it does not qualify as an appealable issue within the meaning of article 82(1)(d). In fact, the second issue revolves around a matter of internal organisation of the Defence team and cannot be confused with the Accused's right under article 67(1)(a) to be informed of the charges, in a language which he fully understands and speaks. The second issue should be rejected on that basis alone.

12. In any event, the Defence's argument misconstrues the Decision and interprets the Chamber's ruling. Accordingly, the second issue does not arise from the Decision. The Decision does not create an obligation for the Defence team to work in the English language. If anything, it requires the Defence to read the Trial Brief in English and explain its substance to their client, as the Chamber rightly points out,²¹ pursuant to regulation 40(6) of the Regulations of the Court. It does not force the Defence to read the underlying evidence in English, nor does it require a 50-page response drafted in English.

¹⁹ Application, paras. 20-45.

²⁰ ICC-01/04-168 OA3, para. 9. 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. *See also*, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

²¹ Decision, para. 8.

13. The rights of the Accused under article 67(1)(a), (b) and (f) were preserved in that the Accused received the document containing the charges in French. He also received all statements, evidence and trial transcripts in French. The Trial Brief assembles all this evidence and places it in the context of the Prosecution's case theory, which has not changed since the beginning of this trial, despite the Defence's best efforts to convince the Chamber otherwise.²²

14. The Application erroneously assumes that the Trial Chamber did not address the issue of the Defence team's working language.²³ First, a Chamber is not obliged to give a detailed answer to every argument raised by the Parties in their submissions²⁴ nor does it have to recite each and every factor put before it.²⁵ Second, the Chamber did consider the language capabilities of the Defence team when it recalled Counsel's duty "to inform the accused of documents other than decisions and orders *for which an obligation of translation exists*."²⁶ In fact, the Chamber had previously noted, after the filing of the Prosecution's Pre-Trial Brief, the Defence team's capacity to work effectively in both languages of the Court.²⁷

15. For these reasons, the second issue is not an appealable issue and does not arise from the Decision. Accordingly, the Defence's Application in this respect should be rejected.

B. The Issues do not meet the criteria for leave to appeal under article 82(1)(d)

16. As noted above, the Application should be rejected because the issues do not arise from the Decision and because the first issue is also not an appealable issue. In

²² Application, para. 8 ("*nouvel état des faits*"), para. 10 ("*incertitudes sur le détail des charges*"), para. 14 ("*si la Chambre avait estimé que le dossier du Procureur était clair*").

²³ Application, para. 24 ("*... la Chambre ne répond pas*").

²⁴ ICC-02/11-01/11-278-Red OA, 26 October 2012, para. 9, Dissenting Opinion.

²⁵ ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20.

²⁶ Decision, para. 8 (emphasis added).

²⁷ ICC-02/11-01/15-224, para. 20, citing ICC-02/11-01/11-489, para. 13: "The Appeals Chamber considers that Mr Gbagbo's counsel must be in a position to explain to him the issues raised in the present appeal. In this regard, the Appeals Chamber notes the Prosecutor's submission that Mr Gbagbo's defence team has in the past demonstrated that it is perfectly capable of understanding and responding to decisions by Chambers and submissions of the Prosecutor and Registrar that were filed in English."

any event, the Application fails to show how the issues meet the remaining requirements of article 82(1)(d).

17. The issues do not significantly affect the fair and expeditious conduct of the proceedings. The Decision does not prevent the Defence from presenting its observations on the continuation of the trial in French. The Defence is fully aware of the evidence in the case. The Defence has followed all witness testimonies, received and responded to all motions to submit evidence in this case, and has had ample opportunity to assess the strength and credibility of the evidence presented at trial. The Prosecution's case theory has not deviated from the confirmation decision or the Pre-Trial Brief; both Accused are still charged for the same incidents under the same modes of liability. In sum, nothing stops the Defence from reading the Trial Brief in English and producing their observations in French.

18. Finally, immediate resolution of the issues by the Appeals Chamber would not materially advance the proceedings. On the contrary, raising the matter before the Appeals Chamber will further delay the proceedings which have already been on hold for nearly three months since the calling of the last Prosecution witness. As stated above,²⁸ the matter of the language of a brief filed as an auxiliary tool has already been disposed of in a previous decision. The Defence is therefore in a position to present its observations to the Chamber. Accordingly, there is no need for the Appeals Chamber's intervention to determine whether the Defence's rights have been protected in this case.

²⁸ Para. 8.

Conclusion

19. For the above reasons, the Prosecution requests the Chamber to dismiss the Application.



Fatou Bensouda, Prosecutor

Dated this 6th day of April 2018
At The Hague, The Netherlands