

## Partly dissenting Opinion of Judge Olga Herrera Carbuccion

1. I respectfully disagree with the majority's decision to reject the Defence's applications for leave to appeal 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' ('Impugned Decision').<sup>1</sup> I consider that the Defence applications for leave to appeal should be partly granted for the specific issue of whether, in ordering the joinder of the two cases against Mr Gbagbo and Mr Blé Goudé, the Chamber erred in its interpretation of Article 64(5) of the Statute and Rule 136 of the Rules.
2. I however agree with the majority's decision to deny leave to appeal with regard to all other issues raised by the Defence.
3. I hereby give the succinct reasons for my dissent.

### I. Introduction

4. On 11 March 2015, the Chamber issued the Impugned Decision.<sup>2</sup>
5. On 16 and 17 March 2015, the Blé Goudé Defence and the Gbagbo Defence filed applications for leave to appeal the Impugned Decision, pursuant to Article 82(1)(d) of the Statute.<sup>3</sup>
6. The Blé Goudé Defence seeks leave to appeal on the following issues:<sup>4</sup>
  - 1.1. Whether the Chamber erred in its application of article 64(5) of the Statute in conjunction with rule 136 of the R.P.E. when it found that joinder was appropriate

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<sup>1</sup> Impugned Decision, ICC-02/11-01/11-810.

<sup>2</sup> Impugned Decision, ICC-02/11-01/11-810.

<sup>3</sup> Defence Request for Leave to Appeal 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", ICC-02/11-01/15-5; Demande d'autorisation d'interjeter appel de la "Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters (ICC-02/11-01/11-810)", ICC-02/11-01/15-6.

<sup>4</sup> ICC-02/11-01/15-5, paras 12-32.

despite the Chamber recalling that the alleged participation in and contribution to the common plan was not the same.

- 1.2. Whether the Chamber misapplied Rule 136 of the R.P.E. when determining that the joinder's possible detrimental consequences to the Defence's fundamental right to adequate time was a matter of trial management, and not a matter of serious prejudice to the Accused.
- 1.3. Whether the Chamber misapplied Rule 136 when relying on the Prosecution's unsubstantiated submissions that the evidence in the two cases is largely the same and, therefore a joint trial would serve the interests of justice by avoiding the duplication of a large portion of the evidence.
- 1.4. Whether the Trial Chamber erred by holding in para 65 that a joint trial would expose witnesses twice to "hardship" and would contravene the interests of the victims and whether the Trial Chamber erred by holding in para 66 that reasons of Judicial economy (a joint trial would result in more court hours and resources and a duplication of efforts by the court's organs) would outweigh the benefits of a separate trial.

## 7. The Gbagbo Defence seeks leave to appeal on the following issues:<sup>5</sup>

- 1.1. Sur l'absence de débat contradictoire.
- 1.2. Sur le choix fait par les Juges d'ignorer la lettre du Statut.
- 1.3. La Chambre a commis une erreur de droit en fondant sa décision sur l'utilisation erronée de critères non utilisables, qu'ils soient non pertinents (jurisprudence Katanga) ou non prévus au Statut (plan commun, même opération).
- 1.4. La Chambre n'a pas procédé à une comparaison des charges pesant sur les deux accusés, opération qui devait pourtant constituer la base de toute décision sur une éventuelle jonction.
- 1.5. La Chambre a-t-elle commis une erreur de droit en ne considérant pas les conséquences de la jonction sur la teneur des charges pesant sur les deux accusés?
- 1.6. La Chambre a-t-elle commis une erreur en ne considérant pas concrètement les conséquences de la jonction sur le déroulement de la procédure et les droits des accusés?

## II. Applicable Law

### 8. Article 82(1)(d) of the Statute sets out the requirements applicable to grant a request for leave to appeal, as follows:

1. whether the decision involves an issue that would significantly affect:
  - i. the fair and expeditious conduct of proceedings; or
  - ii. the outcome of the trial; and
2. whether in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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<sup>5</sup> ICC-02/11-01/15-6, paras 11-47.

9. In this regard, the Appeals Chamber has determined that Article 82(1)(d) of the Statute does not confer an automatic right of appeal. Rather, a right of appeal will arise only if, in the Chamber's opinion, the impugned decision 'must receive the immediate attention of the Appeals Chamber'.<sup>6</sup> It has also further clarified that the 'Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue'.<sup>7</sup> Finally, the Appeals Chamber has found that the second prong of the leave to appeal standard is intended to ensure that proceedings 'follow the right course'.<sup>8</sup>

### III. Submissions and Analysis

10. The Blé Goudé Defence raises as 'First Issue' the question of whether the Trial Chamber erred in its application of Article 64(5) of the Statute and Rule 136 of the Rules, even though the alleged participation of the Accused in the common plan is not the same.<sup>9</sup> Likewise, the Gbagbo Defence identifies as 'second issue' and 'third issue' whether these two provisions foresee two distinct procedures on joinder, and whether the Trial Chamber has the power to join charges that are not identical.<sup>10</sup>
11. The Blé Goudé Defence argues that the Chamber committed an error of law as the Pre-Trial Chamber had clearly separated the charges of both Accused by distinguishing the modes of liability under which they were charged. In this regard, it is of the view that the charges are well distinguished by different modes of liability.<sup>11</sup> The Blé Goudé Defence also submits that the Chamber specifically addressed the event known as the 'Fifth Incident', in

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<sup>6</sup> Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 23 July 2006, ICC-01/04-168, para. 20.

<sup>7</sup> ICC-01/04-168, para. 20.

<sup>8</sup> ICC-01/04-168, para. 15.

<sup>9</sup> ICC-02/11-01/15-5, paras 12-18.

<sup>10</sup> ICC-02/11-01/15-6, paras 18-31.

<sup>11</sup> ICC-02/11-01/15-5, para. 17.

the course of which charges have been confirmed against Mr. Blé Goudé, but not against Mr. Gbagbo. It argues that the Impugned Decision 'entails the risk to generalize the charges against both accused', although these had been clearly separated in the confirmation of charges.<sup>12</sup> The Blé Goudé Defence also argues that a joint trial would prejudice the right to a fair trial, particularly pursuant to Article 67 (1) (b) of the Statute, by reducing the time needed to adequately prepare for trial since the Gbagbo case has been before the Court for more than three years whereas Mr Blé Goudé made his first appearance before Pre-Trial Chamber I only on 27 March 2014.<sup>13</sup>

12. The Gbagbo Defence argues that Article 64(5) of the Statute should be the framework for the application of Rule 136 of the Rules. In its view, since the joinder of charges is impossible due to the significant difference between the charges against each accused, the question about the joinder of instances does not even arise. The Gbagbo Defence thus submits that the Chamber committed an error of law in the interpretation of these relevant provisions and the Impugned Decision is therefore subject to appeal.<sup>14</sup> In relation to the duration of the trial, the Gbagbo Defence submits that the Chamber did not make a precise assessment of how the joinder would increase the duration of trial. In its view, the Chamber should have therefore considered such consequences before taking a decision on the joinder.<sup>15</sup> The Gbagbo Defence submits that the Impugned Decision will significant affect the conduct of proceedings, the duration of trial and the rights of the defence. Therefore, in its view, an immediate resolution of the issue by the Appeals Chamber is fundamental. It submits that, if the Appeals Chamber found at a later stage in the proceedings that the Impugned Decision was unfounded, it could call

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<sup>12</sup> ICC-02/11-01/15-5, para. 18.

<sup>13</sup> ICC-02/11-01/15-5, paras 19-22.

<sup>14</sup> ICC-02/11-01/15-6, para. 26.

<sup>15</sup> ICC-02/11-01/15-6, para. 45.

into question *a posteriori* the entire trial, irrevocably affecting the rights of both accused.<sup>16</sup>

13. Since these issues, as identified by the Defence, overlap, they can be reformulated into one single legal issue, namely whether the Chamber erred in its interpretation of Article 64(5) of the Statute and Rule 136 of the Rules.

14. In the Impugned Decision, the Chamber stated as follows: 'Article 64(5) of the Statute and Rule 136 of the Rules must be *read together*, the former establishing a broad, discretionary power of the Chamber to join charges, and the latter providing guidance as to the exercise of this discretion and the circumstances in which joinder is justified'.<sup>17</sup> Consequently, this issue clearly arises from the Impugned Decision and, as acknowledged by the Prosecution,<sup>18</sup> constitutes an appealable issue.

15. The first criterion according to Article 82(1)(d) of the Statute is that the issue should significantly affect the fair and expeditious conduct of proceedings or impact on the outcome of the trial. As regards this first requirement, the Impugned Decision alters the procedural framework in which both Accused will be tried. In fact, it is significant to note that in a previous determination related to the Impugned Decision, the Single Judge acknowledged 'the crucial importance of the issue at hand [the joinder request] and the potential impact the Chamber's decision could have on the conduct of proceedings and the rights of the accused'.<sup>19</sup> Moreover, in the Impugned Decision the Chamber acknowledged that there could be prejudice to the Accused, even if minimal, 'in comparison to the overall benefits to the interests of justice addressed below'.<sup>20</sup>

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<sup>16</sup> ICC-02/11-01/15-6, para. 52.

<sup>17</sup> Impugned Decision, ICC-02/11-01/11-810, para. 45.

<sup>18</sup> Prosecution's consolidated response to the Defence requests for leave to appeal the Decision on the Joinder of Charges, 23 March 2015, ICC-02/11-01/15-11, paras 4-6.

<sup>19</sup> ICC-02/11-01/11-744, para. 10.

<sup>20</sup> ICC-02/11-01/11-810, para. 60.

16. The second alternate criterion under Article 82(1)(d) of the Statute, that the issue should affect the outcome of the trial, is also met. As noted by the Blé Goudé Defence, the Chamber concluded in the Impugned Decision that 'although their [the Accused] alleged participation in and/or contribution to the conception and implementation of the common plan or purpose is not the same, the conduct of Mr. Gbagbo and Mr. Blé Goudé, as alleged in the Confirmation Decisions, is nevertheless closely linked.'<sup>21</sup> In this regard, it is clear that as a result of the Impugned Decision, this will be the first time in ICC history that the Chamber will have to decide on the individual criminal responsibility of two accused persons in a joint trial, despite having two separate confirmation of charges decisions, with slight yet significant differences.
17. In light of the above, the second requirement, of whether an immediate resolution by the Appeals Chamber may materially advance the proceedings, is met. An immediate resolution by the Appeals Chamber at the interlocutory stage would materially advance the proceedings, as the Impugned Decision impacts the manner in which the Chamber will conduct trial proceedings. The joinder will also have an effect on the manner in which the evidence in this joint trial will be produced and evaluated by the Chamber.<sup>22</sup> Hence, if the Appeals Chamber would determine that the Trial Chamber erred in the Impugned Decision, any negative impact would be minimised if such a finding is made at this early stage of the proceedings.

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<sup>21</sup> ICC-02/11-01/11-810, para. 56.

<sup>22</sup> See also: ICTY, Case of Prosecutor v. Ante Gotovina and Case of Prosecutor v. Ivan Cermak and Mladen Markac, Trial Chamber II, IT-01-45-PT and IT-03-73-PT, Decision on Defence Applications for Certification to Appeal Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 August 2006, para s 11 and 12. In this decision, the ICTY Trial Chamber determined that a joinder decision may significantly affect the fair and expeditious conduct of proceedings as it 'can be expected to have a significant effect on the overall conduct of the proceedings' and that it 'may also have an impact on the ability of one or more Accused to exercise the right to call or examine witnesses'. That Trial Chamber also determined that an Appeals Chamber's determination that such a joinder decision is flawed, issued at an earlier stage 'will minimize the consequences of the decision and will considerably affect the preparation of the two cases for trial and the overall conduct of the proceedings'.

#### **IV. Conclusion**

18. For the foregoing reasons I consider that the criteria under Article 82(1)(d) of the Statute is met and leave to appeal should be granted for the particular issue of whether the Chamber erred in its interpretation of Article 64(5) of the Statute and Rule 136 of the Rules.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Olga Herrera Carbuccion', is written over a horizontal line.

**Judge Olga Herrera Carbuccion**

Dated 22 April 2015

At The Hague, The Netherlands