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TRIAL CHAMBER I

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

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

Public Document

Consolidated Response of the Common Legal Representative to the Requests of the Defence of Mr. Gbagbo and the Defence of Mr. Blé Goudé for Leave to Appeal the Decision on the Joinder of the Cases (ICC-02/11-01/15-5 and ICC-02/11-01/15-6)

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 12 June 2014, Pre-Trial Chamber I, by majority, issued a decision confirming the charges against Mr. Gbagbo under article 61(7)(a) of the Rome Statute and committed him for trial (the “*Gbagbo Confirmation Decision*”).¹

2. On 11 December 2014, Pre-Trial Chamber I, by majority, issued a decision confirming the charges against Mr. Blé Goudé under article 61(7)(a) of the Rome Statute and committed him for trial (the “*Blé Goudé Confirmation Decision*”).²

3. The Presidency assigned both cases to the reconstituted Trial Chamber I.³

4. On 16 December and on 22 December 2014 respectively, the Prosecutor filed in the record of the *Gbagbo* proceedings and in the record of the *Blé Goudé* proceedings a request to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* (the “*Joinder Requests*”).⁴

5. On 11 March 2015, Trial Chamber I (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*” (the “*Decision*”),⁵ pursuant to which the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* were joined.

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

² See the “*Decision on the confirmation of charges against Charles Blé Goudé*” (Pre-Trial Chamber I), No. ICC-02/11-02/11-186, 11 December 2014 (the “*Blé Goudé Confirmation Decision*”).

³ See the “*Decision re-constituting Trial Chamber I and referring to it the case of The Prosecutor v. Laurent Gbagbo*” (Presidency), No. ICC-02/11-01/11-682, 17 September 2014; and the “*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)” (Presidency), No. ICC-02/11-02/11-193-Corr, 22 December 2014 (dated 20 December 2014).

⁴ See the “*Prosecution’s Request to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Ble Goudé*”, No. ICC-02/11-01/11-738, 16 December 2014; and the “*Prosecution’s Request to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Ble Goudé*”, No. ICC-02/11-02/11-194, 22 December 2014 (the “*Joinder Requests*”).

⁵ See the “*Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters*” (Trial Chamber I), No. ICC-02/11-01/11-810 and No. ICC-02/11-02/11-222, 11 March 2015 (the “*Decision*”).

6. On 17 March 2015, both the Defence of Mr. Blé Goudé and the Defence of Mr. Gbagbo requested leave to appeal the Decision (the “Blé Goudé Request” and the “Gbagbo Request”, respectively; together, the “Requests”).⁶

7. Pursuant to regulation 65(3) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims, acting as common legal representative of the victims admitted to participate in both cases (the “Common Legal Representative”),⁷ submits the following joint response to the Blé Goudé Request and the Gbagbo Request.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

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

8. Article 82(1)(d) of the Rome Statute limits the possibility to file an appeal against *“a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”*.

9. The jurisprudence of the Court established the complementary character of the two components mentioned in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.⁸

⁶ See the “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’”, No. ICC-02/11-01/15-5, 17 March 2015 (the “Blé Goudé Request”); and the “Demande d’autorisation d’interjeter appel de la ‘Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters’”, No. ICC-02/11-01/15-6, 17 March 2015 (the “Gbagbo Request”).

⁷ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

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

10. In this regard, the Appeals Chamber determined that “[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.⁹ The Appeals Chamber also indicated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,¹⁰ and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹¹ Accordingly, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.¹²

11. The Appeals Chamber also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.¹³

12. Moreover, pursuant to the constant jurisprudence of the Court, “[t]he mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal”,¹⁴ and “[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”.¹⁵

⁹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 8, para. 8.

¹⁰ *Idem*, para. 9.

¹¹ *Ibid.*

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

¹³ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 8, para. 10.

¹⁴ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the “Decision on Ruto Defence’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Request to Add New Witnesses to its List of Witnesses’” (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

¹⁵ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’”, *supra* note 14, para. 4. See also the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision

13. In this regard, since the Appeals Chamber will interfere with a discretionary decision only under limited conditions, a difference of opinion as to a Chamber's exercise of its discretion is an appealable issue only if the Chamber improperly exercised said discretion.¹⁶

14. Moreover, the Chamber presented with an application for leave to appeal must not enter into examining or considering "*arguments on the merits or the substance of the appeal*" because said arguments are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal is granted.¹⁷

15. Consistent with this jurisprudence, applications for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s) "*by way of indicating a specific factual and/or legal error*".¹⁸

16. According to established jurisprudence, in analysing whether an appealable issue would "significantly affect" the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of "fairness" must be understood as making reference to situations "*when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations*

adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

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

¹⁷ See the "Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", *supra* note 8, para. 22.

¹⁸ See the "the 'Decision on three applications for leave to appeal" (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), para. 70.

and evidence submitted to the Court that might influence its decision”.¹⁹ In turn, “expeditiousness” must be read as “closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”.²⁰

17. The Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²¹

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

18. The Defence of Mr. Blé Goudé seeks leave to appeal the Decision regarding the following four “issues”:

- i. Whether the Chamber erred in its application of article 64(5) of the Rome Statute read in conjunction with rule 136 of the Rules of Procedure and Evidence when it found that the joinder was appropriate despite the Chamber recalling that the alleged participation in and contribution to the common plan was not the same (the “First Blé Goudé Issue”);²²
- ii. Whether the Chamber misapplied rule 136 of the Rules of Procedure and Evidence in determining that the joinder’s possible detrimental consequences to the Defence’s fundamental right to adequate time was a

¹⁹ See e.g. the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.

²⁰ *Idem*, para. 18.

²¹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 8, para. 13.

²² See the Blé Goudé Request, *supra* note 6, paras. 13-18.

matter of trial management, and not a matter of serious prejudice to Mr. Blé Goudé (the “Second Blé Goudé Issue”);²³

- iii. Whether the Chamber misapplied rule 136 of the Rules of Procedure and Evidence 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 (the “Third Blé Goudé Issue”);²⁴ and
- iv. Whether the Trial Chamber erred by holding that a separate trial would expose witnesses twice to “hardship” and would contravene the interests of the victims and whether the Trial Chamber erred by holding that reasons of judicial economy would outweigh the benefits of a separate trial (the “Fourth Blé Goudé Issue”).²⁵

19. The Defence of Mr. Gbagbo seeks leave to appeal the Decision regarding the following six “issues”:

- i. Whether the Trial Chamber erred in denying the Defence leave to sur-reply to the Prosecution reply (the “First Gbagbo Issue”);²⁶
- ii. Whether the Trial Chamber erred in disregarding the Defence’s interpretation of article 64(5) of the Rome Statute and rule 136 of the Rules of Procedure and Evidence according to which the charges against an accused must first be joined before proceeding with the joinder of trials (the “Second Gbagbo Issue”);²⁷
- iii. Whether the Trial Chamber erred in grounding the Decision on criteria that are not relevant or not foreseen by the Statute (the “Third Gbagbo Issue”);²⁸

²³ *Idem*, paras. 19-22.

²⁴ *Ibid.*, paras. 23-30.

²⁵ *Ibid.*, paras. 31-32.

²⁶ See the Gbagbo Request, *supra* note 6, paras. 11-17.

²⁷ *Idem*, paras. 18-26.

²⁸ *Ibid.*, paras. 27-31.

- iv. Whether the Trial Chamber erred in failing to compare the charges of the Accused before deciding on the joinder (the “Fourth Gbagbo Issue”);²⁹
- v. Whether the Trial Chamber erred in failing to take into consideration the impact of the joinder on the content of the charges against each Accused (the “Fifth Gbagbo Issue”);³⁰ and
- vi. Whether the Trial Chamber erred in failing to take into consideration the impact of the joinder on the course of the proceedings and the rights of the two Accused (the “Sixth Gbagbo Issue”).³¹

20. The Common Legal Representative submits that neither the Blé Goudé Request nor the Gbagbo Request satisfies the requirements of article 82(1)(d) of the Rome Statute. Neither request demonstrates the existence of an “issue” which could arise from the Decision and could be the subject of an interlocutory appeal, or shows how any of the alleged “issues” would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In particular, the Common Legal Representative contends that the “issues” identified in the Requests reflect a misreading of the Decision or a mere disagreement with the conclusions of the Chamber, which as such does not suffice for leave to appeal to be granted under article 82(1)(d) of the Rome Statute.³² Assuming *arguendo* that any of the “issues” identified by the Defence arises from the Decision, the Common Legal Representative contends that none of them significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial.

2.1. No “issue” arises from the Decision

a. The First Blé Goudé Issue

²⁹ *Ibid.*, paras. 32-34.

³⁰ *Ibid.*, paras. 35-40.

³¹ *Ibid.*, paras. 41-47.

³² In this sense, see *supra* notes 11-12.

21. The Common Legal Representative submits that the alleged misapplication of article 64(5) of the Statute and rule 136 of the Rules of Procedure and Evidence by the Chamber does not arise from the Decision. In fact, the Defence misreads the Decision when it argues that the Chamber did not rely on the Confirmation Decisions in assessing the parameters of the charges at trial and the conduct of the two Accused.³³

22. In particular, contrary to the arguments of the Defence, the Common Legal Representative contends that the Chamber did not rely on the alleged “common plan” referred to in the Confirmation Decisions “[i]n order to counterbalance the significance of the liability modes in regard to the charges”.³⁴ The Chamber simply stated that, although the conduct alleged in the *Gbagbo* Confirmation Decision and the *Blé Goudé* Confirmation Decision is different, said conduct is sufficiently linked to hold a joint trial because it was *inter alia* meant for the same purpose.³⁵

23. In this regard, the risk to generalize the charges against both Accused referred to by the Defence does not arise from the Decision.³⁶ The Trial Chamber decided that a joint trial will allow considering the individual acts or omissions of the two Accused within the factual context of the same common plan or purpose, but recalled that the final decision on the guilt or innocence of Mr. Blé Goudé and Mr. Gbagbo shall not exceed the facts and circumstances described in the charges confirmed in each Confirmation Decision.³⁷

24. In these circumstances, the Common Legal Representative submits that the First Blé Goudé Issue is not an appealable issue.

b. The Second and Fourth Blé Goudé Issues and the Fifth and Sixth Gbagbo Issues

³³ See the Blé Goudé Request, *supra* note 6, para. 17.

³⁴ *Idem*, para. 16.

³⁵ See the Decision, *supra* note 5, para. 56.

³⁶ See the Blé Goudé Request, *supra* note 6, para. 18.

³⁷ See the Decision, *supra* note 5, para. 57.

25. Both Requests address a number of issues related to an alleged impact of the Decision on the rights of the Accused and on the fairness of the proceedings. In particular, the Second and Fourth Issues of the Blé Goudé Request and the Sixth Issue of the Gbagbo Request address an alleged error committed by the Chamber in failing to take into account the possible consequences of the joinder on the right of the Accused to dispose of adequate time to prepare their cases,³⁸ and by giving priority without proper reasons to considerations of judicial economy³⁹ and the protection of victims and witnesses.⁴⁰

26. In this regard, the Common Legal representative submits that the Second Blé Goudé Issue do not arise from the Decision but from a misreading of the latter. Indeed, contrary to arguments put forward by the Defence of Mr. Blé Goudé,⁴¹ the Chamber neither failed to address the Defence's need for adequate time to prepare for trial nor reduced said time to a matter of trial management. The Decision expressly considers the Defence's right to adequate time and facilities, and indicates that these rights may be determined *in concreto* by the Chamber upon request by the Defence teams.⁴² In addition, contrary to the Defence's contention,⁴³ the Chamber did not refer to the "*attendant inevitable minimum prejudices*" when discussing matters of adequate time for preparation, but when addressing the possibility of different defences and the presentation of evidence relevant to only one Accused.⁴⁴

27. By the same token, the arguments related to the Chamber's alleged preference for the judicial economy and the protection of the rights of victims and witnesses over the rights of the Defence are distorted. Indeed, the Fourth Blé Goudé Issue and

³⁸ See the Blé Goudé Request, *supra* note 6, paras. 19-22; and the Gbagbo Request, *supra* note 6, para. 46.

³⁹ See the Blé Goudé Request, *supra* note 6, para. 19; and the Gbagbo Request, *supra* note 6, paras. 42 and 45.

⁴⁰ See the Blé Goudé Request, *supra* note 6, paras. 31-32; and the Gbagbo Request, *supra* note 6, para. 44.

⁴¹ See the Blé Goudé Request, *supra* note 6, paras. 20 and 22.

⁴² See the Decision, *supra* note 5, para. 61.

⁴³ See the Blé Goudé Request, *supra* note 6, para. 20.

⁴⁴ See the Decision, *supra* note 5, para. 60.

the Sixth Gbagbo Issue show a mere disagreement with the Decision.⁴⁵ The Common Legal Representative submits that the Chamber motivated its preference for the joinder and made use of the discretion afforded to it in this regard,⁴⁶ subject to the rights of all participants, and particularly to those of the Defence.⁴⁷ In these circumstances, said issues do not amount to appealable issues for the purposes of article 82(1)(d) of the Rome Statute.⁴⁸

28. Finally, regarding the Fifth Gbagbo Issue, related to an alleged lack of consideration of the consequences of the joinder on the charges faced by both Accused, the Common Legal Representative submits that it does not arise from the Decision but again from a disagreement with the latter, which as such cannot constitute an appealable issue.⁴⁹ Indeed, contrary to the Defence's contention,⁵⁰ the Decision expressly indicates that the Chamber will not consider charges not confirmed against Mr. Gbagbo, such as the events alleged in Yopougon in February 2011.⁵¹ Moreover, the Decision emphasizes that both Accused will enjoy the same rights as if they were being tried separately.⁵²

29. In these circumstances, the Common Legal Representative submits that the Second and Fourth Blé Goudé Issues and the Fifth and Sixth Gbagbo Issues are not appealable issues.

c. The Third Blé Goudé Issue

30. The Common Legal Representative submits that this issue does not arise from the Decision but from a mere disagreement with the latter, and as such cannot be

⁴⁵ See the Blé Goudé Request, *supra* note 6, para. 32; and the Gbagbo Request, *supra* note 6, paras. 45-46.

⁴⁶ See the Decision, *supra* note 5, paras. 45 and 51.

⁴⁷ *Idem*, paras. 59-61.

⁴⁸ See *supra* note 16.

⁴⁹ See *supra* notes 11-12.

⁵⁰ See the Gbagbo Request, *supra* note 6, para. 37.

⁵¹ See the Decision, *supra* note 5, paras. 54 and 57.

⁵² *Idem*, para. 68.

considered to be an issue for the purposes of article 82(1)(d) of the Rome Statute.⁵³ The Defence simply provides submissions of a speculative nature on the alleged lack of “sameness” of the evidence upon which the Prosecution intends to rely at trial against each Accused,⁵⁴ overlooking that the Decision is based on the finding that the *“Defence submissions concerning the different evidence the two Defence teams will present is unsubstantiated by further detail”*.⁵⁵

31. Furthermore, the Third Blé Goudé Issue arises from the Defence’s misreading of the Decision. Contrary to the Defence’s contention,⁵⁶ the Chamber concludes that *“at a minimum”* the joint trial will avoid the duplication of a *“significant body of evidence”* not because the Prosecution will present exactly the same evidence against the two Accused, but because it will present *“largely the same evidence”* against both Accused.⁵⁷ The Common Legal Representative submits that the doubts of the Defence in this regard do not amount to an appealable issue under article 82(1)(d) of the Rome Statute.⁵⁸

32. In these circumstances, the Common Legal Representative submits that the Third Blé Goudé Issue is not an appealable issue.

d. The First Gbagbo Issue

33. The Common Legal Representative contends that the alleged error by the Chamber in denying the Defence leave to reply to the Prosecution’s reply and to the Common Legal Representative’s reply does not constitute an issue for the purposes of article 82(1)(d) of the Rome Statute, but is a mere disagreement by the Defence with the Chamber’s finding that *“it ha[d] already received extensive submissions on the issue of joinder, including from the Gbagbo Defence”* and that *“it would not benefit from*

⁵³ See *supra* notes 11-12.

⁵⁴ See the Blé Goudé Request, *supra* note 6, para. 29.

⁵⁵ See the Decision, *supra* note 5, para. 64.

⁵⁶ See the Blé Goudé Request, *supra* note 6, paras. 24-27.

⁵⁷ See the Decision, *supra* note 5, para. 64.

⁵⁸ The same conclusions are to be applied to the similar arguments advanced in the Sixth Gbagbo Issue. See the Gbagbo Request, *supra* note 6, paras. 43-44.

further submissions''.⁵⁹ Since the Defence fails to provide any explanation as to why the Chamber improperly exercised its discretion in this regard, this issue must be seen as an opinion against this aspect of the Decision which, as such, cannot be brought before the Appeals Chamber under article 82(1)(d) of the Rome Statute.⁶⁰

34. In this regard, the Common Legal Representative submits that the First Gbagbo Issue arises from a misreading of the Decision by the Defence. In order to deny the Defence leave to reply to the Prosecution's reply and to the Common Legal Representative's reply, the Chamber held that the right to file a sur-reply is not provided for by the legal instruments of the Court.⁶¹ Moreover, contrary to the Defence's submissions,⁶² it cannot be concluded that the Chamber issued the Decision on the basis of the arguments provided in reply to the Defence's response to the Joinder Requests. In fact, there is no express reference to said arguments in the relevant part of the Decision.⁶³ In these circumstances and considering the principle of *iura novit curia*, it is speculative to argue that the Chamber would not have reached its conclusions without the arguments provided in the sur-reply, especially considering that some of the arguments put as examples by the Defence were already provided for in the very Joinder Requests.⁶⁴

35. Accordingly, the Common Legal Representative submits that the First Gbagbo Issue is not an appealable issue.

e. The Second Gbagbo Issue

36. The Common Legal Representative submits that the misinterpretation of article 64(5) of the Rome Statute and rule 136 of the Rules of Procedure and Evidence alleged by the Defence does not constitute an issue arising from the Decision for the

⁵⁹ See the Decision, *supra* note 5, para. 38.

⁶⁰ See *supra* note 16.

⁶¹ See the Decision, *supra* note 5, para. 38.

⁶² See the Gbagbo Request, *supra* note 6, paras. 12 and 14.

⁶³ See the Decision, *supra* note 5, paras. 36-38.

⁶⁴ Cf. the Gbagbo Request, *supra* note 6, para. 13 and the Joinder Requests, *supra* note 4, paras 15-16.

purposes of article 82(1)(d) of the Rome Statute, but only shows the Defence's disagreement with the Trial Chamber reading of said provisions.⁶⁵ Since the Defence only reiterates its submissions before the Chamber rendered the Decision, the Chamber's interpretation of said provisions cannot be said to amount to an improper exercise of its discretion, granting the intervention by the Appeals Chamber.⁶⁶

37. Furthermore, the Defence misreads the Decision by arguing that the Chamber shared the Defence's views on the interpretation of said provisions and nonetheless decided to ignore them.⁶⁷ In this regard, the Common Legal Representative submits that the Chamber simply "noted" the arguments of the Defence,⁶⁸ and decided subsequently not to endorse them.⁶⁹ In this regard, the Common Legal Representative submits that it can be understood from the Decision that the Chamber did not scrutinize the drafters' intention because it found that the literal and teleological interpretation of article 64(5) of the Rome Statute and rule 136 of the Rules of Procedure and Evidence provided sufficient guidance for their application.⁷⁰

38. In these circumstances, the Common Legal Representative submits that the Second Gbagbo Issue is not an appealable issue.

f. The Third Gbagbo Issue

39. The Common Legal Representative contends that the alleged reliance by the Chamber on criteria that are not relevant or are not foreseen by the Rome Statute does not constitute an issue arising from the Decision for the purposes of article 82(1)(d) of the Rome Statute, but is again a misreading of the Decision by the Defence. Moreover, the Common Legal Representative further submits that the

⁶⁵ See the Gbagbo Request, *supra* note 6, paras. 18-26.

⁶⁶ See *supra* note 16.

⁶⁷ See the Gbagbo Request, *supra* note 6, para. 20.

⁶⁸ See the Decision, *supra* note 5, para. 42.

⁶⁹ *Idem*, para. 46.

⁷⁰ *Ibid.*, paras. 43-51.

Defence limits itself to expressing disagreement with the Decision by providing a detailed summary of the arguments it would raise if leave to appeal was granted.⁷¹

40. In this regard, the Defence misrepresents the Decision by arguing that the Chamber did not explain the criteria applied in its ruling on the joinder.⁷² Indeed, the Defence confuses the legal criteria applied by the Chamber to ground its Decision to join the cases – *i.e.* the criteria under rule 139 of the Rules of Procedure and Evidence, expressly addressed by the Chamber –,⁷³ with the elements that the Chamber took into consideration when evaluating the nature of the charges against Mr. Blé Goudé and Mr. Gbagbo and the existing connection between them.⁷⁴ The Chamber did explain these elements by way of example,⁷⁵ and subsequently applied them to the cases before it.⁷⁶

41. Moreover, contrary to the Defence's contention,⁷⁷ the Chamber did not "use" the notion of "same transaction", but found that it could be of assistance for the interpretation of the provisions applied.⁷⁸

42. In these circumstances, the Common Legal Representative submits that the Third Gbagbo Issue is not an appealable issue.

g. The Fourth Gbagbo Issue

43. The Common Legal Representative contends that the alleged failure by the Chamber to compare the charges of the Accused before deciding on the joinder is not an issue arising from the Decision for the purposes of article 82(1)(d) of the Rome Statute, but is a further misreading of the Decision by the Defence. Contrary to the

⁷¹ See the Gbagbo Request, *supra* note 6, paras. 27-30.

⁷² *Idem.*

⁷³ See the Decision, *supra* note 5, para. 51-68.

⁷⁴ *Idem.*, paras. 48-50.

⁷⁵ *Ibid.*, paras. 49-50.

⁷⁶ *Ibid.*, paras. 55-56.

⁷⁷ See the Gbagbo Request, *supra* note 6, para. 29.

⁷⁸ See the Decision, *supra* note 5, paras. 49-50.

Defence's submissions,⁷⁹ the Chamber thoroughly compared the charges as requested by the Defence, and in particular the conduct, time and place at hand, together with their legal characterisation and the alleged modes of liability.⁸⁰

44. In these circumstances, the Common Legal Representative submits that the Third Gbagbo Issue is not an appealable issue.

2.2. The "issues" mentioned by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

45. Assuming *arguendo* that any of the abovementioned issues arises from the Decision, the Common Legal Representative submits that the Defence of Mr. Blé Goudé and the Defence of Mr. Gbagbo fail to show how any of such alleged issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

46. The Defence of Mr. Gbagbo's argument that the joinder of the proceedings against Mr. Blé Goudé and Mr. Gbagbo may have a direct impact on the fairness of the proceedings and, in particular, on the charges is unsubstantiated.⁸¹ Indeed, in the Decision the Chamber has made it clear that "[t]he Prosecution has not requested, nor does the Chamber have the power to authorise, amendments to the facts and circumstances described in the charges against either Accused" and that "[t]he final decision on the guilt or innocence of [either Accused] shall not exceed the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber".⁸²

47. Moreover, contrary to the Defence of Mr. Gbagbo's argument that the joinder of the proceedings may have a direct impact on the length of the proceedings,⁸³ the Chamber in the Decision held that "[s]eparate trials [...] are likely to require more court

⁷⁹ See the Gbagbo Request, *supra* note 6, paras. 32-34.

⁸⁰ See the Decision, *supra* note 5, paras. 53-56.

⁸¹ See the Gbagbo Request, *supra* note 6, para. 49.

⁸² See the Decision, *supra* note 5, para. 57. See also in the same sense, *idem*, para. 59.

⁸³ See the Gbagbo Request, *supra* note 6, para. 49.

hours and resources than one joint trial”.⁸⁴ Furthermore, the Chamber held that further decisions will be taken in the course of the proceedings in relation to “[t]he time needed for adequate trial preparation on the part of the Defence teams” which “[i]s a matter of trial management to be determined by the Chamber at the appropriate time in the proceedings”.⁸⁵ In light of this finding, the claimed affection by the Decision of the Defence’s right to adequate time and facilities enshrined in article 67(1)(b) of the Rome Statute, raised by the Defence of Mr. Blé Goudé with regard to all the issues allegedly stemming from the Decision,⁸⁶ must also to be considered unfounded.

48. Moreover, the Defence’s argument that the joinder of the two cases would impact the fairness of the proceedings is also grounded on the speculative assumption that the Prosecution evidence presented against each Accused “*is hardly the same*”,⁸⁷ and that the joinder of the proceedings would thus fail to avoid duplicating evidence and would impact upon Mr. Blé Goudé’s fair trial rights.⁸⁸ However, it must be recalled that for an issue to be appealable it must “*significantly*” impact upon the fairness and expeditiousness of the proceedings.⁸⁹ The Common Legal Representative submits that the differences in the evidence alleged by the Defence of Mr. Blé Goudé, at the current stage of the proceedings where evidence remains to be disclosed by the Prosecution, cannot satisfy the high threshold laid down in article 82(1)(d) of the Rome Statute.

49. Likewise, the Common Legal Representative submits that the Second and Fourth Issues identified by Defence of Mr. Blé Goudé, concerning the Accused’s right to adequate time and facilities for the preparation of his defence, do not significantly affect the outcome of the trial.⁹⁰ Indeed, the Common Legal Representative contends that the Decision has been issued at an early stage of trial preparation and therefore

⁸⁴ See the Decision, *supra* note 5, para. 66.

⁸⁵ *Idem*, para. 61.

⁸⁶ See the Blé Goudé Request, *supra* note 6, paras. 35-40.

⁸⁷ *Idem*, para. 39

⁸⁸ *Ibid.*, paras. 39 and 40.

⁸⁹ See *supra* note 13.

⁹⁰ See the Blé Goudé Request, *supra* note 6, para. 41.

allows a timely discussion of preliminary matters. Furthermore, it is submitted that there would be no risk for irreversible prejudice, as measures may be taken by the Chamber to eventually minimise the potential affection of the joinder on the expeditiousness of the proceedings. In this regard, the Defence of Mr. Blé Goudé acknowledges itself the possibility for the Defence to “*request the Trial Chamber to suspend proceedings in order to protect the rights of the accused*”.⁹¹

50. Furthermore, none of the alleged issues identified by the Defence of Mr. Gbagbo can be considered as affecting the outcome of the trial. Indeed, the Chamber did not in any way hold that the approach towards the two cases may vary depending on whether they are joined or not.⁹² On the contrary, the Decision states that “[a] joint trial would also avoid the risk of inconsistent treatment and assessment of evidence in separate trials, and, in turn, inconsistent verdicts”.⁹³

51. Since none of the issues mentioned in the Gbagbo Request and the Blé Goudé Request affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these issues may, as argued by the Defence of Mr. Gbagbo,⁹⁴ materially advance the proceedings.⁹⁵

⁹¹ *Idem*, para. 40.

⁹² See the Gbagbo Request, *supra* note 6, para. 50.

⁹³ See also the Decision, *supra* note 5, para. 65.

⁹⁴ See the Gbagbo Request, *supra* note 6, paras. 51-54.

⁹⁵ See the “Decision on the ‘Defence Application for Leave to Appeal the Trial Chamber’s Décision relative aux modalités de participation des victimes au stade des débats sur le fond’” (Trial Chamber II), No. ICC-01/04-01/07-2032, 20 April 2010, para. 43 ; the “Decision on the prosecution and defence applications for leave to appeal the ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Trial Chamber III), No. ICC-01/05-01/08-1169, 26 January 2011, para. 24 ; the “Decision on the Defence Application for Leave to Appeal the ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’” (Trial Chamber IV), No. ICC-02/05-03/09-457, 21 March 2013, para. 12; and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, para. 14.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Trial Chamber to reject the Requests.

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 23rd day of March 2015

At The Hague, The Netherlands