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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Cuno Tarfusser
Judge Olga Herrera-Carbuccia

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public

Prosecution Reply to Defence Response to Joinder Request

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Introduction

1. The Defence's response ("Response")¹ to the Prosecution's request to join the charges in the cases of the *Prosecutor v. Laurent Gbagbo* and the *Prosecutor v. Charles Blé Goudé* ("Joinder Request")² relies on an erroneous interpretation of the applicable law on joinder of charges. According to the Defence, for charges to be joined, the charges of the respective cases have to be identical, in the sense that they must refer to the same facts and circumstances and the same legal characterisation of the facts, including the modes of liability. This is contrary to article 64(5) of the Rome Statute ("Statute"), which does not restrict joinder to cases with identical charges. In fact, article 64(5) of the Statute gives a Trial Chamber broad discretion to determine, on a case-by-case basis, whether it is "appropriate" to join charges.
2. Rule 136 of the Rules of Procedure and Evidence ("Rules") also contradicts the Defence's interpretation of the law. This provision guides the Trial Chamber in the exercise of its discretionary power under article 64(5) by establishing a presumption that "[p]ersons accused jointly shall be tried together".
3. In its Joinder Request, the Office of the Prosecutor ("Prosecution") has demonstrated why Trial Chamber I ("Chamber"), in the exercise of its discretion, should join the charges against Mr Gbagbo and Mr Blé Goudé. The contrary arguments advanced by the Defence are either incorrect or irrelevant.

Submissions

4. The Prosecution does not address all of the Defence's arguments but rather focuses on a discrete portion of the Response addressing the interpretation and application of article 64(5) of the Statute and rule 136 of the Rules, which are central to the Response. The fact that the Prosecution has not replied to other arguments does not mean that it agrees with them.

¹ ICC-02/11-01/11-765.

² ICC-02/11-01/11-738.

(i) *The Trial Chamber's broad discretion under the law to decide on joinder of charges*

5. Article 64(5) provides that “[u]pon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused”. This gives a Trial Chamber broad discretion to determine whether, in the circumstances, it is *appropriate* to join charges. Pre-Trial Chamber I, in its decision joining the charges against Mr Katanga and Mr Ngudjolo, endorsed and applied the jurisprudence from the UN *ad hoc* Tribunals that identified the factors that may be taken into account when determining whether to join charges. It found that:

The preference for joint trials of individuals accused of acting in concert in the commission of a crime is not based merely on administrative efficiency. A joint trial relieves the hardship that would otherwise be imposed on witnesses whose repeated attendance might not be secured; enhances fairness [...] by ensuring a uniform presentation of evidence and procedure against all [accused]; [and] minimizes the possibility of inconsistencies in treatment of evidence, sentencing or other matters, that could arise from separate trials [...].³

6. The Defence, on the other hand, submits that for cases to be joined, the charges against the accused in the respective cases must be identical (« *que ces charges soient les mêmes* »),⁴ in that they must refer to the same facts and circumstances and involve the same legal characterisation of the facts, including the same modes of liability.⁵
7. The Defence's position imports into article 64(5) a restriction on the Trial Chamber's discretion that that is simply not there. Article 64(5) refers to joinder of “charges” without qualifying the type of charges that may be joined.
8. The Appeals Chamber has repeatedly found that the interpretation of the Statute is governed by the Vienna Convention on the Law of Treaties, specifically the provisions of articles 31(1), which sets out the principal rule of interpretation.

³ ICC-01/04-01/07-307, p.9. See also the Pre-Trial Chamber's application of these principles at p.8 and additional jurisprudence of the UN *ad hoc* Tribunals referred to at fns.20-24.

⁴ Response, para.29; see also Section 3 (paras.33-93).

⁵ Response, para.29; see also paras.62-88).

According to this provision, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁶

9. Nothing in the ordinary meaning of the terms in article 64(5) of the Statute, in particular the term “charges,” indicates that a Chamber’s discretionary power to join charges is limited to situations where the legal characterisation of the charges are identical, as argued by the Defence.
10. In addition, article 64(5) should be considered in light of article 64(2), which provides that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. As the Appeals Chamber has observed, a Trial Chamber’s ability to join cases can be a useful means of achieving these objectives:

The interpretation accorded to article 64(5) of the Statute and rule 136 of the Rules tallies with the object of the Statute being, in this regard, the assurance of the efficacy of the criminal process, and promotes its purpose that proceedings should be held expeditiously. Proceedings should be held without delay, a course consistent with the rights of the accused, assured by article 67(1)(c) of the Statute, and the rights of a person facing charges at the confirmation hearing (rule 121 (1) of the Rules). This is what underlies the relevant provisions of the Statute and the Rules and founds the logic of the matter warranting joinder.⁷

11. The Defence’s interpretation of article 64(5), on the other hand, undermines the object and purpose of the provision and would render it almost devoid of any practical use. The Defence’s position would restrict the application of article 64(5) to cases where the facts of the charges against one accused do not deviate in any way from the facts charged against the other accused person or persons, and

⁶ ICC-01/04-168 OA3, para.33; ICC-01/04-01/07-573 OA6, para.5.

⁷ ICC-01/04-01/07-573 OA6, para.8. When joining the charges against the accused Katanga and Ngudjolo, Trial Chamber I referred to its duties under article 64(2): see ICC-01/04-01/07-307, p.6, second paragraph; p.8, first paragraph; p.9 second complete paragraph.

where the legal characterisation of the facts is fully identical, including with respect to the charged modes of liability.

12. However, in practice, persons who jointly commit crimes often play different roles in the commission of those crimes. Since the charges against each accused must accurately describe their roles, this will inevitably lead to differences in the facts and circumstances, and modes of liability, alleged against them in their respective charging documents. On the Defence's restrictive interpretation, however, those persons could not be tried jointly. In addition, the Defence's position fails to properly consider the impact of having separate trials on the fairness and efficiency of the proceedings, the protection and well-being of victims and witnesses, the duplication of evidence, as well as on the rights of the accused.
13. Finally, rule 136 does not support the Defence's position that only identical charges may be joined. Article 64(5) and rule 136 do not set out "separate stages" in the joinder procedure.⁸ They both apply to a Trial Chamber's determination of whether to join two or more accused persons in a trial: article 64(5) sets out the discretionary power of the Trial Chamber to join charges, and rule 136 "provides guidance to the Chamber on the exercise of its discretion".⁹ Together they establish a presumption that "[p]ersons accused jointly shall be tried together." This presumption can only be deviated from "in order to avoid serious prejudice to the accused, to protect the interests of justice or a person jointly accused has made an admission of guilt [...]". Therefore, for persons accused jointly, a Trial Chamber should exercise its discretion in favour of joinder unless this would cause serious prejudice to the accused or to protect the interests of justice. If the Chamber considers that these conditions do not apply, then persons accused jointly must be tried together.

⁸ *Contra* Response, paras.26, 34.

⁹ Peter Lewis, in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Roy Lee (ed.), Transnational Publishers, 2001, p.545.

14. In sum, because article 64(5) and rule 136 do not limit joint trials to accused persons whose charges are based on identical facts and an identical legal characterisation of those facts, the Defence's submissions regarding the meaning of the term charges in article 64(5) based on regulation 52 of the Regulations of the Court is misplaced.¹⁰

(ii) A proper application of the law should lead to the joinder of the cases against Mr Gbagbo and Mr Blé Goudé

15. As demonstrated above, the Defence's attempt to point out differences in the charges against Mr Gbagbo and Mr Blé Goudé¹¹ is irrelevant as these submissions are predicated on the incorrect assumption that for charges to be joined, they must be identical. The fact that Mr Gbagbo and Mr Blé Goudé played different roles in the commission of the crimes, that one crime base incident for which Mr Blé Goudé is charged is used for a different purpose in the charges against Mr Gbagbo, and that the modes of liability charged against them are not entirely identical, are irrelevant to the question of whether these cases should be joined. What matters is that Mr Gbagbo and Mr Blé Goudé are both charged for their alleged co-responsibility for the same crimes¹² committed by pro-Gbagbo forces in Abidjan against perceived Ouattara supporters between 16 December 2010 and 12 April 2011. As a result, the Chamber should exercise its discretion under article 64(5) and rule 136 to join the charges against Mr Gbagbo and Mr Blé Goudé so that they may be tried together.

16. The Defence disputes the applicability of the "same transaction" test¹³ used at the UN *ad hoc* Tribunals for the joinder of cases.¹⁴ While it is not a legally binding principle, it is a precedent that may usefully guide the Trial Chamber in its determination under article 64(5) on the appropriateness of joining charges. It

¹⁰ Response, paras.49-54.

¹¹ Response, paras.55-88.

¹² With the exception of the crimes committed in Yopougon at the end of February 2011 which nevertheless forms part of the alleged attack against a civilian population pursuant to article 7 of the Statute, see ICC-02/11-01/11-656-Red, pp.42-43..

¹³ See Joinder Request, paras.15-16.

¹⁴ Response, paras.43-45.

also fully accords with the drafting history behind article 64(5) and rule 136, and previous interpretations of these provisions by Chambers of this Court.

17. The drafting history of article 64(5) of the Statute supports the interpretation that persons who are accused of committing a crime jointly should be tried jointly and that it is appropriate to apply the “same transaction” test.¹⁵ The 1994 International Law Commission (“ILC”) Draft Statute for an International Criminal Court at article 38(3) provides that “[t]he Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual transaction.”¹⁶ In its commentary to article 38(3), the ILC expressly refers to the Rules of procedure and evidence of the International Tribunal for the former Yugoslavia,¹⁷ which are the legal basis of the “same transaction” test later developed at the ICTY and ICTR.
18. A commentator to the Statute and the Rules has also observed in relation to the provisions on joinder that “people involved in one and the same criminal undertaking must as far as possible be tried at the same time, since otherwise the administration of justice would risk being affected by inconsistencies and contradictions”.¹⁸ Another commentator has noted that during the negotiation of the rules of procedure and evidence “many delegates were concerned [...] that trials before the Court could be very lengthy and extremely traumatic for

¹⁵ *Contra*, Response, paras.43-45.

¹⁶ [See Report of the International Law Commission on the work of its Forty-Sixth Session Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 A/49/10 Vol. II. A/49/10 \(1994\), p.54-55.](#)

¹⁷ *Ibid*: “Paragraph 3 makes provision for joinder of charges against more than one accused in a single proceeding, although it should be open to an accused to object to joinder for sufficient reason, under procedures provided by the rules (see the rules of procedure and evidence of the International Tribunal, rules 48, 73A (iv) and 82).” See also drafting history of Rule 136. According to a proposal of Australia, in joint trials “evidence which is admissible against only some of the joint accused may be considered only against the accused concerned. (N.B. Sub-rule (a) is identical to rule 82 (A) of the ICTY Rules).” This also corroborates that there is no requirement of factual overlap in charges for persons to be tried jointly. See [Preparatory Commission for the International Criminal Court Proposal submitted by Australia Draft Rules of Procedure and Evidence of the International Criminal Court, PCNICCI 1999/DP.I \[26 January 1999\]](#), p.44.

¹⁸ Frank Terrier, in *The Rome Statute of the International Criminal Court: A Commentary*, Antonio Cassese et al (ed.), Powers of the Trial Chamber, Oxford University Press, 2002, p.1270.

witnesses and, for this reason, the threshold for separate trials was set at ‘serious’ prejudice”.¹⁹

19. Similarly, Pre-Trial Chamber I, in its decision joining the charges against Mr Katanga and Mr Ngudjolo, endorsed the jurisprudence from the UN *ad hoc* Tribunals which endorsed a “preference for joint trials of individuals accused of acting in concert in the commission of a crime”.²⁰ Consequently, it joined the charges by noting the “alleged co-responsibility [of the two suspects] for the crimes allegedly committed during and in the aftermath of the [...] attack on the village of Bogoro”.²¹

20. In its Joinder Request the Prosecution amply demonstrated the factual overlap between the charges against Mr Gbagbo and Mr Blé Goudé.²² In particular, the Prosecution pointed to section 4 of the respective confirmation decisions to demonstrate that the facts and circumstances of the confirmed charges and their legal characterisation are almost entirely identical in both cases.²³ The Prosecution also submitted that both accused stand charged for their responsibility for crimes that were committed in the course of the same factual transaction.²⁴ In addition, it is also worth noting that in its Application for leave to appeal the confirmation decision against Mr Gbagbo, the Defence expressed its concerns regarding the closeness of the cases against Mr Gbagbo and Mr Blé Goudé, as well as the extensive references that the Pre-Trial Chamber made to Mr Blé Goudé and the pro-Gbagbo youth led by him.²⁵ The Defence now takes the opposite position by disputing the substantial overlap between the two cases.

¹⁹ Peter Lewis, in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Roy Lee (ed.), Transnational Publishers, 2001, p.546.

²⁰ See ICC-01/04-01/07-307, p.9.

²¹ See ICC-01/04-01/07-307, p.6.

²² Joinder Request, paras.10-16. *Contra*, see Response, paras. 40-47.

²³ Joinder Request, para.14.

²⁴ Joinder Request, para.15.

²⁵ ICC-02/11-01/11-676-Red, paras.106-115.

21. In addition, since the Prosecution intends to adduce almost the same evidence in both cases,²⁶ it has demonstrated the positive impact that a joinder of the two cases would have on the fair and efficient administration of justice, the protection and well-being of victims and witnesses, the avoidance of duplication of evidence, and the rights of Mr Gbagbo and Mr Blé Goudé.²⁷ Although the Defence briefly addresses these arguments,²⁸ it is unnecessary to make further submissions on these matters. Based on the information before it, the Trial Chamber should conclude that it is appropriate to join the charges against Mr Gbagbo and Mr Blé Goudé.

Conclusion

22. For the reasons set out above, as well as in its Joinder Request, the Prosecution reiterates its request that the Chamber join the charges in the cases of the *Prosecutor v. Laurent Gbagbo* and the *Prosecutor v. Charles Blé Goudé*.



Fatou Bensouda, Prosecutor

Dated this 23rd day of February 2015

At The Hague, The Netherlands

²⁶ Joinder Request, para.18.

²⁷ Joinder Request, paras.17-22.

²⁸ Response, paras.94-109.