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Court**

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TRIAL CHAMBER I

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

SITUATION IN COTE D'IVOIRE

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

Public Document

**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*”**

Source: Defence of Mr Charles Blé Goudé

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

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I. Procedural History

1. On 22 December 2014, the Office of the Prosecutor requested Trial Chamber I (“the Chamber”) to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* (“Joinder Request”).¹
2. On 12 February 2015, the Defence team of Mr. Gbagbo responded to the Joinder Request.² On 19 February 2015, the Defence of Mr. Blé Goudé filed its response to the Joinder Request (“the Response”).³
3. 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 Goudé* and related matters” by which it joined the cases (“the Joinder Decision”).⁴

II. Submissions

4. The Defence of Mr. Blé Goudé hereby respectfully requests from the Chamber to be granted leave to appeal the Joinder Decision, pursuant to article 82(1)(d) of the Rome Statute (“the Statute”) and rule 155 of the Rules of Procedure and Evidence (“the R.P.E.”).
5. The Joinder Decision raises capital questions, which go beyond simple disagreement or differences of opinion, but constitute issues that meet the criteria set forth in article 82(1)(d) of the Statute and, as such, deserve to be ruled on by the Appeals Chamber, in order to allow each trial to be conducted within the scope of fairness and without causing serious and irreparable prejudice to both Accused. The decision to join cases or to keep them separated indeed entails tremendous consequences for each party at trial and the numerous exchanges between them and the Chamber prove that the issues at stake should be discussed before the Appeals Chamber.

¹ Prosecution’s Request to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé*, 22 December 2014, ICC-02/11-02/11-194.

² ICC-02/11-01/11- 738-tFRA.

³ ICC-02/11-02/11-217 with public annex.

⁴ ICC-02/11-02/11-222.

6. As stated in the Response,⁵ and in accordance with the decision delivered by the Chamber, *“this is the first time a request for joinder has been filed before a Trial Chamber of this Court”*.⁶ Besides, the Single Judge has already stressed the *“crucial importance of the issue [of joinder] and the potential impact the Chamber’s decision could have on the conduct of proceedings and the rights of the accused.”*⁷ It appears, therefore, that the consequences of any decision on this matter will be critical not only for the present cases, but also for future cases brought before this Court. As a matter of potential precedent, it is consistent with the principle of sound administration of justice that the Appeals Chamber rules on the issues raised by the Joinder Decision.

III. Applicable law

7. Article 82(1) of the Statute provides that:

“Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...]

(d) 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 Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

8. Pursuant to rule 155(1) of the R.P.E.:

“When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall [...] make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.”

9. Regulation 65 of the Regulations of the Court further provides that:

“1. An application for leave to appeal under rule 155 shall [...] specify the legal and/or factual reasons in support thereof. [...]

⁵ ICC-02/11-02/11-217, para. 22.

⁶ ICC-02/11-02/11-222, para. 42.

⁷ Decision on 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, para. 10.

2. An application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons warranting immediate resolution by the Appeals chamber of the matter of the issue.”(emphasis added)

IV. Analysis

10. Article 82(1)(a), (b) and (c) of the Statute provides a list of decisions that may be appealed whereas paragraph (d), as a residual provision, sets forth the legal criteria a decision must meet in order for the parties to seek leave to appeal.

11. The Defence hereby intends to prove that the Joinder Decision of 11 March 2015 meets all the following legal criteria that appear in the structure and content of article 82(1)(d): either party may appeal a decision that involves an issue (III.1.), which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial (III.2.), and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings (III.3.). Therefore, the Defence submits these issues may be appealed.

IV.1. The Decision raises several *appealable issues*.

12. In a founding decision of 13 July 2006,⁸ the Appeals Chamber delivered a definition of the issue according to article 82(1)(d):

“An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination, i.e. not merely a question over which there is a disagreement or conflicting opinion.”⁹

In the instant case, the Joinder Decision raises the following appealable issues.

IV.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 despite the Chamber recalling that the

⁸ 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, ICC-01/04-168, para. 9-13

⁹ Ibid. para 9.

alleged participation in and contribution to the common plan was not the same.

13. In accordance with article 64(5) of the Statute, “*the Trial Chamber may, as appropriate, direct that there be a joinder or severance in respect of charges against more than one accused*” (emphasis added). Therefore, the charges constitute the point of gravity of any decision of joinder or severance. It is reinforced by rule 136(1) of the R.P.E., which provides that “*[p]ersons accused jointly shall be tried together*” (emphasis added).

14. In this regard, the Defence notes that Trial Chamber I intended to take into consideration its written submissions in that the Chamber “*[had] regard to the Confirmation Decisions which define the parameters of the charges at trial.*”¹⁰ The Decision on Confirmation of charges indeed constitutes the only legal source of charges in the context of a trial. As explained in the Response,¹¹ a “charge” is a complex notion which may not be reduced to a mere accusation but is composed of three intrinsic elements: 1) the facts, 2) the legal characterization of the facts and 3) the liability mode.

15. In the *Bemba* case,¹² Trial Chamber explained why the liability mode is intrinsic within the nature, cause and content of the charges:

“If the Chamber were to read article 61(7)(c)(ii) of the Statute in such a manner as to exclude the mode of liability, considerations of fairness would also arise since the Defence would be deprived of its right to be informed promptly and in detail of the nature, cause and content of the charges, in accordance with article 67(1)(a) of the Statute, and of the opportunity to submit observations thereto” (emphasis added).¹³

In other words, underestimating the importance of the liability mode within the concept of charges would inevitably affect the rights of the Defence.

16. However, the Defence deems that the Chamber misapplied article 64(5) of the Statute and rule 136 of the R.P.E. by diminishing the importance of the liability modes when

¹⁰ ICC-02/11-02/11-222, para. 52.

¹¹ ICC-02/11-02/11-217, para. 37 and 38.

¹² Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute, Pre-Trial Chamber III, 3 March 2009, ICC-01/05-01/08-388.

¹³ Ibid. para. 28.

comparing the charges of both Accused. The Chamber indeed reckoned that *“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.”*¹⁴ Concretely, the Chamber put forward the concept of a so-called “common plan” of which the Accused was allegedly part and which refers to the facts of the case, in order to counterbalance the significance of the liability modes in regard to the charges.

17. By doing so, the Chamber did not rely on the Confirmation Decision but on the narrative of the Prosecution according to which the cases should be joined because they would be limited to the conception and implementation of a so-called common plan. Nevertheless, instead of following this narrative, the Pre-Trial Chamber had clearly separated the charges of both Accused by distinguishing their liability modes.¹⁵ Although a common plan is alleged to establish a factual link between the events at stake, the charges are well distinguished by different liability modes. Such distinction, in light of the above mentioned jurisprudence cannot be deemed insignificant.

18. Besides, the Chamber specifically addressed the event in the course of which charges have been confirmed against Mr. Blé Goudé, but not against Mr. Gbagbo, also known as the “Fifth Incident.”¹⁶ By acknowledging that the charges related to the Fifth Incident have not been confirmed against Mr. Gbagbo and, at the same time, considering that these charges are mentioned in the Gbagbo Confirmation Decision and, as such, should be considered against Mr. Gbagbo during a joined trial, the Chamber materialized the Defence’s concerns regarding the fairness of the proceedings. It thus appears that a joinder of both cases entails the risk to generalize the charges against both Accused whereas the Pre-Trial Chamber had clearly, precisely and legally envisioned to separate them.

¹⁴ ICC-02/11-02/11-222, para. 56.

¹⁵ ICC-02/11-02/11-186, para. 182-194; ICC-02/11-01/11-656-Red, para. 266-278. See also ICC-02/11-02/11-217-Anx1.

¹⁶ ICC-02/11-02/11-222, para. 54.

IV.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.

19. The Defence explained in its written submissions¹⁷ and during the Status Conference of 13 February 2015¹⁸ its request for adequate time and facilities to prepare its case, stressing the importance of the article 67 provision of the Statute, which provides that “*the right of the defence to have adequate time and facilities to prepare the defence*”¹⁹ stands as one of the minimum guarantees to which each Accused is entitled. At the Status Conference of 13 February 2015, the Defense substantiated how the fundamental right of Mr. Blé Goudé to have adequate time and facilities to prepare his case is seriously jeopardized once reasons of judicial economy are permitted to supersede it.”

20. However, Trial Chamber I stated that “*the question of the time for adequate trial preparation on the part of the Defence teams is a matter of trial management to be determined by the Chamber.*”²⁰ The Defence therefore considers that the Chamber misapplied article 67(1)(b) by reducing the need for adequate time to prepare the trial to a matter of trial management whereas, according to the Statute, it is the Accused’s fundamental right. Following this misapplication of the primary applicable law of the Court, the Chamber did not address the issue of serious prejudice to the Accused. It then appears that the erroneous consideration of adequate time for preparation as a matter of trial management would entail an “*attendant inevitable minimum prejudice*”,²¹ whereas the spirit and letter of article 67(1)(b) leave no doubt as to the seriousness of the prejudice that would occur if the Defence were deprived of its right to adequate time resulting from a joinder.

¹⁷ Urgent Defence submissions on the need to have adequate time and facilities to prepare for Trial and extension of time to respond to joinder request, ICC-02/11-02/11-201. See also ICC-02/11-02/11-217, para. 43-54.

¹⁸ ICC-02/11-02/11-T-9-CONF-ENG ET 13-02-2015 1-75 NB T, p. 9-23.

¹⁹ ICC-02/11-02/11-217, para.44-48.

²⁰ ICC-02/11-02/11-222, para.61.

²¹ Ibid. para. 60.

21. Considering both instant cases, it appears that the *Gbagbo* case has been before the Court for more than three years²² whereas Charles Blé Goudé made his first appearance before Pre-Trial Chamber I on 27 March 2014,²³ that is to say less than one year ago. A sound comparison of the timeline of each case reveals that both cases are not at the same procedural stage. One Defence team has been preparing the trial for three years, whereas the other Defence team has only been working on the case for a few months, the more so as the Defence team of Mr. Blé Goudé has been rebuilt during the first months of 2015,²⁴ and still faces difficulty to properly familiarise itself with the case.²⁵ Moreover, the arrest warrant against Charles Blé Goudé was issued on 21 December 2011,²⁶ which means that the Prosecution has benefited from more than three years to prepare its case where, once again, the Defence is desperately trying to fill the gap of time.
22. Thus, it appears that by misapplying the Statute, Trial Chamber I has not addressed the fundamental issue of need for adequate time to prepare for trial. The Defence considers that, as a matter of fundamental guarantee to which the Accused is entitled, it is an essential issue for which leave to appeal should be granted. Therefore, the Defence deems it necessary to submit the essential issue of misapplication of the Statute to the Appeals Chamber.

IV.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.

23. In the Joinder Decision, the Chamber noted that:

²² Warrant Of Arrest For Laurent Koudou Gbagbo, 23 November 2011, Pre-Trial Chamber III, ICC-02/11-01/11-1. See also ICC-02/11-01/11-T-1-FRA ET WT 05-12-2011 1-10 PV PT.

²³ ICC-02/11-02/11-T-3-Red-ENG WT 27-03-2014 1-15 NB PT.

²⁴ ICC-02/11-02/11-201.

²⁵ Notification on status quo of Defence access to the software programs of the International Criminal Court, 6 March 2015, ICC-02/11-02/11-220.

²⁶ Warrant Of Arrest For Charles Blé Goudé, 21 December 2011, Pre-Trial Chamber III, ICC-02/11-02/11-1.

“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, 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.”²⁷

24. The Defence submissions concerning the different evidence are declared unsubstantiated whereas the Prosecution’s submissions on the identity of evidence in both cases are seen as substantiated although the Prosecutor did not prove that she would present the same evidence in both cases. The Prosecution’s assertion that both cases involve the same evidence should therefore be considered as unsubstantiated. However, the Trial Chamber has given more credence to this unsubstantiated assertion than to the Defence submissions, as long as it stands as a basis of the Joinder Decision.

25. Besides, to date, the Prosecutor has disclosed several packages of evidence: on 19 February 2015,²⁸ on 2 March 2015²⁹ and on 10 March 2015.³⁰ The Defence has started to review the disclosed evidence and, so far, it is preoccupied by serious doubts arising from the so-called “same evidence” relied upon by the Prosecutor. It indeed appears that what the Prosecutor tends to consider as the same evidence is in fact a global bundle of evidence within which part of it is related to the *Gbagbo* case while the other part is related to the *Blé Goudé* case.

26. Thus, the Defence expresses serious concern regarding the content of the evidence disclosed by the Prosecutor as, to date, it appears that there is not much evidence that would be relevant for both cases. Instead of “same evidence” for both cases, the Prosecutor may have disclosed an artificial combination of separated evidence, some relating to the *Gbagbo* case and some relating to the *Blé Goudé* case.

27. This concern is reinforced by the massive number of witnesses the Prosecutor is planning to bring before Trial Chamber I for both trials. During the Status Conference of 13 February 2015, the Prosecutor mentioned calling more than 115 witnesses

²⁷ ICC-02/11-02/11-222, para.64.

²⁸ ICC-02/11-02/11-218

²⁹ ICC-02/11-02/11-219

³⁰ ICC-02/11-02/11-221

whereas investigations are still in progress.³¹ This number is supposedly to increase to more than 130 witnesses.³² According to the Prosecutor, these witnesses will testify in both cases against both accused. However, due to the serious doubts expressed by the Defence regarding the evidence disclosed so far, and due to the unusual enormity of the number of witnesses called by the Prosecutor in the present case, the Defence submits its preoccupying doubts regarding the veracity of the Prosecutor's submissions according to which the witnesses who will testify against Laurent Gbagbo will also testify against Charles Blé Goudé, so that both cases involve the same witnesses..

28. In sum, the Defence deems necessary to challenge, before the Appeals Chamber, the standard of proof considered by the Chamber when addressing the issue of procedural identity or similarity of both cases. Whereas the Defence's claim regarding the differences in evidence against each accused is seen as unsubstantiated, the Prosecution's claim regarding the essential character of the evidence has not been tested through any screening or verification, despite serious doubts about the reality of this claimed evidence and witness similarity.
29. Considering that the doubts expressed by the Defence about the Prosecution's ability to identify the alleged sameness of evidence and witnesses in both cases, a joinder of trials would not serve the interest of justice and the principle of judicial economy, but would rather deprive both Accused of the right to a fair trial.
30. For these reasons, the Defence considers that the Trial Chamber should not have founded the present joinder on the unsubstantiated submissions filed by the Prosecution.

IV.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

³¹ ICC-02/11-02/11-T-9-CONF-ENG ET 13-02-2015 1-75 NB T, p. 37-38.

³² Ibid.

of efforts by the court's organs) would outweigh the benefits of a separate trial.

31. By emphasizing - without proper motivation - the interests of witnesses, victims and "organs of the court", the Chamber wrongfully applied the standard of "interests of justice," since it negates the fair trial rights of the accused in having a separate trial for the reasons as set forth in IV sub 1.2 above. The Court's primary task is to protect the rights of the accused and not those of the "organs of the court" nor the witnesses or victims.
32. The Defence admits that the latter individuals have a standing in the Court; but argues that their position within the Court's system should not be upheld to the detriment of the rights of the accused. The preference given by the Chamber to their position (paragraphs 65 and 66 of the Joinder Decision) over the fair trial rights of Mr Blé Goudé as set forth in section 1.2 above, leads to the conclusion that the Court misapplied the appropriate test, which results in a a fundamental "issue" which should be resolved before the Appeals Chamber.

IV.2. The resolution of the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

33. Under article 82(1)(d), not every issue is appealable.³³ The party seeking leave to appeal must present an issue that would “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.”³⁴ The Defence will first submit that all the four aforementioned issues³⁵ satisfy one of the disjunctive conditions, namely that the decision involves an issue that would have serious repercussions on the fair and expeditious conduct of the proceedings. Secondly, the Defence will substantiate how the two issues pertaining to the interests of justice and the serious prejudice to the accused satisfy the second disjunctive condition, which is that the issues affect the outcome of the trial.

³³ *The Prosecutor v. Lubanga*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-I68, para. 10

³⁴ *Ibid.*

³⁵ *See supra* Section IV.

IV.2.1. The resolution of the issue would significantly affect the fair and expeditious conduct of the proceedings

34. Neither the Statute nor the R.P.E. define the meaning of “fair and expeditious” in the context of article 82(1)(d). In *The Prosecutor v. Lubanga*,³⁶ the Appeals Chamber found that the term “fair” under article 82(1)(d) encompasses the norms of a fair trial, which cannot be separated from “the corresponding human right, incorporated in the Statute by distinct provisions of it (article 64(2) and article 67(1) and article 21(3)); making its interpretation subject to internationally recognized human rights.”³⁷ The Appeals Chamber further determined that the “expeditious conduct of the proceeding” is part and parcel of a fair trial as is evidenced by the numerous human rights instruments that provide under their minimum guarantees the right to a trial without undue delay or within reasonable time³⁸

35. On several occasions, the Defence in the instant case has brought to the attention of the Chamber its need for adequate time to prepare for trial.³⁹ The right to adequate time and facilities is a minimum guarantee, which the accused is entitled to under article 67(1)(b). Therefore, similar to the Appeals Chamber in *Lubanga*, the Chamber should find that this fundamental human right enshrined in article 67(1)(b) cannot be separated from the norms of a fair trial that are encompassed by the terms “fair and expeditious conduct of the proceedings.” The Defence submits that the four issues presented in this leave to appeal all significantly impair the Defence’s right to adequate time and facilities, and consequently significantly affect the “fair...conduct of the proceedings.”

36. Firstly, the second issue and the fourth issue expressly raise questions of fairness. The third issue contests the Chamber’s determination that the potential considerable

³⁶ ICC-01/04-168 , paras. 10-11.

³⁷ Ibid., para. 11.

³⁸ Ibid., para 11, (n.) 13.

³⁹ See ICC-02/11-02/11-201;ICC-02/11-02/11-T-9-CONF-ENG,p. 9-23; Notification on status quo of defence access to the software programs of the International Criminal Court, ICC-02/11-02/11-220.

infringements on the Defence's customary right to adequate time and facilities is a matter of trial management, and that concerns over this right are outweighed by the interests of judicial economy. The Defence respectfully argues that without effective resolution of these issues, the fair conduct of the proceedings will be affected because no amount of trial management can redress the fact that Mr. Blé Goudé will always have significantly less time to prepare for his trial compared to both Mr. Gbagbo and the Prosecution.

37. The Prosecution has been pursuing the cases against the two accused since 2011, and Lead Counsel for Mr. Gbagbo has also been consistently representing Mr. Gbagbo for the past three years.⁴⁰ The amount of time accorded to the Defence of Mr. Ble Goudé to prepare for trial pales in comparison- it has not even been one year since Mr. Ble Goudé was surrendered to the Court. Moreover, the Defence team of Mr. Charles Blé Goudé has been recently reconstituted, and as such, more time is needed for the team to become trained and acquainted with the case file.⁴¹ Less than two weeks ago, the Defence team submitted to the Chamber, a notification on the status quo of its team members' training, in which it submitted that there have been significant delays.⁴²

38. If these issues are not brought before the Appeals Chamber, the Defence team will find itself pressed for resources and time to prepare an adequate defence. While the Defence avers that rights of victims and witnesses is protected by the Rome Statute,⁴³ the Chamber's decision would stand for the proposition, that in the case of joinder, the rights of victims and witnesses along with the interests of judicial economy trump the right of the accused to adequate time under article 67(1)(b). Given that the right to adequate time is one of the *minimum* guarantees of a fair trial, this decision significantly affects the fair conduct of the proceedings.

39. The resolution of the first and the third issue would also seriously affect the fair conduct of the proceedings. If not granted leave to appeal, then the Defence will not be able to contest the Chamber's finding of appropriateness of joinder despite both accused's vastly different alleged participation and implementation in the common

⁴⁰ ICC-02/11-02/11-1; ICC-02/11-01/11-1.

⁴¹ ICC-02/11-02/11-201, paras. 24-36.

⁴² ICC-02/11-02/11-220.

⁴³ Article 68 of the Rome Statute.

plan. The consequence will be that the Defence will need more time to familiarize itself with the incriminating evidence in both cases, which is not the same due to each accused vastly different alleged role in the post electoral crisis. This will significantly impact the fairness of the proceedings because the Defence will find itself doubling its effort to review the expansive materials in the Gbagbo case, which are not material to the case at hand as required by rule 77 of the R.P.E.⁴⁴ As explained in the above Section IV.1.3, the Defence has begun reviewing the most recent disclosure packages, and has found that the evidence against both accused is hardly the same. Therefore, serious doubts are raised regarding the Chamber's resolution of the fourth issue for which it found that a joint trial would avoid duplicating evidence, and therefore not have an effect on the Accused's fair trial rights.

40. Given that all four issues stemming from the Decision affect the Defence's fundamental right to adequate time, their resolution has a significant impact on the expeditious conduct of the proceedings under article 82(1)(d). As the Defence submitted at the Status Conference of 13 February 2015, a defence team bears the legal and ethical obligation to request the Trial Chamber to suspend proceedings in order to protect the rights of the accused, that is to say to have adequate time to prepare for the trial.⁴⁵ If the Chamber rejects the Defence's leave to appeal, the Defence respectfully submits that it will face insurmountable difficulties to secure the fair trial rights of Mr. Blé Goudé, given the following two facts: (1) the Defence has been allotted significantly less time to prepare than the Defence of Mr. Gbagbo and the Prosecution, (2) the material evidence against both accused is different, which stems from the vastly varying modes of liability confirmed for both accused.

IV.2.2. The resolution of the issue would affect the outcome of the trial.

41. In *The Prosecutor v. Lubanga*, the Appeals Chamber determined that when there is a breach of the norms of a fair trial at the pre-trial stage, it might have an effect on the

⁴⁴ Rule 77 states that "the Prosecutor shall...permit the defence to inspect any books, documents, photographs, and other tangible objects..., which are *material* to the preparation of the defence (*emphasis added*)."

⁴⁵ ICC-02/11-02/11-T-9-CONF-ENG, p. 9, line 25- p.10, lines 1-2.

outcome of a trial.⁴⁶ The Defence submits that the second and the fourth issue, which address the incumbent prejudice on Mr. Blé Goudé's fundamental right to adequate time to prepare for trial, cannot be remedied by simple trial management, and thereby could seriously affect the outcome of the trial.

IV.3. The issue requires an immediate resolution by the Appeals Chamber in order to materially advance the proceedings.

42. The Defence submits that an immediate resolution of the issues raised in this request will materially advance the proceedings.

43. The Defence draws the Chamber's attention to the definition given by the Appeals Chamber of the terms "immediate" which means avoiding errors by referring the issue to the Appeals Chamber; "advance" which means to move forward by ensuring that the proceedings follow the right course; and "proceedings" which means the proceedings in their entirety.⁴⁷ In this regard, the Appeals Chamber stated that:

"A wrong decision on an issue in the context of article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back."

44. The Trial Chamber's decision to join the cases if not resolved immediately by the Appeals Chamber, in light of the issues explained above, will result in serious and irreversible prejudice and the breach of the right to fair trial against Mr. Charles Blé Goudé.

45. Furthermore the Defence submits that the Trial Chamber's Decision has serious consequences that will irreparably change the course of the proceedings. By way of example, the Defence refers to the order in paras. 71-73 of the Joinder Decision

⁴⁶ICC-01/04-I68, para. 11

⁴⁷Idem, paras. 14-19.

instructing the Registry to close the *Blé Goudé* and *Gbagbo* cases and create a joint record for all the public documents and other material; while confidential, *ex parte* and under seal documents retain their classification “for the time being”. The two cases have already been closed and the public records joined.⁴⁸ Unsure of what the duration “for the time being” entails, the Defence submits that if the matter is not immediately resolved by the Appeals Chamber, the confidential, *ex parte* and under seal records will soon be joined too. This would lead to contamination of information, a serious consequence that would cause irreparable damage.

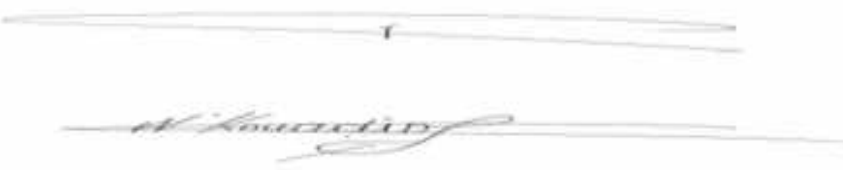
46. Furthermore, the Defence submits that since this is a novel issue before the Trial Chamber, the issues require an immediate resolution by the Appeals Chamber not only to advance the proceedings in the *Blé Goudé* and *Gbagbo* cases, but also in future cases where the issue of joinder may arise.

47. For the above reasons, including all the other submissions in this application, the Defence submits that the immediate resolution of these issues by the Appeals Chamber is necessary to materially advance the proceedings.

VI. Relief sought

For the foregoing reasons, the defence respectfully requests the honourable Trial Chamber to grant leave to appeal the Chamber’s decision to join the *Gbagbo* and *Blé Goudé* cases.

⁴⁸ Registry’s report pursuant to 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*”, 13 February 2015, Registry, ICC-02/11-01/15



A handwritten signature in dark ink, appearing to read 'Mr. Knoop', is centered within a rectangular box. The signature is written in a cursive style with a long horizontal stroke extending to the right.

Mr. Knoop, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this 16 March 2015

At The Hague, Netherlands