

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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ICC-02/11-02/11

Date: 11 March 2015

**TRIAL CHAMBER I**

**Before:** Judge Geoffrey Henderson, Presiding Judge  
Judge Cuno Tarfusser  
Judge Olga Herrera Carbuccion

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE  
IN THE CASES OF  
*THE PROSECUTOR v. LAURENT GBAGBO*  
AND  
*THE PROSECUTOR v. CHARLES BLÉ GOUDÉ***

**Public  
with public annex A**

**Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Eric MacDonald

**Counsel for Mr Laurent Gbagbo**

Mr Emmanuel Altit  
Ms Agathe Bahi Baroan

**Counsel for Mr Charles Blé Goudé**

Mr Geert-Jan Alexander Knoops  
Mr Claver N'dry

**Legal Representatives of Victims**

Ms Paolina Massidda

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

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Trial Chamber I ('Chamber') of the International Criminal Court ('Court'), in the cases of *The Prosecutor v. Laurent Gbagbo* ('Gbagbo case') and *The Prosecutor v. Charles Blé Goudé* ('Blé Goudé case'), having regard to, *inter alia*, Articles 64, 67 and 68 of the Rome Statute ('Statute'), Rules 121(10), 131, 132, 132bis and 136 of the Rules of Procedure and Evidence ('Rules'), Regulations 13(2), 23(1) and 54 of the Regulations of the Court ('Regulations') and Regulations 20, 21 and 22 of the Regulations of the Registry, issues the following 'Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters' ('Decision').

## I. Procedural History

1. On 12 June 2014, Pre-Trial Chamber I confirmed the charges against Mr Gbagbo ('Gbagbo Confirmation Decision').<sup>1</sup> On 17 September 2014, the Presidency referred the *Gbagbo* case to the Chamber.<sup>2</sup>
2. On 11 December 2014, Pre-Trial Chamber I confirmed the charges against Mr Blé Goudé ('Blé Goudé Confirmation Decision', together with the *Gbagbo* Confirmation Decision, 'Confirmation Decisions').<sup>3</sup> On 20 December 2014, the Presidency referred the *Blé Goudé* case to the Chamber.<sup>4</sup>
3. On 16 and 22 December 2014, the Office of the Prosecutor ('Prosecution') requested that the Chamber join the *Gbagbo* and *Blé Goudé* cases ('Gbagbo

<sup>1</sup> Pre-Trial Chamber I, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Conf (public redacted version at ICC-02/11-01/11-656-Red). *See also* Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-02/11-01/11-656-Anx.

<sup>2</sup> Presidency, Decision re-constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Laurent Gbagbo*, 17 September 2014, ICC-01/11-01/11-682.

<sup>3</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>4</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-02/11-02/11-193-Corr.

Prosecution Request' and 'Blé Goudé Prosecution Request', respectively, and together, 'Prosecution Requests').<sup>5</sup>

4. On 6 January 2015, the Legal Representative of the Victims ('LRV') in both the *Gbagbo*<sup>6</sup> and *Blé Goudé*<sup>7</sup> cases responded to the Prosecution Requests ('*Gbagbo* LRV Response' and '*Blé Goudé* LRV Response', respectively, and together, 'LRV Responses').
5. On the same day, the Single Judge, in the *Gbagbo* case, dismissed a challenge to the Chamber's competence to hear the *Gbagbo* Prosecution Request and extended the deadline for any response to 21 days from notification of its French translation, as well as the French translation of the *Blé Goudé* Confirmation Decision.<sup>8</sup> The Chamber also granted the same extension in the *Blé Goudé* case.<sup>9</sup> The French versions of the *Blé Goudé* Confirmation Decision and *Gbagbo* Prosecution Request were notified, respectively, on 20<sup>10</sup> and 21<sup>11</sup> January 2015, resulting in a 12 February 2015 deadline for any response to the Prosecution Requests. On 6 February 2015, following a request by the defence for Mr Blé Goudé ('Blé Goudé Defence'), the Single Judge further extended the deadline for any response to the *Blé Goudé* Prosecution Request to 19 February 2015.<sup>12</sup> On 9 February 2015, the Single Judge authorised the defence for Mr Gbagbo ('Gbagbo

<sup>5</sup> Prosecution's Request to join the cases of *The Prosecutor v. Laurent GBAGBO* and *The Prosecutor v. Charles BLE* [sic] *GOUDÉ*, 16 December 2014, ICC-01/11-01/11-738; Prosecution's Request to join the cases of *The Prosecutor v. Laurent GBAGBO* and *The Prosecutor v. Charles BLE* [sic] *GOUDÉ*, 22 December 2014, ICC-01/11-02/11-194.

<sup>6</sup> Consolidated Response of the Common Legal Representative of victims to the Prosecution's request to join the *Gbagbo* and *Blé Goudé* cases (ICC-02/11-01/11-738) and to the subsequent Defence's request (ICC-02/11-01/11-742), 6 January 2015, ICC-02/11-01/11-743.

<sup>7</sup> Response of the Common Legal Representative of victims to the Prosecution's request to join the *Gbagbo* and *Blé Goudé* cases (ICC-02/11-02/11-194), 6 January 2015, ICC-02/11-02/11-196.

<sup>8</sup> Decision on the Defence challenge to the Chamber's competence to hear the Prosecution's Joinder Request and on its request for a variation of the response deadline, 6 January 2015, ICC-02/11-01/11-744, page 6.

<sup>9</sup> Decision on 'Counsel's request to withdraw pursuant to Regulation 78(1) of the Regulations of the Court' and extension of deadline for response, 6 January 2015, ICC-01/11-02/11-197, para. 12.

<sup>10</sup> ICC-02/11-02/11-186-tFRA.

<sup>11</sup> ICC-02/11-01/11-738-tFRA.

<sup>12</sup> Decision on urgent Defence request for extension of time to respond to joinder Request, 6 February 2015, ICC-02/11-02/11-209.

Defence', together with the Blé Goudé Defence, 'Defence' or 'Defence teams') to file a 40-page response to the Prosecution Request.<sup>13</sup>

6. The Gbagbo Defence responded to the *Gbagbo* Prosecution Request on 12 February 2015 ('*Gbagbo* Defence Response').<sup>14</sup> The Blé Goudé Defence responded to the *Blé Goudé* Prosecution Request on 19 February 2015 ('*Blé Goudé* Defence Response').<sup>15</sup>
7. With leave of the Single Judge,<sup>16</sup> the Prosecution<sup>17</sup> and LRV<sup>18</sup> replied to the *Gbagbo* Defence Response on 23 February 2015 ('Prosecution Reply' and 'LRV Reply', respectively).
8. On 2 March 2015, the Gbagbo Defence requested that the Prosecution Reply be dismissed *in limine* and leave to reply to the Prosecution Reply and LRV Reply ('Sur-reply Request').<sup>19</sup> On 3 March 2015, the Prosecution<sup>20</sup> and LRV<sup>21</sup> responded to the Sur-reply Request.

<sup>13</sup> Decision on requests for leave to reply to Defence response ICC-02/11-01/11-765, 20 February 2015, ICC-02/11-01/11-775, para. 2. *See also* Email from Trial Chamber I Legal Officer to Defence on 9 February 2015 at 18:01.

<sup>14</sup> Réponse de la Défense à la « Demande de jonction des affaires Le Procureur c. Laurent Gbagbo et Le Procureur c. Charles Blé Goudé » (ICC-02/11-01/11-738-tFRA) déposée par l'Accusation, 12 February 2015, ICC-02/11-01/11-765.

<sup>15</sup> Defence response to the "Prosecutor's request to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé*", 19 February 2015, ICC-02/11-02/11-217 with public annex.

<sup>16</sup> Decision on requests for leave to reply to Defence response ICC-02/11-01/11-765, 20 February 2015, ICC-02/11-01/11-775 ('Leave to Reply Decision').

<sup>17</sup> Prosecution Reply to Defence Response to Joinder Request, 23 February 2015, ICC-02/11-01/11-781.

<sup>18</sup> Reply of the Common Legal Representative of victims to the "Réponse de la Défense à la « Demande de jonction des affaires *Le Procureur c. Laurent Gbagbo* et *Le Procureur c. Charles Blé Goudé* » (ICC-02/11-01/11-738-tFRA) déposée par l'Accusation." (ICC-02/11-01/11-765), 23 February 2015, ICC-02/11-01/11-780.

<sup>19</sup> Requête afin que soit rejetée la réplique du Procureur intitulée « Prosecution Reply to Defence Response to Joinder Request » (ICC-02/11-01/11-781) et Demande d'autorisation aux fins de pouvoir répondre à : - la réplique du Représentant légal intitulée « Reply of the Common Legal Representative of victims to the "Réponse de la Défense à la « Demande de jonction des affaires *Le Procureur c. Laurent Gbagbo* et *Le Procureur c. Charles Blé Goudé* » (ICC-02/11-01/11-780) ; et à - la réplique du Procureur intitulée « Prosecution Reply to Defence Response to Joinder Request » (ICC-02/11-01/11-781), si elle n'était pas rejetée *in limine*, 2 March 2015, ICC-02/11-01/11-792.

<sup>20</sup> Prosecution response to Defence request ICC-02/11-01/11-792, 3 March 2015 (notified on 4 March 2015), ICC-02/11-01/11-795 ('Prosecution Sur-reply Response').

<sup>21</sup> Response to Defence's request for Leave to respond to the replies to the Defence Joinder Response filed by the Prosecution and by the Common Legal Representative of Victims (ICC-02/11-01/11-792), 3 March 2015, ICC-02/11-01/11-794 ('LRV Sur-reply Response').

## II. Submissions

9. The Chamber considers that the issue of joinder, by its very nature, concerns the interests of the parties and participants in both the *Gbagbo* and the *Blé Goudé* cases. Accordingly, the Chamber addresses together all filings arising from the two Prosecution Requests in this Decision.

### *Prosecution Requests*

10. The Prosecution claims that joinder is in the interests of justice and judicial economy because the charges are largely the same,<sup>22</sup> the majority of the witnesses and other evidence to be relied upon by the Prosecution at trial in both cases relates to both Mr Gbagbo and Mr Blé Goudé,<sup>23</sup> and joinder would not unduly delay the proceedings or otherwise prejudice the Accused.<sup>24</sup>
11. In relation to the similarity of the cases, the Prosecution notes that its application for a warrant of arrest against Mr Blé Goudé subsumed the facts detailed in its application for a warrant of arrest against Mr Gbagbo; that the Pre-Trial Chamber has confirmed the extensive similarities between the *Blé Goudé* and *Gbagbo* cases; that, in the confirmation proceedings against Mr Blé Goudé, the Prosecution relied on almost the same evidence that it relied upon during the confirmation proceedings against Mr Gbagbo; and that it intends to rely in both cases on the additional evidence relied presented at the confirmation proceedings against Mr Blé Goudé.<sup>25</sup>

<sup>22</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 1 and 10-16; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 1 and 10-16.

<sup>23</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 1 and 18; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 1 and 18-19.

<sup>24</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 20-22; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 21-23.

<sup>25</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 10-13; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 10-13.

12. Comparing the Confirmation Decisions, the Prosecution submits that Section 4, concerning the facts, circumstances and their legal characterisation, are almost identical except insofar as they describe the individual criminal conduct of the Accused.<sup>26</sup> It claims that the charged crimes in both cases were committed in the course of the same factual transaction: both Accused allegedly shared a common plan or purpose and acted in a coordinated manner to implement it, resulting in the commission of the crimes charged.<sup>27</sup>

13. The Prosecution submits that a joint trial in this case would avoid the duplication of evidence, thereby promoting judicial economy and saving Court time and resources.<sup>28</sup> It further claims that joinder avoids inconsistent findings and verdicts, in particular, due to inconsistent treatment of the evidence; differential treatment of the Accused; the risk of hardship to witnesses; the risk that witnesses would become unavailable after testifying in one trial; and ultimate reversal on final appeal.<sup>29</sup> The Prosecution asserts that any delays resulting from joinder are off-set by the benefits, that the Chamber can ensure that there is no undue delay and that a joint trial, once it commences, will likely proceed more expeditiously than parallel trials.<sup>30</sup>

14. Finally, the Prosecution submits that joinder will not result in prejudice to the Accused because the trial is being held before professional judges who are in a position to 'guard [themselves] against any potential prejudice', for

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<sup>26</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, para. 14; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, para. 14.

<sup>27</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 1 and 14-16; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 1 and 14-16.

<sup>28</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 1 and 18; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 1 and 18-19.

<sup>29</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 17 and 19; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 17 and 20.

<sup>30</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 20-21; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 21-22.



example, where evidence is admissible against one Accused, but not the other.<sup>31</sup> The Prosecution notes that the possibility of antagonistic defences is not *per se* a conflict of interest capable of causing serious prejudice.<sup>32</sup>

#### *LRV Responses*

15. In support of the Prosecution Requests, the LRV submits that joinder will facilitate expeditiousness, increase the safety of victims and witnesses, minimise the impact of their participation (including associated security risks), ensure that the same issues arising in both cases are dealt with consistently, avoid the expense of two trials, and 'contribute to ascertaining the truth of the violent events detailed in the confirmation decisions in both cases without affecting the rights of the defence'.<sup>33</sup>

16. The LRV 'shares' the arguments in the Prosecution Requests that the cases are essentially the same and that joinder will avoid duplication in the presentation of evidence and promote judicial economy.<sup>34</sup> She emphasises that the Prosecution Requests do not seek to amend the charges, but only that the Chamber hears the confirmed charges against both Accused as part of the same trial.<sup>35</sup> Finally, the LRV notes that the Prosecution Requests have been filed at an early stage of trial preparation in both cases, allowing a timely discussion of preliminary matters.<sup>36</sup>

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<sup>31</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, para. 22; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, para. 23.

<sup>32</sup> *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, para. 22; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, para. 23.

<sup>33</sup> *Gbagbo* LRV Response, ICC-02/11-01/11-743, paras 15 and 17; *Blé Goudé* LRV Response, ICC-02/11-02/11-196, paras 13 and 15.

<sup>34</sup> *Gbagbo* LRV Response, ICC-02/11-01/11-743, para. 16; *Blé Goudé* LRV Response, ICC-02/11-02/11-196, para. 14.

<sup>35</sup> *Gbagbo* LRV Response, ICC-02/11-01/11-743, paras 26-27.

<sup>36</sup> *Gbagbo* LRV Response, ICC-02/11-01/11-743, paras 18 and 28; *Blé Goudé* LRV Response, ICC-02/11-02/11-196, paras 16-17.

*Gbagbo Defence Response*

17. The Gbagbo Defence submits that the *Gbagbo* Prosecution Request is too short to have been based on a proper rationale and to present real grounds, should be dismissed *in limine*, and the Prosecution should be invited to submit a new, sufficiently motivated request.<sup>37</sup> Despite the complexity of the case, the novel nature of joinder and its potential impact,<sup>38</sup> the Gbagbo Defence argues that the Prosecution has not specifically, and in adequate detail, identified a legal or factual basis for requesting joinder and fails to sufficiently demonstrate the similarity of the charges and analyse the advantages and disadvantages of joinder.<sup>39</sup>

18. If the Chamber nevertheless decides to consider the *Gbagbo* Prosecution Request, the Gbagbo Defence submits, based on the plain language of the provisions, that charges must first be joined under Article 64(5) of the Statute before trials may be joined under Rule 136 of the Rules.<sup>40</sup> It therefore claims that it is insufficient that the charges against two persons involve the same transaction.<sup>41</sup> Rather, the Gbagbo Defence argues that the charges, including the facts, their legal characterisation and the modes of liability, must be identical.<sup>42</sup> It claims that, if there are any differences in the charges against individual accused, joinder *de facto* leads to an amendment of the charges.<sup>43</sup>

19. The Gbagbo Defence requests that the *Gbagbo* Prosecution Request be denied because it does not demonstrate that the charges are the same, or that joinder is legally sound, practically justified and in the interests of

<sup>37</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 1, 3 and 21.

<sup>38</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 3-7, 13-16 and 20.

<sup>39</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, *inter alia*, paras 9, 17 and 19.

<sup>40</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 26, 30, 32, 34 and 36.

<sup>41</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 27, 29 and 42.

<sup>42</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 29, 50-53 and 62.

<sup>43</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, para. 54.

justice.<sup>44</sup> It stresses that, for joinder of charges under Article 64(5) of the Statute, there is no presumption.<sup>45</sup> The Gbagbo Defence further submits that the 'same transaction' concept relied upon by the Prosecution has no basis in the Court's legal framework.<sup>46</sup>

20. In comparing the charges, the Gbagbo Defence submits that only the confirmed charges against each Accused should be considered and that the charges in Confirmation Decisions are very different.<sup>47</sup> It submits that, although four of the same events underlie the charges against both Accused, the incidents referred to in the context of these events are either different or understood differently in the Confirmation Decisions.<sup>48</sup> It notes that both Accused are charged under Article 25(3)(a) of the Statute only for crimes arising from one incident and claims that the Pre-Trial Chamber considered that the alleged link between the Accused, the alleged common purpose, was irrelevant in establishing individual responsibility under other modes.<sup>49</sup> The Gbagbo Defence also notes that the February 2011 incidents at Yopougon are charged for Mr Blé Goudé, but not Mr Gbagbo.<sup>50</sup>

21. The Gbagbo Defence submits that different charges require different trials: the Chamber is therefore requested to evaluate the negative consequences of joinder on the rights of the Accused and the proper administration of justice, and reject the *Gbagbo* Prosecution Request.<sup>51</sup> It reiterates that joinder would result in a modification of the charges and require the Accused to defend against unconfirmed charges.<sup>52</sup> Noting that the Appeals Chamber has not yet affirmed the alternative charging approach adopted by the

<sup>44</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 38-42 and 47.

<sup>45</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 35 and 37.

<sup>46</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 43-46.

<sup>47</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 55-61, 63-66, 70-73, 75-84 and 89.

<sup>48</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, para. 65.

<sup>49</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 67, 69-70 and 86. *See also*, para. 73.

<sup>50</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, para. 74.

<sup>51</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 27-28 and 91-92 and page 33.

<sup>52</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 71, 74-75, 78, 85-86, 90 and 92-93.

Pre-Trial Chamber, the Gbagbo Defence claims that joinder of different charges will cause confusion and witnesses will be questioned from different angles.<sup>53</sup> The Gbagbo Defence therefore requests the Chamber, if it is nevertheless minded to join the charges, to order the Prosecution to state which specific charges it wishes to join in order to allow the Chamber to assess the risk to the Accused of defending against unconfirmed charges.<sup>54</sup>

22. If the Chamber were to join the charges, the Gbagbo Defence submits that the Chamber must then assess, under Rule 136 of the Rules, whether a joint trial would result in prejudice to the Accused and protect the interests of justice.<sup>55</sup> If joinder was granted, it claims it would need further time to prepare for trial as it would have to review the *Blé Goudé* case record and conduct investigations, resulting in a 2016 trial start date.<sup>56</sup> The Gbagbo Defence finally requests that the Chamber schedule a status conference allowing all parties to be heard on a new, realistic start date for trial.<sup>57</sup>

23. The Gbagbo Defence further claims that, due to the difference in the charges, joinder may negatively impact on the administration of justice as there may be some evidence relevant only to one Accused; witnesses will be perceived and relied upon in a different way for each Accused thereby causing difficulty to the Defence in examining them; and there will be different Defence cases and possibly different Prosecution cases.<sup>58</sup> The Gbagbo Defence claims that it is premature to make any conclusions as to the similarity of the evidence as investigations are ongoing.<sup>59</sup> Moreover, it submits that professional judges could ensure consistency in two separate

<sup>53</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 68, 87-88 and 93

<sup>54</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, para. 93 and page 33.

<sup>55</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 94-95 and 105.

<sup>56</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 96-99.

<sup>57</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, para. 100 and page 34.

<sup>58</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 101-103.

<sup>59</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, para. 104.

cases and that inconsistency in verdicts may still result even in a joint trial.<sup>60</sup> Finally, the Gbagbo Defence requests that the Chamber order the Prosecution to provide further information including what evidence it intends to adduce in a joint trial and how it will ensure that charges are not modified, in order to enable the parties to express views on the relevance of any joinder.<sup>61</sup>

*Blé Goudé Defence Response*

24. The Blé Goudé Defence submits that the *Blé Goudé* Prosecution Request should be rejected and separate trials ordered<sup>62</sup> because the Prosecution misstates the law pertaining to joinder and fails to substantiate how the cases are the same.<sup>63</sup> In the event the Chamber finds the cases to be sufficiently similar, the Blé Goudé Defence submits that separate trials are necessary in order to avoid serious prejudice to both Accused.<sup>64</sup> It asserts that the *Blé Goudé* Prosecution Request is unsubstantiated, failing to demonstrate that the legal requirements for joinder have been met and requesting a major change in the procedural framework of two cases for the sole reason that it would benefit the Prosecution.<sup>65</sup>

25. The Blé Goudé Defence submits that the 'joinder of charges' is a prerequisite for a 'joinder of trials'.<sup>66</sup> It claims that the Prosecution incorrectly assumed that Rule 136 of the Rules creates a presumption of joinder which would oblige the Chamber, as the only body entitled to join or sever charges after they are confirmed, to join cases against persons

<sup>60</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, para. 106.

<sup>61</sup> *Gbagbo* Defence Response, ICC-02/11-01/11-765, paras 107-109 and page 34.

<sup>62</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, para. 64.

<sup>63</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 4 and 15.

<sup>64</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 4 and 15.

<sup>65</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 5-14 and 19.

<sup>66</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 21 and 27.

accused jointly.<sup>67</sup> The Blé Goudé Defence maintains that the charges are not the crimes alleged in the arrest warrant or document containing the charges, but only those contained in the Confirmation Decisions.<sup>68</sup>

26. The Blé Goudé Defence argues that the confirmed charges are neither identical, nor similar: the events and the modes of liability are different.<sup>69</sup> It submits that whether the crimes are alleged to have happened during the same events or 'same transaction' is irrelevant as this test is derived from a provision in the ICTY Rules of Procedure and Evidence which has no equivalent in the Statute or Rules.<sup>70</sup>

27. The Blé Goudé Defence asserts that joinder would irreparably violate its right to adequate time to prepare for trial and hence violate the principle of equality of arms.<sup>71</sup> It reminds the Chamber that, on the date of the *Blé Goudé* Prosecution Request, Mr Blé Goudé was effectively without counsel; that he did not choose new counsel until 7 January 2015; that the current team is still actively recruiting members; and that the Blé Goudé Defence is familiarising itself with this complex and large case.<sup>72</sup>

28. The Blé Goudé Defence further submits that, if the cases are joined, it would also have to familiarise itself with the *Gbagbo* case in which a trial date of 7 July 2015 is imminent.<sup>73</sup> It submits that such a start date would result in severe prejudice to Mr Blé Goudé because he would only have had a year and a half since his first appearance before the Court, and his team only six to eleven months, to prepare for trial.<sup>74</sup> Moreover, the Blé

<sup>67</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 23-26. *See also*, paras 31-32.

<sup>68</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 33-38.

<sup>69</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 39-41. *See also*, Annex 1, ICC-02/11-02/11-217-Anx1.

<sup>70</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, para. 42.

<sup>71</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 43-47.

<sup>72</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 48-49.

<sup>73</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, para. 50.

<sup>74</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 50-51. *See also*, paras 52-54.

Goudé Defence submits that, as the Gbagbo Defence has indicated that it would also need more time to prepare, delays resulting from joinder would violate the right to trial without undue delay.<sup>75</sup>

29. The Blé Goudé Defence argues that a joinder would prejudicially and prematurely ‘assume the existence of an alleged “common plan” or connection between Mr Gbagbo and Mr Blé Goudé’.<sup>76</sup> It submits that the alleged responsibility of Mr Gbagbo, as former President, and Mr Blé Goudé, as a youth leader, is different, which could lead to different Prosecution and Defence cases.<sup>77</sup> The Blé Goudé Defence argues that a joint trial would therefore result in the admission of evidence which is relevant to Mr Gbagbo, but not Mr Blé Goudé; for example, evidence of ‘the alleged common plan between members of the so-called inner circle to all four charged incidents’ even though this evidence would only be relevant, in the *Blé Goudé* case, to two incidents.<sup>78</sup> It claims that if evidence relevant to Mr Gbagbo, but not Mr Blé Goudé, is admitted, there is a ‘serious risk’ that the Chamber would consider this evidence and could modify the charges to include co-perpetration for all charged incidents.<sup>79</sup>

30. Finally, the Blé Goudé Defence submits that joinder does not necessarily serve the interests of judicial economy.<sup>80</sup> It asserts that the Prosecution has not provided the Chamber any information pertaining to the number of witnesses common to both cases, thereby preventing the Chamber from assessing whether joinder would be judicially economical.<sup>81</sup>

<sup>75</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, para. 51.

<sup>76</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, para. 55. *See also*, para. 58.

<sup>77</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 56-57 and 59, and Annex 1, ICC-02/11-02/11-217-Anx1.

<sup>78</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 55 and 59-61, *citing* ICC-02/11-02/11-217-Anx1.

<sup>79</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, para. 60.

<sup>80</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, paras 62-63.

<sup>81</sup> *Blé Goudé* Defence Response, ICC-02/11-02/11-217, para. 63.

*Prosecution Reply*

31. The Prosecution replies that, contrary to the Gbagbo Defence interpretation, Article 64(5) of the Statute gives the Chamber broad discretion to determine whether it is appropriate to join charges and that Rule 136 of the Rules creates a presumption of joinder where persons are jointly accused.<sup>82</sup> It claims that there is nothing in the plain language of Article 64(5) of the Statute that would limit the Chamber's discretion to order joinder to situations where the legal characterisation of the charges is identical.<sup>83</sup>

32. Further, the Prosecution submits that the Gbagbo Defence interpretation undermines the object and purpose of Article 64(5) of the Statute.<sup>84</sup> It claims that persons who jointly commit crimes often play different roles and, in turn, the charges against them will often be different.<sup>85</sup> The Prosecution further submits that Rule 136 of the Rules does not support the Defence's position that only identical charges may be joined.<sup>86</sup> It asserts that Article 64(5) of the Statute and Rule 136 of the Rules must be read together: the former establishes the discretionary power of the Chamber to join the charges, and the latter provides guidance to the Chamber in the exercise of this discretion.<sup>87</sup>

33. The Prosecution stresses that the charges need not be identical; rather, it is sufficient that the accused 'are both charged for their alleged co-responsibility for the same crimes'.<sup>88</sup> The Prosecution acknowledges that the 'same transaction' test used at the *ad hoc* tribunals is not a binding

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<sup>82</sup> Prosecution Reply, ICC-01/11-01/11-781, paras 1-3, 5 and 14.

<sup>83</sup> Prosecution Reply, ICC-01/11-01/11-781, paras 7-9.

<sup>84</sup> Prosecution Reply, ICC-01/11-01/11-781, paras 10-11.

<sup>85</sup> Prosecution Reply, ICC-01/11-01/11-781, para. 12.

<sup>86</sup> Prosecution Reply, ICC-01/11-01/11-781, para. 13.

<sup>87</sup> Prosecution Reply, ICC-01/11-01/11-781, para. 13.

<sup>88</sup> Prosecution Reply, ICC-01/11-01/11-781, para. 15.



principle at the Court, but submits that it may provide useful guidance to the Chamber and accords with the relevant drafting history.<sup>89</sup>

#### *LRV Reply*

34. The LRV replies that the Gbagbo Defence's interpretation of Article 64(5) of the Statute and Rule 136 of the Rules is contrary to the wording, context, purpose and drafting history of these provisions.<sup>90</sup> She submits that the 'literal tenor' of Article 64(5) of the Statute permits joinder where charges are not identical, and that Rule 136(1) of the Rules does not prohibit joint trials where accused have not been 'charged jointly'.<sup>91</sup> The LRV further contends that, as the provisions relating to joinder at the Court are not sufficiently clear, the ICTY concept of 'same transaction' may serve as an interpretative aid.<sup>92</sup> The LRV submits that the charges need only be sufficiently related, for example, by the alleged existence of a common plan, and the facts need not be identical.<sup>93</sup>

### **III. Preliminary Matters**

#### *a) Sur-reply Request*

35. The Gbagbo Defence requests that the Chamber reject the Prosecution Reply and alternatively seeks leave to sur-reply because (i) the Prosecution Reply exceeds the scope of the reply granted by the Chamber; (ii) the Prosecution Reply repeats arguments and attempts to address shortcomings in the Prosecution Requests; (iii) arguments in favour of joinder were presented in four filings, while opposing arguments were only made in one filing; (iv) the issue of joinder is of crucial importance; (v) the Defence should have the last word; and (vi) the Defence should

<sup>89</sup> Prosecution Reply, ICC-01/11-01/11-781, paras 16-19.

<sup>90</sup> LRV Reply, ICC-02/11-01/11-780, paras 11, 15-20, 30 and 43.

<sup>91</sup> LRV Reply, ICC-02/11-01/11-780, paras 13-14.

<sup>92</sup> LRV Reply, ICC-02/11-01/11-780, paras 11 and 21-30.

<sup>93</sup> LRV Reply, ICC-02/11-01/11-780, paras 31-37 and 40.

have the opportunity to respond to all arguments raised by the Prosecution.<sup>94</sup> The Prosecution and LRV oppose the Sur-reply Request submitting that the Prosecution Reply did not exceed the scope granted by the Chamber, there is no legal basis for filing a sur-reply, the defence has already made extensive submissions on the issue of joinder and the Sur-reply Request improperly includes substantive submissions on the issue of joinder.<sup>95</sup>

36. The Chamber recalls that the scope of the Prosecution Reply and LRV Reply was limited to submissions in reply to that portion of the *Gbagbo* Defence Response addressing the interpretation and application of Article 64(5) of the Statute and Rule 136 of the Rules.<sup>96</sup> The Chamber will disregard any portion of the Prosecution Reply and LRV Reply which exceeds this scope. It therefore dismisses the *Gbagbo* Defence request that the Prosecution Reply be rejected *in limine*.

37. The Chamber further notes that the Sur-reply Request provides a detailed summary of the submissions the *Gbagbo* Defence would make if leave was granted.<sup>97</sup> The Chamber disapproves of this practice and cautions the parties and participants that they are not to make submissions in reply or sur-reply unless they are authorised to do so.<sup>98</sup>

38. The Chamber stresses that the Statute, Rules and Regulations do not expressly contemplate sur-replies. Recalling that it will disregard any portion of the Prosecution Reply and LRV Reply which exceeds the

<sup>94</sup> Sur-reply Request, ICC-02/11-01/11-792, paras 12-25 and 52.

<sup>95</sup> Prosecution Sur-reply Response, ICC-02/11-01/11-795, paras 1-4; LRV Sur-reply Response, ICC-02/11-01/11-794, paras 8-14.

<sup>96</sup> Leave to Reply Decision, ICC-02/11-01/11-775, paras 4 and 7.

<sup>97</sup> Sur-reply Request, ICC-02/11-01/11-792, paras 26-51.

<sup>98</sup> The Appeals Chamber has taken a similar approach. See *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824, para. 68.

authorised scope, the Chamber considers that there are no new issues arising therefrom. The Chamber further recalls that it has already received extensive submissions on the issue of joinder, including from the Gbagbo Defence. The Chamber therefore finds that it would not benefit from further submissions and dismisses the Sur-reply Request.

***b) Request for dismissal in limine of Prosecution Requests***

39. The Chamber notes that both Defence teams submit that the Prosecution Requests are insufficiently substantiated. On this basis, the Gbagbo Defence requests that the Chamber reject the *Gbagbo* Prosecution Request *in limine*. Pursuant to Regulation 23(1) of the Regulations, any document filed with the Court shall, as far as practicable, state, *inter alia*, the reason for filing the document, the relief sought and all relevant legal and factual issues, including details of the applicable law relied upon. The Prosecution Requests state the reason they were filed, the relief sought, the law relied upon, and the legal and factual issues the Prosecution deemed relevant. The Chamber therefore considers that the Prosecution Requests do not evince a *per se* absence of reasoning or motivation which would justify dismissal *in limine*. The merits of the Prosecution Requests will be addressed below.

**IV. Applicable Law**

40. Article 64(5) of the Statute provides that, '[u]pon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.'

41. Rule 136 of the Rules further provides that:

1. Persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of

justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2.

2. In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.

## V. Analysis

42. At the outset, the Chamber notes that this is the first time a request for joinder has been filed before a Trial Chamber of this Court. The Chamber notes the Defence submissions concerning the applicable law, in particular that the *charges* against an accused must first be joined under Article 64(5) of the Statute before joinder of *trials* is possible under Rule 136 of the Rules. The Defence argues, relying on the plain language of the French version of the Statute and Rules,<sup>99</sup> that trial proceedings can only be joined, after completion of the confirmation stage, if the charges confirmed against two or more accused are identical.

43. In this regard, the Chamber observes that the Court's legal documents must be interpreted in accordance with the ordinary meaning given to the terms, as used in their context, and in light of the object and purpose.<sup>100</sup> The Chamber must exclude any interpretation that would render statutory provisions meaningless or ineffective.<sup>101</sup>

44. As set out above, Article 64(5) of the Statute provides, *inter alia*, that, among its functions and powers, a Trial Chamber may, 'as appropriate', order joinder in respect of charges against more than one accused. Rule 136(1) of the Rules, concerning '[j]oint and separate trials', provides that

<sup>99</sup> The French version of Rule 136(1) of the Rules provides: '*Les accusés dont les charges ont été jointes sont jugés ensemble [...]*'.

<sup>100</sup> Article 31(1) of the Vienna Convention on the law of treaties, adopted 23 May 1969 and entered into force 27 January 1980, UNTS, Vol. 115, page 331. *See also, Situation in the Democratic Republic of the Congo*, Appeals Chamber, Judgment 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 OA3, para. 33; *The Prosecutor v. Germain Katanga*, Trial Chamber II, Jugement rendu en application de l'article 74 du Statut, 8 March 2014, ICC-01/04-01/07- 3436 ('*Katanga Judgment*'), paras 43-45.

<sup>101</sup> *Katanga Judgment*, ICC-01/04-01/07- 3436, para. 46.

persons accused jointly are to be tried together unless the Trial Chamber considers that separate trials are necessary (i) in order to avoid serious prejudice to the accused, (ii) to protect the interests of justice or (iii) because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with Article 65(2) of the Statute. Rule 136(2) of the Rules ensures that, in joint trials, each accused is afforded the same rights as if such accused were being tried separately.

45. The Chamber considers that 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. Whether separate trials are necessary in order to avoid 'serious prejudice' to the accused and protect the interests of justice, as provided in Rule 136(1) of the Rules, is a consideration to be taken into account in all cases where joint trials are contemplated.

46. If it were to construe Article 64(5) of the Statute and Rule 136 of the Rules as submitted by the Defence, the Chamber would have no power to jointly try persons charged in different confirmation decisions unless the facts and circumstances described in these charges are identical. Nothing in the plain language of these provisions indicates that the power of the Trial Chamber to join charges is limited to such situations. The Chamber further finds that the Defence interpretation would, in practice, unduly restrict the Chamber's ability to order the joinder of charges and trials under Article 64(5) of the Statute and Rule 136 of the Rules. Such limited utility would defeat the object and purpose of these provisions.

47. In this respect, the Chamber considers that Article 64(5) of the Statute and Rule 136 of the Rules must be read in light of Article 64(2) of the Statute,

which provides that the Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. According to Pre-Trial Chamber I, joint proceedings are consistent with the object and purpose of the Statute and Rules insofar as they enhance the fairness and expeditiousness of the proceedings by avoiding the duplication of evidence, inconsistency in the presentation and assessment of evidence, undue impact on witnesses and victims, and unnecessary expense.<sup>102</sup> The Appeals Chamber has confirmed that, consistent with the rights of the accused, joinder promotes the 'efficacy of the criminal process' and expeditiousness of the proceedings.<sup>103</sup>

48. The Chamber therefore finds that it has the power, under Article 64(5) of the Statute and Rule 136 of the Rules, to join charges against more than one accused, even when those charges are not identical. The Chamber finds it appropriate to consider the nature of the charges and whether a connection exists between them.

49. In the *Katanga* Joinder Decision, Pre-Trial Chamber I considered that the Prosecutor had made a joint application for arrest warrants, alleged that both accused were co-perpetrators of crimes arising from the same incident, and relied on the same evidence against both accused.<sup>104</sup> The Chamber further notes the 'same transaction' test applied at the ICTY,

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<sup>102</sup> *The Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, 10 March 2008, ICC-01/04-01/07-257 ('*Katanga* Joinder Decision'), pages 8-9; *see also* ICTR, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-A, Appeals Chamber, Judgement, 11 February 2014 ('*Ndindiliyimana et al.* Appeal Judgment'), para. 140; ECCC, *In the case of Ieng et al.*, 002/19-09-2007-ECCC-TC/SC(18), Supreme Court Chamber, Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, 8 February 2013, para. 33; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-PT, Trial Chamber, Decision on Defence's Motions for Separate Trials and Severance of Counts, 1 July 2005, para. 23

<sup>103</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008, ICC-01/04-01/07-573 OA 6 ('*Katanga and Ngudjolo* Appeal Decision'), para. 8.

<sup>104</sup> *Katanga* Joinder Decision, ICC-01/04-01/07-257, page 6.

ICTR and SCSL,<sup>105</sup> which is mentioned in the drafting history relating to Article 64(5) of the Statute.<sup>106</sup> Under the 'same transaction' test, the fundamental question is whether persons are charged with having committed crimes, regardless of whether those crimes are alleged to be the same crimes, in the course of the same transaction.<sup>107</sup> The individual acts or omissions of two or more accused, 'whether occurring as one event or a number of events, at the same or different locations' or time periods, are part of the 'same transaction' if they are alleged to form part of a common scheme, strategy or plan.<sup>108</sup> The Chamber considers that the 'same transaction' concept and the jurisprudence related to joinder at the *ad hoc* tribunals may be of assistance in interpreting and applying Article 64(5) of the Statute and Rule 136 of the Rules.

50. Finally, the Chamber notes that the European Court of Human Rights has found that the proper administration of justice may be best served by the

<sup>105</sup> Rule 48 of the ICTY Rules of Procedure and Evidence; Rule 48 of the ICTR Rules of Procedure and Evidence; Rule 48 of the SCSL Rules of Procedure and Evidence.

<sup>106</sup> See e.g. Draft Statute for an International Criminal Court (1994), in *Yearbook of the International Law Commission, 1994* (vol. ii, part two), Article 38(3) (referring to joinder in cases where the charges arise 'out of the same factual situation'); Commentaries to the Draft Statute for an International Criminal Court (1994), in *Yearbook of the International Law Commission, 1994* (vol. ii, part two), page 55; Report of the Preparatory Committee on the Establishment of an International Criminal Court, General Assembly Official Records, 51<sup>st</sup> Session, 1996, Supplement No. 22A (A/51/22), page 181 (In the compilation of the proposals relating to joinder, Australia and the Netherlands proposed the same wording as provided in the ICTY Rules of Procedure and Evidence, including the 'same transaction' requirement); Working paper on article 64, 4 July 1998, A/CONF.183/C.1/WGPM/L.41, Article 64(5) (permitting joinder where there are charges 'arising out of the same or related factual situations').

<sup>107</sup> ICTY, *Prosecutor v. Pandurević and Trbić*, IT-05-86-AR73.1, Appeals Chamber, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006 ('*Pandurević and Trbić* Appeal Decision'), para. 7; ICTY, *Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, Appeals Chamber, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ('*Tolimir et al.* Appeal Decision'), para. 7.

<sup>108</sup> *Tolimir et al.* Appeal Decision, para. 7; *Pandurević and Trbić* Appeal Decision, para. 7; ICTY, *Prosecutor v. Gotovina and Prosecutor v. Čermak and Markač*, IT-03-73-AR73.1, IT-03-73-AR73.2 and IT-01-45-AR73.1, Appeals Chamber, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006 ('*Gotovina* Appeal Decision'), paras 21-22; Rules 2 and 48 of the ICTY Rules of Procedure and Evidence.

joint and parallel progression of cases involving charges which are interdependent and closely linked.<sup>109</sup>

51. Accordingly, in exercising its discretion to determine whether joinder is appropriate, the Chamber will consider (a) the charges contained in the Confirmation Decisions and whether separate trials are necessary in order (b) to avoid 'serious prejudice' to the accused and (c) to protect the interests of justice.

*a) Consideration of the charges*

52. In considering the charges against the two Accused, the Chamber will have regard to the Confirmation Decisions which define the parameters of the charges at trial.<sup>110</sup>

53. Both Mr Gbagbo and Mr Blé Goudé have had charges confirmed against them which arise from the same allegations, namely crimes allegedly committed during the same four incidents by the same direct perpetrators who targeted the same victims because they were perceived to be supporters of Mr Ouattara.<sup>111</sup> These common incidents are the attacks related to the demonstrations at the Radiodiffusion-Télévision Ivoirienne

<sup>109</sup> See e.g. ECtHR, *Boddaert v. Belgium*, Application No. 12919/87, Judgment (Merit and Just Satisfaction), 12 October 1992 ('*Boddaert* Judgment'), paras 37-39 (The court noted that the joined case 'originated in a murder following another murder committed in the same place', '[a] number of persons coming from the same circle were implicated', two of the suspects accused each other of having committed the crime of which they were both suspected, and at least one of the crimes committed after the original case began was closely linked with the crimes charged in the original case. The court found it was reasonable, in these circumstances, for the authorities to consider that joinder of these charges was in the good administration of justice); ECtHR, *Coëme and Others v. Belgium*, Application Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment, 22 June 2000 ('*Coëme and Others* Judgment'), paras 139-140 (The court noted that the authorities had determined that the offences of which all accused were charged came to light during the same investigation and the charges were interdependent, and found that the consideration of these charges together was compatible with the balance to be struck between expeditiousness and the proper administration of justice).

<sup>110</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 124.

<sup>111</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 37 (First Incident), 51 (Second Incident), 55-56 (Third Incident), 65, 72 (Fourth Incident), 193-194 (murder), 195-196 (rape), 197-203 (other inhumane acts and attempted murder), 204-206 (persecution) and 267-278; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 25 (First Incident), 40 (Second Incident), 42-43 (Third Incident), 45, 47 (Fourth Incident), 115-116 (murder), 117-118 (rape), 119-121 (other inhumane acts and attempted murder), 122-123 (persecution), and 182-194.



(‘RTI’) headquarters (16-19 December 2010) (‘First Incident’),<sup>112</sup> the attack on a women’s demonstration in Abobo (3 March 2011) (‘Second Incident’),<sup>113</sup> the shelling of Abobo market and the surrounding area (17 March 2011) (‘Third Incident’),<sup>114</sup> and the attack on Yopougon (on or around 12 April 2011) (‘Fourth Incident’).<sup>115</sup>

54. Mr Blé Goudé is also charged with crimes allegedly committed during the 25-28 February 2011 attack on Yopougon (‘Fifth Incident’).<sup>116</sup> Mr Gbagbo is not charged with crimes arising from the Fifth Incident. However, in the *Gbagbo* Confirmation Decision, the Pre-Trial Chamber did consider events occurring between 25 and 28 February 2011 in Yopougon in a section addressing ‘other acts’ of violence by pro-Gbagbo forces directed at parts of the population perceived to be supporters of Mr Ouattara.<sup>117</sup> Overall, Pre-Trial Chamber I found, in both cases, substantial grounds to believe that acts of violence by pro-Gbagbo forces were committed against the civilian population at the same locations and during the same time periods.<sup>118</sup> Pre-Trial Chamber I found that these acts formed part of an ‘attack’ and therefore concluded that the contextual elements for crimes against humanity were satisfied.<sup>119</sup>

<sup>112</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 24-41, 193-194, 195-206 and 267-278.; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 17-25, 115-123 and 182-194.

<sup>113</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 42-51, 193-194, 197-206 and 267-278; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 39-40, 115-123 and 182-194.

<sup>114</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 52-63, 193-194, 197-206 and 267-278.; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 41-43, 115-116, 119-123 and 182-194.

<sup>115</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 64-72, 193-206 and 267-278; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 44-50, 115-123 and 182-194.

<sup>116</sup> *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 26-38, 115-116, 119-123 and 182-194.

<sup>117</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, para. 77 (vii and ix).

<sup>118</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 73-77; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 51-55. Although 39 events are listed in the *Gbagbo* Confirmation Decision, the Chamber notes that this includes two events included in the Fifth Incident in the *Blé Goudé* Confirmation Decision. See *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, para. 77 (vii and ix); *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 26-38.

<sup>119</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 207-225; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 124-132.

55. Mr Blé Goudé and Mr Gbagbo are named numerous times in both Confirmation Decisions. Mr Gbagbo and Mr Blé Goudé are both alleged to have been part of an 'inner circle' which jointly designed and implemented a common plan with the purpose of maintaining Mr Gbagbo as President by all means, including through the use of armed force against civilians.<sup>120</sup> According to the Pre-Trial Chamber, the existence of this common plan or purpose was an essential element founding charges against both Mr Gbagbo and Mr Blé Goudé under Articles 25(3)(a)<sup>121</sup> and 25(3)(d)<sup>122</sup> of the Statute.<sup>123</sup> The Pre-Trial Chamber also relied on the existence of the common plan in confirming charges against Mr Gbagbo under Article 25(3)(b) of the Statute,<sup>124</sup> and Mr Blé Goudé under Articles 25(3)(b)<sup>125</sup> and 25(3)(c)<sup>126</sup> of the Statute.

56. Although their 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. The Chamber therefore finds that, based on the nature of these charges, joinder is appropriate.

57. The Chamber finally emphasises that the Prosecution has not requested, nor does the Chamber have the power to authorise, amendments to the

<sup>120</sup> See e.g. *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 79-86 and 267-278; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 57-62 and 184.

<sup>121</sup> Mr Gbagbo is charged as a co-perpetrator under Article 25(3)(a) of the Statute for all crimes confirmed by the Pre-Trial Chamber in the *Gbagbo* Confirmation Decision. See *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, para. 278. Mr Blé Goudé is charged as a co-perpetrator under Article 25(3)(a) of the Statute for the crimes committed during the Fourth Incident and Fifth Incident. See *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, para. 194.

<sup>122</sup> Both Mr Gbagbo and Mr Blé Goudé are charged under Article 25(3)(d) of the Statute for all crimes confirmed by the Pre-Trial Chamber. See *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, para. 278; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, para. 194.

<sup>123</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 230-238 and 252-259; *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 138-140 and 172-181.

<sup>124</sup> *Gbagbo* Confirmation Decision, ICC-02/11-01/11-656-Red, paras 245-248 and 250.

<sup>125</sup> *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, para. 165.

<sup>126</sup> *Blé Goudé* Confirmation Decision, ICC-02/11-02/11-186, paras 168-170.

facts and circumstances described in the charges against either Accused. Pursuant to Article 74(2) of the Statute, the final decision on the guilt or innocence of Mr Gbagbo shall not exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber in the *Gbagbo* Confirmation Decision. Likewise, the final decision on the guilt or innocence of Mr Blé Goudé shall not exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber in the *Blé Goudé* Confirmation Decision.

*b) 'serious prejudice to the accused'*

58. Chambers at the Court and the *ad hoc* tribunals have generally assessed potential prejudice caused by joinder to the rights of the accused in reference to expeditiousness<sup>127</sup> and conflicts of interest, for example, the presentation of evidence relevant to only one accused or the possibility of antagonistic defences.<sup>128</sup>

59. In relation to Defence submissions concerning the prejudice that may arise from the merging and amendment of charges, the Chamber reiterates that the Prosecution has not requested, and the Chamber has no power to authorise, amendments to the facts and circumstances described in the charges against either Accused. The Chamber further emphasises that it has only considered the Confirmation Decisions in assessing whether

<sup>127</sup> *The Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber II, Decision Severing the Case Against Dominic Ongwen, 6 February 2015, ICC-02/04-01/05-424 ('*Ongwen* Severance Decision'), paras 8-9; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA, para. 61. See also, *Katanga and Ngudjolo* Appeal Decision, ICC-01/04-01/07-573 OA 6, para. 8; ECCC, *In the case of Nuon and Khieu*, 002/19-09-2007-ECCC-TC/SC(28), Supreme Court Chamber, Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002, 25 November 2013 ('*Nuon and Khieu* Appeal Decision'), paras 38 and 40.

<sup>128</sup> ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Appeals Chamber, Judgement, 23 January 2014 ('*Šainović et al.* Appeal Judgment'), para. 40; *Pandurević and Trbić* Appeal Decision, paras 8 and 23; *Nuon and Khieu* Appeal Decision, para. 38; STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, Decision on Trial Management and Reasons for Decision on Joinder, 25 February 2014 ('*Ayyash et al.* Decision'), paras 26, 28 and 49.

charges against Mr Gbagbo and Mr Blé Goudé may be joined. It has drawn no conclusions nor made any assumptions relating to the charges.

60. In relation to submissions concerning the possibility of different defences and the presentation of evidence relevant to only one Accused, the Chamber stresses that joinder, by its very nature, contemplates such 'attendant inevitable minimum prejudices'.<sup>129</sup> The Chamber, composed of professional judges, is capable of fully taking into consideration the circumstances and specific aspects of each concrete case and set of charges before it when determining the guilt or innocence of an Accused, excluding extraneous factors such as any prejudicial evidence.<sup>130</sup> Taking this into account, the Defence fails to explain, other than asserting that confusion will result (in particular, in the examination of witnesses from two different perspectives), how these potential consequences of joinder will nevertheless cause 'serious prejudice' to the Accused. Recalling that the charges are closely linked, the Chamber considers that any prejudice to the accused would be minimal in comparison to the overall benefits to the interests of justice addressed below.

61. Moreover, the Defence indicates that the right to adequate time and facilities would necessitate a delay to the start date of the trial, while, at the same time, threatening the right of the Accused to be tried without undue delay. The ICTY Appeals Chamber and European Court of Human Rights have confirmed that the proper administration of justice may be best served by joinder, even if it risks some delay or adds some degree of

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<sup>129</sup> ICTY, *Prosecutor v. Delalić et al.*, IT-96-21, Trial Chamber, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998, para. 35; *Gotovina* Appeal Decision, para. 37.

<sup>130</sup> *Tolimir et al.* Appeal Decision, paras 21-22; *Pandurević and Trbić* Appeal Decision, para. 27; *Gotovina* Appeal Decision, paras 37-38. *See also*, *Ayyash et al.* Decision, para. 49.

complexity in the proceedings.<sup>131</sup> In any event, the 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.

62. Accordingly, the Chamber finds that separate trials are not necessary in order to avoid 'serious prejudice' to Mr Gbagbo and Mr Blé Goudé. The Chamber considers that a joint trial is appropriate to ensure a fair and expeditious trial pursuant to Article 64(2) of the Statute and, as will be explained in the following section, is in the interests of justice.

*c) 'the interests of justice'*

63. Chambers at the Court and the *ad hoc* tribunals have generally considered the following factors in assessing whether joinder serves the interests of justice: duplication of evidence; consistency in the presentation and assessment of evidence and verdicts; the interests of victims; hardship to witnesses, the likelihood of their reappearance and risk of exposure for protected witnesses; and judicial economy including considerations related to the number of witnesses the Prosecution would have to call in a joint versus separate trials, the length of a joint trial relative to the cumulative length of separate trials and economical use of court resources.<sup>132</sup>

64. The Chamber notes that, according to the Prosecution, largely the same evidence has been and will be disclosed in both cases, largely the same evidence was relied upon by the Prosecution at the confirmation hearing,

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<sup>131</sup> *Gotovina* Appeal Decision, para. 44; *Boddaert* Judgment, paras 37-39; *Coëme and Others* Judgment, paras 139-140 (Despite the risk of delaying the trial of one accused, the joint consideration of charges was compatible with the balance to be struck between expeditiousness and the proper administration of justice); ECtHR, *Neumeister v. Austria*, Application No. 1936/63, Judgment (Merits), 27 June 1968, para. 21 ('The course of the investigation would probably have been accelerated had the Applicant's case been severed from those of his co-accused, but nothing suggests that such a severance would here have been compatible with the good administration of justice').

<sup>132</sup> *Ongwen* Severance Decision, ICC-02/04-01/05-424, para. 7; *Šainović et al.* Appeal Judgment, para. 40; *Ndindiliyimana et al.* Appeal Judgment, para. 140; *Pandurević and Trbić* Appeal Decision, paras 8 and 23; *Nuon and Khieu* Appeal Decision, paras 38-41; *Ayyash et al.* Decision, paras 24-31.

and the Prosecution will present largely the same evidence at trial against both Accused. Defence submissions concerning the different evidence the two Defence teams will present is unsubstantiated by further detail. The Chamber is therefore satisfied that a joint trial would, at a minimum, avoid the duplication of a significant body of evidence.

65. A joint trial would also avoid the risk of inconsistent treatment and assessment of evidence in separate trials, and, in turn, inconsistent verdicts. Further, it is evident that requiring witnesses to testify twice could pose hardship to witnesses, as well as increase the risk of exposure of protected witnesses. For all these reasons, the Chamber considers a joint trial to be in the interests of witnesses and victims and in accordance with the Chamber's obligations under Article 68(1) of the Statute.

66. In relation to judicial economy, the Chamber considers that two separate trials, in which the evidence will be largely the same, whether conducted simultaneously or otherwise, are likely to require more court hours and resources than one joint trial, and will lead to a duplication of efforts on the part of all organs of the Court. Indeed, in light of the close connection between the two cases before this Chamber, conducting two trials would require the Prosecution to demonstrate twice the factual allegations underpinning the charges against both Accused. The Chamber considers that this would be a misuse of resources with no discernible benefit for the overall interests of justice.

67. The Chamber therefore considers that separate trials are not necessary at this stage in order to protect the interests of justice. The Chamber considers that, in accordance with Article 64(2) of the Statute, a joint trial is the most appropriate solution.

*d) Conclusion*

68. Pursuant to Article 64(5) of the Statute and Rule 136 of the Rules, the Chamber finds it appropriate to join the charges and jointly try Mr Gbagbo and Mr Blé Goudé. Pursuant to Article 64(2) of the Statute, the Chamber shall ensure the fairness of these joint trial proceedings. Under Rule 136(2) of the Rules, it shall accord the same rights to each accused as if they were being tried separately.

**VI. Consequential Matters**

69. Having found that the *Gbagbo* and *Blé Goudé* cases are to be joined under Article 64(5) of the Statute and Rule 136 of the Rules, the Chamber now addresses the practical consequences of its Decision on the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('joint case').

*a) Presiding and Single Judge*

70. Pursuant to Regulation 13(2) of the Regulations, the judges of Trial Chamber I decide that Judge Geoffrey Henderson shall continue acting as the Presiding Judge in the joint case. To ensure the expeditiousness and efficiency of the proceedings, the Chamber also considers it appropriate that the Presiding Judge, Geoffrey Henderson, continue acting as judge for the preparation of the trial in the joint case ('Single Judge') for addressing, determining and deciding issues arising in the preparatory phase of these proceedings which properly fall within the scope of Rule 132*bis* of the Rules.

*b) Joint case record*

71. Pursuant to Rule 131 of the Rules and Regulation 20 of the Regulations of the Registry, the Chamber orders the Registry to open a case record for the joint case and provide access to all parties and participants. The Chamber orders that this Decision be the first document on the joint case record. The

*Gbagbo* and *Blé Goudé* case records should be closed with this Decision being the final document on both records.

72. Pursuant to Rules 121(10) and 131 of the Rules and Regulations 21 and 22 of the Regulations of the Registry, the Chamber orders that all public documents and other material on both the *Blé Goudé* and *Gbagbo* case records be included on the joint case record. All confidential, *ex parte* and under seal documents and other information on either case record will, for the time being, retain their current classification and will not be included on the joint case record.

73. The parties, LRV and Registry shall indicate by 7 April 2015 any objection, and the reasons therefore, to any party or participant being granted access to any confidential document or material on either the *Blé Goudé* or *Gbagbo* case records. The Chamber will thereafter rule on these objections and on access to the parts of the joint case record for which no objection was made.

*c) Other*

74. The Chamber vacates the commencement date for the trial in the *Gbagbo* case.<sup>133</sup> The Chamber decides that all other decisions and orders made in the *Gbagbo* and *Blé Goudé* cases shall continue to apply, as appropriate and until ordered otherwise, in the joint case.

75. The Chamber informs the parties and participants that it will hold a status conference in the joint case on 21 April 2015. In order to facilitate the preparation of the parties and participants, the Chamber appends to this Decision a provisional agenda for this status conference. The parties shall make written submissions on the provisional agenda items no later than 14 April 2015. The LRV shall make submissions on items d, f, h and i. The

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<sup>133</sup> Order setting the commencement date for the trial and the time limit for disclosure, 17 November 2014, ICC-02/11-01/11-723.



Registry is invited to make submissions on items b, d and h. Should the parties or participants wish to add other items to the agenda, the Chamber requests that they indicate such proposed additions in their written submissions due on 14 April 2015. The Chamber will issue the final agenda for the status conference in due course.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Sur-reply Request;

**GRANTS** the Prosecution Requests and **JOINS** the *Gbagbo* and *Blé Goudé* cases;

**DECLARES** that Judge Geoffrey Henderson is the Presiding Judge in the joint case;

**DESIGNATES** the Presiding Judge, Geoffrey Henderson, as the Single Judge for the purposes of trial preparation in the joint case;

**ORDERS** the Registry to open a case record for the joint case, with this Decision as the first document, and provide appropriate access to all parties and participants;

**ORDERS** the Registry to close the *Blé Goudé* and *Gbagbo* case records with this Decision being the last document on each;

**ORDERS** the Registry to transfer all public documents and other material on both the *Blé Goudé* and *Gbagbo* case records to the joint case record;

**ORDERS** the parties, LRV and Registry to indicate by 7 April 2015 any objection to any party or participant being granted access to any confidential document or material on the *Blé Goudé* and *Gbagbo* case records;

**VACATES** the commencement date set for the trial in the *Gbagbo* case;

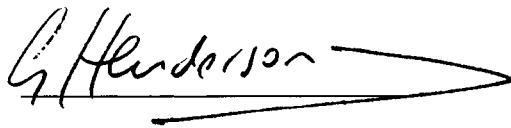
**DECIDES** that all decisions and orders made in the *Gbagbo* and *Blé Goudé* cases shall continue to apply, as appropriate and until ordered otherwise, in the joint case;

**SCHEDULES** a status conference for 21 April 2015 at 9:30;

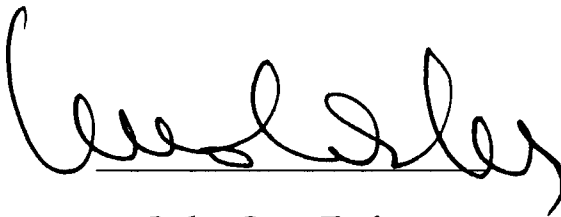
**ORDERS** the parties and participants to make written submissions concerning the agenda for the status conference appended to this Decision, following the instructions provided in paragraph 75 above, no later than 14 April 2015; and

**REJECTS** all other requests.

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



**Judge Geoffrey Henderson, Presiding Judge**



**Judge Cuno Tarfusser**



**Judge Olga Herrera Carbuccia**

Dated 11 March 2015

At The Hague, The Netherlands