

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/11-01/15

Date: 22 April 2015

TRIAL CHAMBER I

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

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

Public

Decision on Defence requests 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'

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

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Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit

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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

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Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber I ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('Gbagbo and Blé Goudé case'), having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Defence requests 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"'.¹

I. Procedural history

1. On 11 March 2015, the Chamber issued its 'Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters', finding it appropriate, pursuant to Article 64(5) of the Statute and Rule 136 of the Rules of Procedure and Evidence ('Rules'), to join the charges against and jointly try Mr Gbagbo and Mr Blé Goudé and disposing of various preliminary and consequential matters ('Impugned Decision').¹
2. On 16 March 2015, the Defence for Mr Blé Goudé ('Blé Goudé Defence') requested leave to appeal the Impugned Decision ('Blé Goudé Defence Request').² On 17 March 2015, the Defence for Mr Gbagbo ('Gbagbo Defence'; together with the Blé Goudé Defence, 'Defence') requested leave to appeal the Impugned Decision ('Gbagbo Defence Request'; together with the Blé Goudé Defence Request, 'Defence Requests').³

¹ Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters, 11 March 2015, ICC-02/11-01/15-1.

² Defence request for leave to appeal the "Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor and Charles Blé Goudé* and related matters", 16 March 2015 (registered on 17 March 2015), ICC-02/11-01/15-5.

³ Demande d'autorisation d'interjeter appel de la « Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters » (ICC-02/11-01/11-810), 17 March 2015, ICC-02/11-01/15-6.

3. On 23 March 2015, the Office of the Prosecutor ('Prosecution')⁴ and Legal Representative of Victims ('LRV')⁵ responded to the Defence Requests ('Prosecution Response' and 'LRV Response', respectively).

II. Submissions

Blé Goudé Defence Request

4. The Blé Goudé Defence identifies four issues which it submits arise from the Impugned Decision (together, 'Blé Goudé Issues'):
 - a) Whether the Chamber erred in its application of Article 64(5) of the Statute in conjunction with Rule 136 of the Rules when it found that joinder was appropriate despite the different forms of participation in the common plan ('Blé Goudé Issue One');
 - b) Whether the Chamber misapplied Rule 136 of the Rules in determining that possible, detrimental consequences on the fundamental Defence right to adequate time and facilities to prepare its case was a matter of trial management, and not a matter of serious prejudice to the Accused ('Blé Goudé Issue Two');
 - c) Whether the Chamber misapplied Rule 136 of the Rules by allegedly relying on the Prosecution's unsubstantiated submissions that the evidence in the two cases is the same ('Blé Goudé Issue Three'); and
 - d) Whether the Chamber erred by holding that a separate⁶ trial would expose witnesses twice to 'hardship' and would contravene the interests of the victims, and that reasons of judicial economy for holding a joint trial would outweigh the benefits of a separate trial ('Blé Goudé Issue Four').

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

⁵ 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), 23 March 2015, ICC-02/11-01/15-9.

⁶ The Chamber notes that the Blé Goudé Defence appears to erroneously use the word 'joint' in the heading at pages 11 and 12 when formulating this ground of appeal; however, it is considered clear from paragraphs 31 and 32 that it is referring to 'separate', not 'joint'.

5. In relation to Blé Goudé Issue One, the Blé Goudé Defence submits that the Chamber diminished the importance of the modes of liability by focusing on the existence of a 'common plan', resulting in the consideration of uncharged incidents against Mr Gbagbo.⁷ Concerning Blé Goudé Issue Four, it submits that the Chamber wrongfully applied the interests of justice standard as the Court's primary task is to protect the rights of the Accused, not the rights of other organs of the Court, witnesses or victims.⁸
6. Regarding the impact of the Blé Goudé Issues, the Blé Goudé Defence submits that it will 'face insurmountable difficulties' to secure the rights of Mr Blé Goudé because (i) the Blé Goudé Defence has been allotted significantly less time to prepare than the other parties; and (ii) the evidence against Mr Blé Goudé and Mr Gbagbo is different.⁹ It further submits that Blé Goudé Issue Two and Blé Goudé Issue Four could impact on the outcome of the trial because prejudice to Mr Blé Goudé's fundamental right to adequate preparation time cannot be remedied by 'simple trial management'.¹⁰ For these reasons, the Blé Goudé Defence also submits that immediate resolution by the Appeals Chamber is necessary in order to materially advance the proceedings. In this regard, it notes that joinder is a novel issue and would cause irreparable changes in the proceedings, such as the 'contamination' that would result from the 'joining' of confidential material on the case records.¹¹

Gbagbo Defence Request

7. The Gbagbo Defence identifies six issues ('Gbagbo Issues'; together with the Blé Goudé Issues, 'Issues') which it submits would significantly impact on the

⁷ Blé Goudé Defence Request, ICC-02/11-01/15-5, paras 13-18.

⁸ Blé Goudé Defence Request, ICC-02/11-01/15-5, paras 31-32.

⁹ Blé Goudé Defence Request, ICC-02/11-01/15-5, paras 34-40.

¹⁰ Blé Goudé Defence Request, ICC-02/11-01/15-5, para. 41.

¹¹ Blé Goudé Defence Request, ICC-02/11-01/15-5, paras 42-47.

fair and expeditious conduct of the proceedings and outcome of the trial,¹² and appellate resolution of which would materially advance the proceedings:¹³

- a) Whether the Chamber violated the fairness of the proceedings in denying the Defence request to 'have the last word' ('Gbagbo Issue One');
 - b) Whether the Chamber erred in law in its interpretation of Article 64(5) of the Statute ('Gbagbo Issue Two');
 - c) Whether the Chamber erred in its 'substitution' of criteria, namely the nature of and connection between the charges, for the statutory criteria ('Gbagbo Issue Three');
 - d) Whether the Chamber erred in its failure to conduct a rigorous comparison of the charges ('Gbagbo Issue Four');
 - e) Whether the Chamber erred in failing to assess the consequences of joinder on the content of the charges against the Mr Gbagbo and Mr Blé Goudé ('Gbagbo Issue Five'); and
 - f) Whether the Chamber erred in failing to concretely assess the consequences of joinder on the proceedings and the rights of Mr Gbagbo ('Gbagbo Issue Six').
8. In relation to Gbagbo Issue One, the Gbagbo Defence submits that the Chamber heavily relied on the Prosecution's reply, to which it did not have an opportunity to respond.¹⁴ Concerning Gbagbo Issue Two, it submits that the law clearly requires a two-step approach to joinder.¹⁵ The Gbagbo Defence therefore contends that the Chamber should have explained why it dismissed the Defence's interpretation and opted for a teleological interpretation (*'une*

¹² Gbagbo Defence Request, ICC-02/11-01/15-6, paras 48-50.

¹³ Gbagbo Defence Request, ICC-02/11-01/15-6, paras 51-54.

¹⁴ Gbagbo Defence Request, ICC-02/11-01/15-6, paras 12-14.

¹⁵ Gbagbo Defence Request, ICC-02/11-01/15-6, paras 19-21.

interprétation téléologique') of the Statute.¹⁶ Further, in relation to Gbagbo Issue Three, the Gbagbo Defence claims that the Chamber never justified its use of the 'nature of the charges' and 'connection' criteria.¹⁷ In relation to Gbagbo Issue Five, the Gbagbo Defence considers that Mr Gbagbo now has to face charges for an incident which was not confirmed by the Pre-Trial Chamber.¹⁸

9. Finally, concerning Gbagbo Issue Six, the Gbagbo Defence submits that the Chamber should have assessed the practical impact of joinder.¹⁹ It submits, for example, that the Chamber should not have relied on the Prosecution's submissions that it would present the same evidence, as investigations are currently ongoing.²⁰ Further, according to the Gbagbo Defence, the Chamber never evaluated the impact joinder would have on the length of proceedings.²¹

Prosecution Response

10. The Prosecution acknowledges that Gbagbo Issue Two and Blé Goudé Issue One, which appear to challenge the Chamber's power to join charges that are not identical, may raise an identifiable subject or topic that was essential to the Impugned Decision and therefore constitute appealable issues.²² It submits that none of the other Issues are appealable, as they are, according to the Prosecution, merely disagreements with, based on misunderstandings of, or do not arise from the Impugned Decision.²³ The Prosecution further submits that none of the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It highlights that the question of joinder is separate from matters of fairness in the supervision,

¹⁶ Gbagbo Defence Request, ICC-02/11-01/15-6, paras 22-23.

¹⁷ Gbagbo Defence Request, ICC-02/11-01/15-6, paras 27-28.

¹⁸ Gbagbo Defence Request, ICC-02/11-01/15-6, paras 35-40.

¹⁹ Gbagbo Defence Request, ICC-02/11-01/15-6, paras 42 and 45.

²⁰ Gbagbo Defence Request, ICC-02/11-01/15-6, paras 43-44.

²¹ Gbagbo Defence Request, ICC-02/11-01/15-6, para. 45.

²² Prosecution Response, ICC-02/11-01/15-11, paras 4-6.

²³ Prosecution Response, ICC-02/11-01/15-11, paras 7-21.

management and conduct of joined proceedings.²⁴ Likewise, the Prosecution submits that appellate intervention would not materially advance the proceedings as the Chamber has clearly indicated its intention to protect the rights of Mr Gbagbo and Mr Blé Goudé as the proceedings continue.²⁵

LRV Response

11. In relation to Gbagbo Issue One, the LRV contends that the Gbagbo Defence fails to provide any explanation as to why the Chamber improperly exercised its discretion.²⁶ The LRV submits that Gbagbo Issues Four, Five and Six and Blé Goudé Issues Two, Three and Four, concerning the Chamber's consideration of the charges and the impact of joinder on the rights of the accused and the interests of justice, arise from misunderstandings of and/or are based on mere disagreements with the Impugned Decision.²⁷ Finally, the LRV submits that the Issues would not significantly impact on the fair and expeditious conduct of the proceedings or the outcome of the trial. The LRV stresses that the Chamber clearly stated that the charges were not being modified and that matters relating to adequate time and facilities for the preparation of the defence would be addressed at the appropriate time.²⁸

III. Applicable law

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

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

²⁴ Prosecution Response, ICC-02/11-01/15-11, paras 22-28.

²⁵ Prosecution Response, ICC-02/11-01/15-11, paras 29-30.

²⁶ LRV Response, ICC-02/11-01/15-9, paras 33-34.

²⁷ LRV Response, ICC-02/11-01/15-9, paras 25-28, 30-31 and 43-44.

²⁸ LRV Response, ICC-02/11-01/15-9, paras 45-51.

13. Article 82(1)(d) of the Statute does not confer an automatic right of appeal. A right of appeal will arise only if, in the Chamber's opinion, the impugned decision 'must receive the immediate attention of the Appeals Chamber'.²⁹

IV. Analysis

14. In order to succeed in its request, the Defence must satisfy this Chamber that both requirements of Article 82(1)(d) have been met. This requires an analysis of the issues raised by the specific decision in the context of the specific circumstances of the case. The outcome of such an analysis should serve as the basis for this Chamber's consideration on whether to grant leave to appeal. It is insufficient to argue that the impugned decision was not correctly reasoned (that the impugned decision may be wrong)³⁰ or that it involves an important area of law.³¹ A chamber ought not to grant leave to appeal on the basis that issues related to joinder *a priori* satisfy both requirements of Article 82(1)(d).³² It follows that a careful scrutiny of the issues raised by the Defence is required in order to make this assessment.
15. The Chamber notes that both Defence Requests rely, in part, on what the Chamber considers to be misconceptions of, and unfounded assumptions concerning, the Impugned Decision. Such misconceived and unfounded submissions cannot satisfy the leave to appeal criteria. In assessing the Defence Requests, the Chamber considers it appropriate to first recall the relevant findings reached in the Impugned Decision.

²⁹ *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 ('DRC Appeal Decision'), para. 20.

³⁰ See for example, DRC Appeal Decision, para. 9; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on the Mr Ruto's Request for Excusal from Continuous Present at Trial, ICC-01/09-01/11-817, 18 July 2013, para. 12; ICTY, Trial Chamber, *Prosecutor v. Karadžić*, Decision on Accused's Application for Certification to Appeal Denial of Motion for Judgement of Acquittal Under Rule 98 Bis, 18 July 2012, IT-95-5/18-T, para. 6.

³¹ See for example, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on the Mr Ruto's Request for Excusal from Continuous Present at Trial, ICC-01/09-01/11-817, 18 July 2013, para. 16.

³² ICTY, Trial Chamber, *Prosecutor v. Stanišić and Župljanin*, Decision on Stojan Župljanin's Motion for Certification, 13 February 2009, IT-08-91-PT, para. 11.

16. Based on the nature of the charges, the Chamber found that joinder was appropriate³³ and that separate trials were not necessary to avoid serious prejudice to the Accused³⁴ or to protect the interests of justice.³⁵ The Chamber considered that joinder was the most appropriate procedural solution to ensure a fair and expeditious trial and protect the interests of justice.³⁶ The Chamber twice emphasised that joinder would not result in any amendment of the charges.³⁷ Pursuant to Article 64(2) of the Statute and Rule 136(2) of the Rules, the Chamber acknowledged its obligations to ensure fair and expeditious proceedings in the *Gbagbo and Blé Goudé* case and to accord the same rights to each accused as if they were being tried separately.³⁸ The Chamber did not make any final determination as to how it would meet these obligations. Rather, it scheduled a status conference and invited submissions from the parties and participants on various matters impacting on the rights of the parties, participants and the overall conduct of the joint proceedings.³⁹
17. Having examined the Impugned Decision, the Chamber finds that none of the Issues would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, as required under the first limb of Article 82(1)(d) of the Statute. Indeed, unlike other legal issues that give rise to an automatic right of appeal at the Court,⁴⁰ the fact that the Impugned Decision deals with the issue of joinder does not, in and of itself, satisfy the leave to appeal criteria. The Defence must demonstrate that the relevant criteria are met. It fails to do so. The Defence speculates, based on cumulative contingencies, as to the prejudice it *may* suffer *if* the Chamber fails to properly discharge its obligations under Article 64(2) of the Statute and Rule 136 of the

³³ Impugned Decision, ICC-02/11-01/15-1, paras 56 and 68.

³⁴ Impugned Decision, ICC-02/11-01/15-1, paras 62 and 68.

³⁵ Impugned Decision, ICC-02/11-01/15-1, paras 67-68.

³⁶ Impugned Decision, ICC-02/11-01/15-1, paras 62 and 67-68.

³⁷ Impugned Decision, ICC-02/11-01/15-1, paras 57 and 59.

³⁸ Impugned Decision, ICC-02/11-01/15-1, paras 62 and 67-68.

³⁹ Impugned Decision, ICC-02/11-01/15-1, paras 73 and 75 and public Annex.

⁴⁰ See, for example, Article 82(1)(a), (b) and (c) of the Statute.

Rules. Although joinder modified the procedural framework in which Mr Gbagbo and Mr Blé Goudé would be tried and, by its very nature, contemplates minimal prejudices,⁴¹ the Defence does not demonstrate that this procedural modification, risk of minimal prejudice, or any other factor would have any *significant* impact on the fairness and expeditiousness of the proceedings or the outcome of the trial.

18. For the same reasons, the Chamber is also of the opinion that resolution of the Issues by the Appeals Chamber would not materially advance the proceedings. It is not sufficient for the Defence to argue that this is the first time that a Trial Chamber of this Court has joined charges and trials, or that the law relating to joinder is of general interest and may arise in future proceedings.⁴² After the most careful scrutiny of the Defence Requests, the Chamber has not identified any argument which shows that immediate appellate resolution of the Issues may materially advance the proceedings. The Chamber reiterates that it shall conduct the *Gbagbo and Blé Goudé* case in accordance with Article 64(2) of Statute and Rule 136 of the Rules.

19. The Chamber acknowledges that the legal interpretation of Article 64(5) of the Statute and Rule 136 of the Rules (in particular, whether a Chamber may join charges against accused which are not identical) may constitute a discrete and identifiable issue arising from the Impugned Decision.⁴³ However, in light of

⁴¹ Impugned Decision, ICC-02/11-01/15-1, paras 60-61.

⁴² *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber VA, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusai from Continuous Presence at Trial', 18 July 2013, ICC-01/09-01/11-817, para. 16; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, 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", 26 January 2011, ICC-01/05-01/08-1169, para. 25; *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008 (registered on 27 February 2008), ICC-01/04-01/06-1191, para. 11.

⁴³ Gbagbo Issues Two and Three and Blé Goudé Issue One, at least in part, identify this issue. The Chamber is not satisfied that any other Issue identified by the Defence constitutes an 'appealable issue' as defined by the Appeals Chamber. See DRC Appeal Decision, ICC-01/04-168, para. 9.

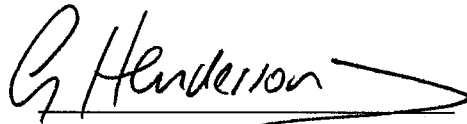
its analysis above, the Chamber finds that the Defence fails to satisfy either of the cumulative Article 82(1)(d) criteria in relation to this, or any, Issue.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Requests.

Judge Herrera Carbuccia appends a partly dissenting opinion.

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



Judge Geoffrey Henderson, Presiding Judge



Judge Olga Herrera Carbuccia



Judge Bertram Schmitt

Dated 22 April 2015

At The Hague, The Netherlands