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Pénale  
Internationale**



**International  
Criminal  
Court**

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**TRIAL CHAMBER I**

**Before:** Judge Geoffrey Henderson, Presiding Judge  
Judge Olga Herrera Carbuccion  
Judge Bertram Schmitt

**SITUATION IN CÔTE D'IVOIRE**

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

**Public Document**

**Common Legal Representative's Consolidated Response to the requests submitted by Mr. Gbagbo and Mr. Blé Goudé for leave to appeal the Order setting the commencement date for trial (ICC-02/11-01/15-63 and ICC-02/11-01/15-64)**

**Source:** Office of Public Counsel for Victims

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## I. PROCEDURAL BACKGROUND

1. On 12 June 2014, Pre-Trial Chamber I, by majority, issued a decision confirming the charges against Mr. Gbagbo under article 61(7)(a) of the Rome Statute and committed him for trial.<sup>1</sup>
2. On 4 November 2014, Trial Chamber I (the “Chamber”) held the first status conference in the *Gbagbo* case, where *inter alia* the commencement date of the trial was discussed.<sup>2</sup>
3. On 17 November 2014, the Chamber set the commencement date for the trial in the *Gbagbo* case for 7 July 2015.<sup>3</sup>
4. On 11 December 2014, Pre-Trial Chamber I, by majority, issued a decision confirming the charges against Mr. Blé Goudé under article 61(7)(a) of the Rome Statute and committed him for trial.<sup>4</sup>
5. On 13 February 2015, the Chamber held a status conference in the *Blé Goudé* case, where *inter alia* the commencement date of the trial was discussed.<sup>5</sup>
6. On 11 March 2015, the Chamber issued the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé*

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<sup>1</sup> See the “Decision on the confirmation of charges against Laurent Gbagbo” (Pre-Trial Chamber I), No. ICC-02/11-01/11-656-Red, 12 June 2014.

<sup>2</sup> See the transcript of the status conference held on 4 November 2014, No. ICC-02/11-01/11-T-25-Red-ENG, 18 March 2015, p. 62, line 4 to p. 69, line 20.

<sup>3</sup> See the “Order setting the commencement date for the trial and the time limit for disclosure” (Trial Chamber I), No. ICC-02/11-01/11-723, 17 November 2014.

<sup>4</sup> See the “Decision on the confirmation of charges against Charles Blé Goudé” (Pre-Trial Chamber I), No. ICC-02/11-02/11-186, 11 December 2014 .

<sup>5</sup> See the transcript of the status conference held on 13 February 2015, No. ICC-02/11-02/11-T-9-Red-ENG, 18 March 2015, p. 62, line 14 to p. 67, line 4.

*Goudé and related matters*” (the “Joinder Decision”),<sup>6</sup> joining the cases, finding that “[t]he question of the time needed for adequate trial preparation on the part of the Defence teams is a matter of trial management to be determined by the Chamber at the appropriate time in the proceedings”,<sup>7</sup> and vacating the commencement of the trial date in the *Gbagbo* case.<sup>8</sup>

7. On 14 April 2015, the Defence of Mr. Gbagbo and the Defence of Mr. Blé Goudé filed their submissions for the status conference scheduled in the Joinder Decision, addressing *inter alia* the starting date for the trial.<sup>9</sup>

8. On 21 April 2015, the Chamber held a status conference in the *Gbagbo and Blé Goudé* case (the “Status Conference”), where *inter alia* the commencement date of the trial was discussed.<sup>10</sup>

9. On 7 May 2015, the Chamber issued the “Order setting the commencement date for trial” (the “Impugned Order”),<sup>11</sup> deciding that “[t]he trial commencement date [is set] for 10 November 2015, in order to hear the opening statements of the parties and participants. Thereafter, the Prosecution will start its presentation of evidence in January 2016, at a date to be confirmed”.<sup>12</sup>

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<sup>6</sup> See the “Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters” (Trial Chamber I), No. ICC-02/11-01/15-1, 11 March 2015 (the “Joinder Decision”).

<sup>7</sup> *Idem*, para. 61.

<sup>8</sup> *Ibid.*, para. 74.

<sup>9</sup> See the “Soumissions de la Défense concernant l'ordre du jour de la conférence de mise en état prévue le 21 avril 2015”, No. ICC-02/11-01/15-32-Red, 14 April 2015, paras. 78-101; and the “Defence Submissions on Agenda Items for the Status Conference of 21 April 2015”, No. ICC-02/11-01/15-33, 14 April 2015, paras. 7-34.

<sup>10</sup> See the transcript of the status conference held on 21 April 2015, No. ICC-02/11-01/15-T-1-CONF-ENG ET, 22 April 2015, p. 86, line 6 to p. 95, line 4 (open session).

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

<sup>12</sup> *Idem*, para. 16.

10. On 13 May 2015, the Defence of Mr. Gbagbo requested leave to appeal the Impugned Order (the “*Gbagbo Request*”),<sup>13</sup> in relation to the following issues:

- a. Whether the Order fails to provide reasons for setting the commencement date for trial (the “*First Gbagbo Issue*”);<sup>14</sup>
- b. Whether the Order fails to consider the Defence’s arguments on the time necessary to prepare the case (the “*Second Gbagbo Issue*”);<sup>15</sup>
- c. Whether the Chamber erred in calculating the time granted to the Defence for preparation of the trial (the “*Third Gbagbo Issue*”);<sup>16</sup> and
- d. Whether the Chamber erred in finding that the opening statements can be detached from the actual start of the trial (the “*Fourth Gbagbo Issue*”).<sup>17</sup>

11. On the same date, the Defence of Mr. Blé Goudé requested leave to appeal the Impugned Order (the “*Blé Goudé Request*”),<sup>18</sup> in relation to the following issue:

- a. 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 (the “*Blé Goudé Issue*”).<sup>19</sup>

12. Pursuant to regulation 65(3) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims, acting as Legal Representative of the victims admitted to participate in the proceedings (the “*Common Legal*”

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<sup>13</sup> See the “*Demande d’autorisation d’interjeter appel du « order setting the commencement date for trial » (ICC-02/11-01/15-58)*”, No. ICC-02/11-01/15-63, 13 May 2015 (the “*Gbagbo Request*”).

<sup>14</sup> *Idem*, para. 16 and section 1.1.

<sup>15</sup> *Ibid.*, para. 16 and section 1.2.

<sup>16</sup> *Ibid.*, para. 16 and section 1.3.

<sup>17</sup> *Ibid.*, para. 16 and section 1.4.

<sup>18</sup> See the “*Defence request for leave to appeal the “Order setting the commencement date of trial” (ICC-02/11-01/15-58)*”, No. ICC-02/11-01/15-64, 13 May 2015 (the “*Blé Goudé Request*”).

<sup>19</sup> *Idem*, para. 12 and section IV.1.

Representative”),<sup>20</sup> respectfully submits a consolidated response to the *Gbagbo* Request and the *Blé Goudé* Request (the “Requests”).

## II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

### 1. The criteria contained in article 82(1)(d) of the Rome Statute

13. Article 82(1)(d) of the Rome Statute limits the possibility to file an appeal against “*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 or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings*”.

14. The jurisprudence of the Court established the complementary character of the two components mentioned in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.<sup>21</sup>

15. In this regard, the Appeals Chamber determined that “[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.<sup>22</sup> The Appeals Chamber also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,<sup>23</sup> and defined the term “issue” as “*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or*

<sup>20</sup> See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

<sup>21</sup> See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, para. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

<sup>22</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 21, para. 8.

<sup>23</sup> *Idem*, para. 9

*conflicting opinion*".<sup>24</sup> Accordingly, the mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.<sup>25</sup>

16. The Appeals Chamber also considered that "[n]ot every issue may constitute the subject of an appeal. It must be one apt to '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>26</sup>

17. Moreover, pursuant to the constant jurisprudence of the Court, "the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal",<sup>27</sup> and "[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances".<sup>28</sup>

18. In this regard, since the Appeals Chamber will interfere with a discretionary decision only under limited conditions, a difference of opinion as to a Chamber's exercise of its discretion is an appealable issue only if the Chamber improperly exercised its discretion.<sup>29</sup>

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<sup>24</sup> *Ibid.*

<sup>25</sup> See the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 6; and the "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'" (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 12.

<sup>26</sup> See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 21, para. 10.

<sup>27</sup> See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'" (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the "Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses'" (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

<sup>28</sup> See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", *supra* note 27, para. 4. See also the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

<sup>29</sup> See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009" (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009, para. 80. See also the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'" (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, para. 30.

19. Moreover, the Chamber presented with an application for leave to appeal must not examine or consider *“arguments on the merits or the substance of the appeal”*, since said arguments may be more appropriately considered by the Appeals Chamber if and when leave to appeal is granted.<sup>30</sup>

20. Consistent with this jurisprudence, applications for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s) *“by way of indicating a specific factual and/or legal error”*.<sup>31</sup>

21. According to established jurisprudence, in analysing whether an appealable issue would *“significantly affect”* the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of *“fairness”* must be understood as making reference to situations *“when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision”*.<sup>32</sup> In turn, *“expeditiousness”* must be read as *“closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”*.<sup>33</sup>

22. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the *“outcome of the trial”* under article 82(1)(d) of the Rome Statute, *“[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a*

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<sup>30</sup> See the *“Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”*, *supra* note 21, para. 22.

<sup>31</sup> See the *“the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), para. 70.*

<sup>32</sup> See *e.g.* the *“Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.*

<sup>33</sup> *Idem*, para. 18.



*given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.*<sup>34</sup>

## **2. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Requests**

### *a. No “issue” arises from the Impugned Order*

23. The Common Legal Representative submits that the Defence fails to identify an “issue” that arises from the Impugned Order, as required by article 82(1)(d) of the Rome Statute.

24. Most arguments contained in the Requests were already considered and dismissed by the Chamber in the Impugned Order. In fact, the Defence reiterates or makes arguments similar to those previously advanced before the Chamber concerning most of the subjects addressed in their Requests, without presenting additional submissions. Consequently, the contentions raised by the Defence in the Requests simply reflect a mere disagreement with the conclusions of the Chamber, which as such does not meet the requisite threshold for leave to appeal to be granted.<sup>35</sup>

25. In this regard, the Common Legal Representative agrees with the Defence of Mr. Gbagbo that in the *Gbagbo* case the Pre-Trial Chamber reformulated one issue for which leave to appeal was granted “*with a view to receiving meaningful guidance by the Appeals Chamber*”.<sup>36</sup> However, the Common Legal Representative strongly disagrees with the Defence that it is “[l]e devoir des Juges d’identifier de telles questions dans une

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<sup>34</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 21, para. 13.

<sup>35</sup> In this sense, see *supra* note 24.

<sup>36</sup> See the *Gbagbo* Request, *supra* note 13, para. 5, quoting the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 36.

*demande d'autorisation de faire appel, quitte à les reformuler, afin de les soumettre à la Chambre d'appel".*<sup>37</sup>

26. It must be noted that the "reformulation" relied upon by the *Gbagbo* Defence took place only after the Pre-Trial Chamber agreed that a particular issue identified by the Prosecution stemmed from the decision at hand.<sup>38</sup> Consequently, the Common Legal Representative submits that this decision cannot be read to dispense the parties from their obligation to "[set] out the reasons for the request for leave to appeal",<sup>39</sup> and to "specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue".<sup>40</sup>

27. In this context, the Requests cannot be seen as the proper course for submissions regarding a mere dispute over the correctness of the Chamber's reasoning, and must therefore be dismissed.<sup>41</sup>

*i. The First Gbagbo Issue*

28. The Defence of Mr. Gbagbo alleges that the "[l]es Juges n'expliquent à aucun moment dans la décision attaquée pourquoi et comment ils ont décidé de la date du 10 novembre 2015 comme date de début du procès et d'une date à fixer en janvier 2016 comme date de début de la présentation de son cas par le Procureur".<sup>42</sup>

29. However, the Chamber does provide its reasons, *albeit* in summary form. The Impugned Order expressly indicates that "[t]he Chamber has also taken into account the Defence arguments, in particular those concerning the time needed for preparation, in light of

<sup>37</sup> See the *Gbagbo* Request, *supra* note 13, para. 6.

<sup>38</sup> See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges", *supra* note 36, para. 35.

<sup>39</sup> See the Rules of Procedure and Evidence, rule 155(1).

<sup>40</sup> See the Regulations of the Court, regulation 65(1) and (2).

<sup>41</sup> In this sense, see *supra* note 25.

<sup>42</sup> See the *Gbagbo* Request, *supra* note 13, para. 16.

*the complexity of the case, the volume of the material disclosed, the joinder of the two cases, and available resources”.*<sup>43</sup>

30. In any event, the Common Legal Representative submits that a lack of reasoning, if any, does not *per se* qualify as an “appealable issue”, since what is required under article 82(1)(d) of the Rome Statute is the identification of a specific question arising from the Impugned Order.

31. There is no obligation for the Chambers of the Court to provide a full explanation for each and every aspect of their decisions, particularly where the issues addressed are procedural in nature. In fact, the ICTY authorities relied upon by the Defence are limited to the reasoning of substantive decisions, such as judgements or decisions on provisional release.<sup>44</sup> This is consistent with the jurisprudence of the European Court for Human Rights, which has constantly stated that “Article 6 § 1 [ensuring fair trial guarantees] *oblige courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument*”<sup>45</sup> and that “*the extent to which [the] duty to give reasons applies may vary according to the nature of the decision and can only be determined in the light of the circumstances of the case*”.<sup>46</sup>

32. Accordingly, the Common Legal Representative submits that the First *Gbagbo* Issue does not arise from the Impugned Order, issued after the Chamber considered the Defence’s submissions during the Status Conference.<sup>47</sup>

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<sup>43</sup> See the Impugned Order, *supra* note 11, para. 15.

<sup>44</sup> See the *Gbagbo* Request, *supra* note 13, para. 25.

<sup>45</sup> See ECHR, *Perez v. France*, Application No. 47287/99, 12 February 2004, para. 81; *García Ruiz v. Spain*, Application No. 30544/96, 21 January 1999, para. 26 ; *Van de Hurk v. The Netherlands*, Application No. 16034/90, 19 April 1994, para. 61.

<sup>46</sup> See ECHR, *Ruiz Torija v. Spain*, Application No. 18390/91, 9 December 1994, para. 29; *Hiro Balani v. Spain*, Application No. 18064/91, 9 December 1994, para. 27.

<sup>47</sup> See the transcript of the Status Conference, *supra* note 10, p. 94, lines 2-5 (open session) (“[y]ou can rest assured that the Bench in its careful exercise of this balancing right is mindful. And the -- although it is not a mathematical exercise, as you have referred to the transcripts in the Ongwen case, it is helpful in assessing how much time it will actually take in preparation”) and lines 9-12 (open session) (“[b]ecause the Chamber is conscious of the fact of the joinder and of the need for the parties to be fully and properly prepared in their defence. So we are very mindful of both of your submissions and will pay it the carefullest scrutiny as we consider our decision”).

ii. *The Second Gbagbo Issue*

33. The Defence of Mr. Gbagbo alleges that in deciding on the time necessary to prepare the defence the Chamber “[n]e s’est ni fondée sur la nature particulière du temps nécessaire à la Défense ni n’a examiné les facteurs permettant une évaluation objective de la détermination du temps nécessaire à la préparation de la défense”.<sup>48</sup> As stated by the Defence, “[l]a question est donc de savoir s’il ressort de la décision que les Juges auraient analysé précisément les besoins de la Défense au regard du caractère crucial pour l’équité des débats que revêt le droit de l’accusé à pouvoir se préparer effectivement en vue du procès. [...] L’accusé est seul à même à pouvoir déterminer le temps qu’il lui faut pour préparer effectivement sa défense”.<sup>49</sup>

34. The Common Legal Representative submits that the Defence does not argue an “issue” of improper exercise of discretion by the Chamber, which could be amenable to appeal.<sup>50</sup> By contrast, as evidenced by the submissions quoted above, the Defence merely disagrees with the Impugned Order not to set the trial date pursuant to its request.

35. Accordingly, the Common Legal Representative submits that the Second *Gbagbo* Issue is not an appealable issue pursuant to article 82(1)(d) of the Rome Statute,<sup>51</sup> even if the Defence expressly contests its characterisation as a “mere disagreement” with the Impugned Order.<sup>52</sup>

iii. *The Third Gbagbo Issue and the Blé Goudé Issue*

36. The Defence of Mr. Gbagbo alleges that “[l]a Défense ne disposera que de trois mois entre le 10 août 2015 (date de la reprise) et le 10 novembre 2015 [...] [et] ne disposera

<sup>48</sup> See the *Gbagbo* Request, *supra* note 13, para. 33.

<sup>49</sup> *Idem*, paras. 36 and 39.

<sup>50</sup> See *supra* note 29.

<sup>51</sup> See *supra* notes 24-25.

<sup>52</sup> See the *Gbagbo* Request, *supra* note 13, paras. 35-36.

*que de trois semaines supplémentaires avant la présentation de son cas par le Procureur, étant rappelé que la présentation de son cas par le Procureur suivra immédiatement la reprise des activités de la Cour dans ses nouveaux locaux [et parce que] les Juges ont inclus dans le temps octroyé à la Défense pour se préparer les périodes de ralentissement judiciaire d'été et d'hiver alors que lors de ces périodes le travail ne peut être mené dans des conditions normales".*<sup>53</sup> Similarly, the Defence of Mr. Blé Goudé challenges whether "[t]he Chamber correctly assumed that the Defence would have an additional two months following the opening statements on 10 November 2015 [since *inter alia*] December 2015 also coincides with the recess of the Court".<sup>54</sup>

37. In this regard, the Common Legal Representative submits that the Requests show a new disagreement with the Impugned Order, but do not identify any appealable issue pursuant to article 82(1)(d) of the Rome Statute. In fact, these submissions are based on a misreading of the Impugned Order and of the legal instruments of the Court.

38. In particular, the Impugned Order does not determine that the Prosecution case will follow immediately upon the Court's relocation to the new premises, but that the presentation of evidence by the Prosecution will start "[i]n January 2016, at a date to be confirmed".<sup>55</sup> Similarly, the activities of the Defence will not necessarily be limited by the judicial recess,<sup>56</sup> as evidenced by the fact that duty judges and officers remain working during said time,<sup>57</sup> time limits are not suspended,<sup>58</sup> and hearings may be held on urgent issues.<sup>59</sup>

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<sup>53</sup> *Idem*, paras. 36 and 39.

<sup>54</sup> See the *Blé Goudé* Request, *supra* note 18, para. 29.

<sup>55</sup> See the Impugned Order, *supra* note 11, para. 16.

<sup>56</sup> See the *Blé Goudé* Request, *supra* note 18, para. 29.

<sup>57</sup> See the Regulations of the Court, regulations 17-19.

<sup>58</sup> See the "Decision on Defence request on the suspension of time limits during judicial recess" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-585, 27 December 2013, para. 5.

<sup>59</sup> See the Regulations of the Court, regulation 19 *bis*(2).

39. Accordingly, the Common Legal Representative submits that the Third *Gbagbo* Issue and the *Blé Goudé* Issue are not appealable issues pursuant to article 82(1)(d) of the Rome Statute but mere disagreements with the Impugned Order.<sup>60</sup>

*iv. The Fourth Gbagbo Issue*

40. The Defence of Mr. Gbagbo alleges that the Chamber made an error because “[1]a déclaration d’ouverture ne peut être détachée du commencement du procès, et plus précisément ici du commencement de la présentation de son cas par le Procureur [...] La déclaration d’ouverture de la Défense ne peut être conçue avant que la Défense ait arrêté une stratégie [...] La déclaration d’ouverture doit être suivie immédiatement du début du cas du procureur pour produire tous ses effets”.<sup>61</sup>

41. The Common Legal Representative submits that the “issue” identified by the Defence does not arise from the Impugned Order but from the Defence’s misinterpretation thereof.

42. As stated in the Impugned Order, the Chamber set “the trial commencement date for 10 November 2015, in order to hear the opening statements of the parties and participants”,<sup>62</sup> i.e. it expressly considered the opening statements as part of the trial proceedings. Consequently, the Defence’s assumption that the Chamber has “severed” (“détachée”) the opening statements from the rest of the proceedings on the basis of the consideration of the opening statements as simple statements or as statement of a different nature is incorrect. The Defence even concedes this point.<sup>63</sup>

43. At most, the Defence’s submissions amount to a disagreement with the Chamber’s exercise of its discretion to separate the opening statements from the rest

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<sup>60</sup> See *supra* notes 24-25.

<sup>61</sup> See the *Gbagbo* Request, *supra* note 13, para. 48.

<sup>62</sup> See the Impugned Order, *supra* note 11, para. 16.

<sup>63</sup> See the *Gbagbo* Request, *supra* note 13, paras. 45-46.

of the trial proceedings. The Defence of Mr. Gbagbo wished the Chamber to join the opening statements with the rest of the trial proceedings, and to postpone them altogether to a later date.<sup>64</sup> The Common Legal Representative submits that the Chamber's refusal to do so does not amount to an improper exercise of its discretion and can therefore not be appealed.<sup>65</sup>

44. Accordingly, the Common Legal Representative submits that the Fourth *Gbagbo* Issue does not arise from the Impugned Order, and simply reiterates the Defence's disagreement therewith. The Defence's contention that the Appeals Chamber has not addressed matters of this nature yet does not suffice for leave to appeal to be granted.<sup>66</sup>

*b. The "issues" raised by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution thereon by the Appeals Chamber may not materially advance the proceedings*

45. Assuming *arguendo* that any of the "issues" identified by the Defence arises from the Decision, the Common Legal Representative submits that the Defence fails to demonstrate how any of said issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that their immediate resolution by the Appeals Chamber may materially advance the proceedings. Revising generally the content of previously submitted arguments without demonstrating the conditions relevant for leave to appeal a decision is not sufficient to satisfy the requirements set forth in article 82(1)(d) of the Rome Statute.<sup>67</sup>

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<sup>64</sup> *Idem*, paras. 49-50.

<sup>65</sup> See *supra* note 29.

<sup>66</sup> Cf. the *Gbagbo* Request, *supra* note 13, para. 51, and the "Decision on Defence's requests seeking leave to appeal the 'Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record' and seeking suspensive effect of it." (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015, footnotes 36 and 40.

<sup>67</sup> See *e.g.* the *Gbagbo* Request, *supra* note 13, paras. 9-14

46. The *Gbagbo* Request generally contends that “[s]i la personne poursuivie n’avait pas le temps de préparer de façon adéquate sa défense, elle partirait avec un handicap par rapport au Procureur, ce qui attenterait au caractère équitable du procès”,<sup>68</sup> and that “[i]l est évident que la détermination de la date du procès, affecte durablement la suite de la procédure, en touchant directement à la capacité de l’accusé de préparer sa défense. Dans ces circonstances il apparaît clairement qu’une résolution immédiate de la question par la Chambre d’appel est fondamentale”.<sup>69</sup>

47. However, these submissions do not identify *in concreto* how the alleged “issues” significantly affect the fairness and the expeditiousness of the proceedings at hand, and the reasons why a decision by the Appeals Chamber would materially advance the proceedings. At most, these submissions show once again the disagreement of the Defence of Mr. Gbagbo with the Impugned Order.

48. The only substantive arguments provided in the *Gbagbo* Request seemingly amenable to satisfying the second component of article 82(1)(d) of the Rome Statute are the reference to a decision of the ICTY granting leave to appeal a decision concerning the date of trial,<sup>70</sup> and to an ICTR ruling finding it appropriate to grant leave to appeal “a crucial matter of procedure and evidence”.<sup>71</sup>

49. However, the Common Legal Representative submits that, contrary to the contentions of the Defence of Mr. Gbagbo,<sup>72</sup> these references do not show that the practice of the *ad hoc* tribunals referred to is consistent enough, and seem to forget that the fact that a given issue could amount to a “principle” is not sufficient to warrant the granting of leave to appeal.<sup>73</sup> More importantly, these submissions fail to

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<sup>68</sup> *Idem*, para. 52.

<sup>69</sup> *Ibid.*, para. 56.

<sup>70</sup> *Ibid.*, paras. 54-55 and 59.

<sup>71</sup> *Ibid.*, para. 57, apparently referring to ICTR, *Prosecutor v. Karemera et al.*, “Decision on Joseph Nzirorera’s Application for Certification to Appeal [Denial of Motion to Obtain Statements of Witnesses ALG and GK]” (Trial Chamber III), 9 octobre 2007.

<sup>72</sup> See the *Gbagbo* Request, *supra* note 13, paras. 55, 57 and 59.

<sup>73</sup> See *supra* note 27.



notice that the Appeals Chamber has already clarified that the Court is not bound by the practice of the ICTY or the ICTR pursuant to article 21 of the Rome Statute.<sup>74</sup>

50. The *Blé Goudé* Request is more articulate in its arguments on the impact of the alleged “issue” on the fairness and expeditiousness of the proceedings, and on the need for an immediate resolution by the Appeals Chamber. Moreover, the Defence of Mr. Blé Goudé contends that the alleged “issue” would significantly affect the outcome of the trial. However, the Common Legal Representative submits that none of these arguments suffices to show the required “significant” impact of said issue, and are rather more akin to a request for reconsideration than to a request for leave to appeal.

51. In fact, the Defence of Mr. Blé Goudé expressly reiterates the arguments on fairness it put before the Chamber prior to the issuance of the Impugned Order, referring *inter alia* to the submissions made during the Status Conference.<sup>75</sup> From this perspective, the *Blé Goudé* Request could be considered as a request for reconsideration of the Impugned Order. However, the Common Legal Representative contends that said ruling does not meet the test for reconsideration because it cannot be said to be “manifestly unsound” and give rise to “manifestly unsatisfactory” consequences.<sup>76</sup> Although the Defence may not like the consequences of the Impugned Order, it is evident that it is sensible and well-reasoned.

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<sup>74</sup> See the “Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’” (Appeals Chamber), No. ICC-01/09-01/11-414 OA3 OA4, 24 May 2012, para. 31; and the “Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome’” (Appeals Chamber), No. ICC-01/09-02/11-425 OA4, 24 May 2012, para. 37. See also the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 56.

<sup>75</sup> See the *Blé Goudé* Request, *supra* note 18, paras. 24 (“[t]he Defence feels it to be superfluous to extensively repeat its arguments. Yet, it provides herewith a concise overview of its main arguments thereto”) and 27.

<sup>76</sup> See 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”). See also

52. In other occasions, by contrast, the Defence of Mr. Blé Goudé provides arguments which were not submitted to the Chamber during the Status Conference. Said submissions should however have been made then if they were found to be important by the Defence (*"de non apparentibus et de non existentibus eadem est ratio"*).<sup>77</sup>

53. Other arguments contained in the *Blé Goudé* Request are plainly inaccurate in light of the text of the Impugned Order. In particular, contrary to the Defence's submission,<sup>78</sup> the Chamber did consider the impact of the relocation of the Court when issuing the Impugned Order.<sup>79</sup>

54. In any event, the Defence of Mr. Blé Goudé fails to show how the alleged issue may have a "significant" impact on the fairness and expeditiousness of the proceedings, or on the outcome of the trial, as required by article 82(1)(d) of the Rome Statute.<sup>80</sup> Indeed, the Defence fails to take into account both the duties of the Chamber and the legal possibilities available under the statutory texts that deprive the Impugned Order of the material effect alleged in the *Blé Goudé* Request on the upcoming trial.

55. In particular, the Common Legal Representative submits that the Defence's contentions on the alleged impact of the identified issue on the fairness and expeditiousness of the proceedings are inconsistent with the possibility, provided by regulation 35 of the Regulations of the Court and acknowledged by the Defence in the *Blé Goudé* Request,<sup>81</sup> to submit requests for the postponement of the proceedings when necessary. The Defence may therefore limit or prevent the impact of the Impugned Order.

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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.

<sup>77</sup> See the *Blé Goudé* Request, *supra* note 18, para. 29 ("*[t]he opening statement is a decisive of the trial's momentum [sic] and, as such, it requires a sound and complete knowledge of the case, at least one month before it is scheduled*").

<sup>78</sup> *Idem*.

<sup>79</sup> See the Impugned Order, *supra* note 11, para. 15.

<sup>80</sup> See *supra* note 26.

<sup>81</sup> See the *Blé Goudé* Request, *supra* note 18, paras. 31-32.

56. Similarly, addressing the impact on the outcome of the trial, the Defence of Mr. Blé Goudé merely indicates that the Impugned Order “[a]ffects the outcome of the proceedings by tipping the scales to the advantage of one party at trial”.<sup>82</sup> The Common Legal Representative contends that this statement fails to notice the duty of the Chamber, indicated in the Impugned Order,<sup>83</sup> to provide the necessary remedies to ensure the equality between the parties during the trial pursuant to article 64(3)(a) of the Rome Statute. The rights of the Defence will therefore remain protected during the trial, despite the Impugned Order.

57. Since none of the “issues” identified in the Requests affects the fair and expeditious conduct of the proceedings or the outcome of the trial, as demonstrated *supra*, the Common Legal Representative submits that it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these issues may materially advance the proceedings.<sup>84</sup>

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<sup>82</sup> *Idem*, para. 35.

<sup>83</sup> See the Impugned Order, *supra* note 11, para. 14.

<sup>84</sup> See the “Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing” (Pre-Trial Chamber I), No. ICC-02/11-01/11-530, 8 October 2013, para. 42.

**FOR THE FOREGOING REASONS**, the Common Legal Representative respectfully requests the Chamber to dismiss the Requests.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style and is underlined with a single horizontal line.

**Paolina Massidda**  
**Principal Counsel**

Dated this 18<sup>th</sup> day of May of 2015

At The Hague, The Netherlands