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TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

**Public
With public Annex A**

**Prosecution's Request to join the cases of *The Prosecutor v. Laurent GBAGBO* and
*The Prosecutor v. Charles BLE GOUDÉ***

Source: Office of the Prosecutor

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

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1. The Office of the Prosecutor (“Prosecution” or “OTP”) respectfully submits a request to Trial Chamber I (“Chamber”) to join the cases of *The Prosecutor vs. Laurent GBAGBO* (Mr Gbagbo) and *The Prosecutor vs. Charles BLÉ GOUDÉ* (Mr Blé Goudé). It is in the interests of justice and judicial economy to join the cases against Mr Gbagbo and Mr Blé Goudé. Notably, the charges confirmed against them are largely the same. They shared a common plan or purpose and acted jointly to implement this plan, which led to the attack against the civilian population, in the context of which the crimes charged in both cases were committed. Accordingly, the vast majority of the witnesses and other evidence to be relied upon by the Prosecution relates to both accused.

Procedural background

2. On 23 November 2011, Pre-Trial Chamber III issued the “Warrant of Arrest for Laurent Koudou GBAGBO”.¹
3. On 30 November 2011, Mr Gbagbo was surrendered to the Court and his first appearance before Pre-Trial Chamber III was held on 5 December 2011².
4. On 21 December 2011, Pre-Trial Chamber III issued the “Warrant of Arrest” for Mr Blé Goudé.³
5. On 12 June 2014, the decision on the confirmation of charges against Mr Gbagbo (“Gbagbo confirmation decision”) was issued by Pre-Trial Chamber I.⁴
6. On 11 December 2014, the decision on the confirmation of charges against Mr Blé Goudé (“Blé Goudé confirmation decision”) was issued by Pre-Trial Chamber I.⁵

¹ ICC-02/11-01/11-1. *See also* Pre-Trial Chamber, “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo”, 30 November 2011, ICC-02/11-01/11-9-Conf.

² ICC-02/11-01/11-T-1-ENG.

³ ICC-02/11-02/11-1. *See also* Pre-Trial Chamber, “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé”, 6 January 2012, ICC-02/11-02/11-3.

⁴ ICC-02/11-01/11-656-Conf.

⁵ ICC-02/11-02/11-186.

Submission

(a) The Chamber's power to join cases

7. Article 64(5) of the Rome Statute ("Statute") provides that "*the Trial Chamber may, as appropriate, direct that there be a joinder or severance in respect of charges against more than one accused*". Moreover, Rule 136 of the Rules of Procedure and Evidence ("Rules") articulates a presumption of joinder of cases by providing that persons accused jointly, "*shall be tried together*".⁶ This presumption should equally apply to persons who have been charged in relation to the same alleged conduct and crimes, irrespective of the fact that, due to a delay in the surrender of Mr Blé Goudé to the Court, the charges against him and Mr Gbagbo were confirmed by Pre-Trial Chamber I in two separate confirmation decisions.
8. Beyond the explicit powers of the Chamber to join cases, there is also abundant international and domestic jurisprudence on the inherent power to join cases.⁷

⁶ Rule 136 of the Rules contains a presumption in favour of joinder of persons accused jointly, in contrast to the similar Rule 48 of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), International Criminal Tribunal for Rwanda ("ICTR") and Special Court for Sierra Leone ("SCSL"), which provide instead that: "[p]ersons accused of the same or different crimes committed in the course of the same transaction *may be* jointly charged and tried." [Emphasis added]. Nevertheless, the *ad hoc* tribunals have in practice favoured joinder. See e.g. *Prosecutor v. Delali et al.*, Decision on the Motion by Defendant Delali Requesting Procedures for Final Determination of the Charges against Him, 1 July 1998, para.35: "[T]he principles of administration of justice have always accepted the practice of trying joint offenders jointly irrespective of the attendant inevitable minimum prejudices."

⁷ Pursuant to Article 21 of the Statute, relevant observations of the *ad hoc* tribunals support this argument such as, for instance: *The Prosecutor v. Bagosora*, ICTR-96-7, *Kabiligi*, ICTR-97-34, *Ntabakuze*, ICTR-97-30, and *Nsengiyumva*, ICTR-96-12, Decision on the Prosecutor's Motion for Joinder, paras 103-104, 108. In this case, the Trial Chamber observed that: "[i]n common law jurisdictions, questions of joinder lie entirely within the discretion of the Court, which has inherent power to formulate its own rules"; citing the cases of *R. v. Assim*, [1966] 2 ALL ER 881 and *Director of Public Prosecutions v. Doot & Others*, (1973) A.C. 807 (House of Lords). The Trial Chamber also referred to civil law jurisdictions, where joinder can be initiated by the Court. The Trial Chamber concluded that it is in the public interest that joint offences may be tried together and that in "appropriate circumstances the Trial Chamber may so order *quite apart from the provision of the Rules allowing for joinder*...." [Emphasis added]. See also *Prosecutor v. Norman*, SCSL-2003-08-PT, *Fofana*, SCSL-2003-011-PT, and *Kondewa*, SCSL-2003-12-PT, 27 January 2004, para.15 in which the Chamber considered that: "the cumulative effect of these statutory provisions is the vesting of a discretionary jurisdiction in the Court to grant the joinder of indictments, weighing the overall interests of justice and the rights of the accused person. In fact, the founding instruments of both the ICTY and ICTR are to the same effect."

The rationale is clear, as explained by Lord Morris, in *Director of Public Prosecutions v. Merriman*:⁸

[...] questions of joinder, whether of offences or of offenders, are very considerably matters of practice on which this court unless restrained by statute has inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Here is essentially a field in which rules of fairness and of convenience should be evolved and where there should be no fetter to the fashioning of such rules [...]

(b) Reasons for joining the cases against Mr Gbagbo and Mr Blé Goudé

9. The Prosecution submits that the following considerations strongly support a joinder of the cases:

(i) *The cases are essentially one and the same:*

10. The cases against Mr Gbagbo and Mr Blé Goudé are essentially one and the same.

While separate Arrest Warrant Applications were filed against them, the Prosecution clearly submitted that the facts previously detailed in the Gbagbo Arrest Warrant Application were subsumed in the Arrest Warrant Application against Mr Blé Goudé.⁹

11. Accordingly, the Prosecution sought the arrest of Mr Gbagbo and Mr Blé Goudé for jointly taking part, in the aftermath of the 2010 presidential elections, in a common plan to attack civilians, in particular, those perceived to support Mr Ouattara. Consequently, the Prosecution's alleged facts and circumstances against both Accused are identical and the Accused are charged pursuant to overlapping and similar crimes and modes of liability.

⁸ (1972) 56 Cr. App. R. 766 HL. Lord Morris cites the case of *Reg. v. Assim* [1966] 2 Q.B. 249. See *The Prosecutor v. Bagosora*, ICTR-96-7, *Kabiligi*, ICTR-97-34, *Ntabakuze*, ICTR-97-30, and *Nsengiyumva*, ICTR-96-12, Decision on the Prosecutor's Motion for Joinder, 29 June 2000, para.104. *Prosecutor v. Norman*, SCSL-2003-08-PT, *Fofana*, SCSL-2003-011-PT, and *Kondewa*, SCSL-2003-12-PT, 27 January 2004, para.20.

⁹ ICC-02/11-32-Conf-Exp, paras.5 and 7.

12. In its “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé”,¹⁰ the Pre-Trial Chamber treated this case to be one and the same as the case against Mr Gbagbo. It noted their “extensive similarities”¹¹, followed the approach taken in the former case “*mutatis mutandis*” in the latter,¹² and noted that the conclusions drawn in the former case were “equally applicable” also in the latter.¹³ As a result, the Pre-Trial Chamber referred to and incorporated into the Blé Goudé decision the reasoning and findings that it had previously made in the Gbagbo decision.¹⁴
13. During the proceedings on the confirmation of charges against Mr Blé Goudé, the Prosecution relied on almost all the evidence that it also relied on for the purposes of the confirmation of charges against Mr Gbagbo. In addition, the Prosecution relied on additional evidence that it had obtained after filing its list of evidence in the proceedings against Mr Gbagbo, but on which the Prosecution intends to rely at trial both against Mr Gbagbo and Mr Blé Goudé.¹⁵
14. A comparison of the Gbagbo confirmation decision,¹⁶ with the Blé Goudé confirmation decision¹⁷ further demonstrates the identity of the two cases: Section 4 of the respective decisions, which spells out the facts and circumstances and their legal characterisation confirmed by the Chamber, is almost identical. The only significant difference can be found in the respective portions that describe the criminal conduct of Mr Gbagbo and Mr Blé Goudé. However, the critical consideration is that the Pre-Trial Chamber found that both Accused shared a common plan or purpose and that they acted in a coordinated manner to

¹⁰ ICC-02/11-02/11-3.

¹¹ ICC-02/11-02/11-3, para.9.

¹² ICC-02/11-02/11-3, para.12.

¹³ ICC-02/11-02/11-3, para.19.

¹⁴ See e.g. ICC-02/11-02/11-3, paras 9, 12, 19-23, 27-28, 30.

¹⁵ ICC-02/11-02/11-80 and 80-Conf-AnxA, ICC-02/11-02/11-82 and 82-Conf-AnxA, ICC-02/11-02/11-101 and 101-Conf-AnxA, ICC-02/11-02/11-103 and 103-Conf-AnxA, ICC-02/11-02/11-109 and 109-Conf-AnxA, ICC-02/11-02/11-115 and 115-Conf-AnxA, ICC-02/11-02/11-125, 125-Conf-AnxA and 125-Conf-AnxB, ICC-02/11-02/11-140 and 140-Conf-AnxA, ICC-02/11-02/11-144 and 144-Conf-AnxA, ICC-02/11-02/11-149 and 149-Conf-AnxA. Also see ICC-02/11-01/11-T-25-CONF-ENG ET, p.8, 1.4-p.9, 1.4, p.12, 1.21-p.13, 1.3, p.27, 1.24-p.28,1.14.

¹⁶ ICC-02/11-01/11-656-Red and ICC-02/11-01/11-656-Anx.

¹⁷ ICC-02/11-02/11-186 and ICC-02/11-02/11-186-Anx.

implement the common plan, which resulted in the commission of the crimes charged.

15. Moreover, the charged crimes in both cases were committed in the course of the same factual transaction. This was considered by other international courts and tribunals as a reason for joining cases, in particular where “a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan” are involved.¹⁸

16. Additionally, joinder of cases is also justified even if the crimes charged are not identical for each accused, as long as they were committed in the context of the same transaction.¹⁹

(ii) A joinder would minimise the potential impact on witnesses and their participation in the proceedings

17. The Prosecution submits that a joinder serves the interests of justice by minimising the impact of the upcoming trial proceedings on victims and witnesses. In particular, joinder would serve as an appropriate measure to protect the witnesses’ physical and psychological well-being since they would not have to testify multiple times.²⁰ Potentially many witnesses will be called to testify. It is also in the interests of justice that the Prosecution not “lose” the cooperation of witnesses due to consecutive or simultaneous trials. It has been acknowledged that it is more burdensome for victims to give testimony on separate occasions

¹⁸ ICTY: *The Prosecutor v. Vujadin Popovic et al.*, IT-02-57, Decision on Motion of Joinder, 21 September 2005, paras 7, 11; *The Prosecutor v. Gotovina, Cermak and Markac*, IT-06-90, Decision on Interlocutory Appeals against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, Appeals Chamber, 25 October 2006, paras 16-17; *The Prosecutor v. Rahim Ademi and The Prosecutor v. Mirko Norac*, IT-01-46-PT and IT-04-76-I, Decision on Motion for Joinder of Accused, 30 July 2004, p.1; SCSL: *Prosecutor v. Norman, Fofana and Kondewa*, Decision and Order on Prosecution Motion’s for Joinder, 27 January 2004, p.8, para.17,18(d).

¹⁹ ICTY: *The Prosecutor v. Vujadin Popovic et al.*, IT-02-57, Decision on Motion of Joinder, 21 September 2005, paras 7, 11.

²⁰ *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-257, Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, 10 March 2008, p.8.

over a period of time than to undergo consecutive cross-examination in a single trial.²¹ It would also serve to avoid discrepancies and inconsistencies inevitable when conducting separate trials.²²

(iii) *A joinder would avoid duplication of the presentation of evidence and promotes judicial economy:*

18. The Prosecution's intention is to adduce almost the same evidence in both cases. Consequently, separate trials would result in the presentation of a fair amount of overlapping evidence. A joinder would allow the Court to proceed more efficiently²³ and would serve to save valuable court time and resources.²⁴

²¹ ICTY: *The Prosecutor v. Vujadin Popovic et al.*, IT-02-57, Decision on Motion of Joinder, 21 September 2005, para.25; STL: *The Prosecutor v. Ayyash et al.*, Decision on Trial Management and Reasons for Decision on Joinder, 23 February 2014, p.11, para.31; ICTR: *The Prosecutor v. Nyiramasuhuko, ICTR-97-21-I, Nsabimana et al.*, ICTR-97-29A and B-I, *Nayabashi*, ICTR-96-15-T and *Ndayambaje*, ICTR-96-8-T, Decision on the Prosecutor's Motion for Joinder, 5 October 1999, p.17, para.16.

²² ICTR: *The Prosecutor v. Bagosora*, ICTR-96-7, *Kabiligi*, ICTR-97-34, *Ntabakuze*, ICTR-97-30, and *Nsengiyumva*, ICTR-96-12, 29 June 2000, para.143.

²³ ICTY: *The Prosecutor v. Vujadin Popovic et al.*, IT-02-57, Decision on Motion of Joinder, 21 September 2005, para.22; *The Prosecutor v. Meakic, Gruban and Knezevic*, IT-95-4, Decision on the Prosecution's Motion for Joinder of the Accused, 17 September 2000, p.10, para.30.

²⁴ See *Prosecutor v. Delali et al.*, Decision on the Motion by Defendant Delali Requesting Procedures for Final Determination of the Charges against Him, 1 July 1998, para.35: Reasons of public interest for joinder cited include: savings in expense and time; interests of transparent justice that the same verdict and the same treatment should be returned against all persons jointly tried with respect to the offences committed in the same transaction; to avoid discrepancies and inconsistencies inevitable from the separate trial of joint offenders. *The Prosecutor v. Kayishema*, ICTR-95-I-T, Decision on the Joinder of the Accused and Setting the Date for Trial, 6 November 1996, p.3. Reasons cited for joinder include: to obviate risks of contradiction in the decision rendered when related and indivisible facts are examined; allowing a more consistent and detailed perception of evidence presented by the Prosecutor; a better protection of victims' and witnesses' physical and mental safety, including by eliminating the need for them to make several journeys to repeat their testimony. *Prosecutor v. Norman, Fofana and Kondewa*, Decision and Order on Prosecution Motions for Joinder, SCSL-2003-12-PT, 27 January 2004, para.18. Repeats the same factors as outlined in *Delali* and *Kayishema*, as being relevant; adding: interests of the Prosecution; interests of the international community in trial of persons charged with serious violations of international humanitarian law; rights of the accused to a fair and expeditious trial. *The Prosecutor v. Radoslav Brdanin and Momir Tali*, Decisions on Motions by Momir Tali for a Separate Trial and for Leave to File a Reply, 9 March 2000, para.30: It is in the interests of justice for co-accused to be able to refute attempts by the other to blame them. Articles 68(1) and 57(3)(c) of the Statute also provide TC I with the power to take appropriate measures for the protection of victims and witnesses, which it is submitted includes joinder of proceedings to avoid witnesses being required to testify twice in two separate cases thereby sparing them additional trauma and reducing impact on their physical and mental safety (including by avoiding the need to make several journeys to repeat their testimony, which can increase chances of their detection as ICC witnesses).

(iv) A joinder ensures that the same issues and evidence arising in both cases are dealt with consistently:

19. The Prosecution notes that a joint trial would ensure consistency with respect to the admissibility of evidence, procedural and legal findings and the ultimate verdicts. Evidence evaluated by different Trial Chambers can result in conflicting rulings and judgements. Exposing “half of the picture” is contrary to the interests of justice and “nothing could be more destructive to the pursuit of justice than to have inconsistent results in separate trials based on the same facts”.²⁵ Additionally, a joint trial affords an equal treatment to both suspects.²⁶ There would be no risk of having different evidence presented in the event that witnesses, after testifying in one case, became unavailable to testify in the other. Consistency of the two proceedings and judgments will also contribute to ensuring that the judgments against the two Accused will not be overturned on appeal.

(v) Joining the cases would not result in undue delay with respect to Mr Gbagbo

20. The Prosecution asserts that, any delays as a result of a joinder are off-set by the benefits of having a joint trial when weighing the overall interests of justice and rights of the Defence. Mr Gbagbo’s trial is currently scheduled to start on 7 July 2015. The Prosecution recalls that the Defence had suggested the end of November and even December 2015 as a date for start of the trial. This suggests that the Defence would not perceive a limited delay of the commencement of the trial to be prejudicial to Mr Gbagbo. The Chamber, by its management of the pre-trial proceedings, can ensure that there is no undue delay. Moreover, once a joint trial has commenced, it is likely to proceed more expeditiously than parallel trials

²⁵ ICTY: *The Prosecutor v. Brdanin and Talic*, IT-99-36-T, Decision on Prosecution’s Oral Request for the Separation of Trials, 20 September 2002, para.31 and also cited by STL: *The Prosecutor v. Ayyash et al.*, Decision on Trial Management and Reasons for Decision on Joinder, 23 February 2014, p.10, para.28.

²⁶ *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-257, Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, 10 March 2008, p.8.

to be conducted before the same Trial Chamber. This is so because the evidence will only have to be heard once and the same procedural decisions will be applicable with respect to both Accused.

21. In any event, the desire for a speedy trial should not outweigh, in the present case, the benefits of a joint trial.²⁷ The ICTY's Trial Chamber in *The Prosecutor v. Delalić et al.* stressed that "the principles of administration of justice have always accepted the practice of trying joint offenders jointly irrespective of the attendant inevitable minimum prejudices."²⁸ The Prosecution further stresses that as reflected by Rule 136(2), the joinder affords each of the persons charged with the same rights as if they were tried separately.²⁹ A joinder will not interfere with the right of Mr Gbagbo and Mr Blé Goudé to be tried without undue delay as guaranteed by Article 67(c) of the Statute.

(vi) A joinder will not result in a prejudice to the Accused

22. The trial is being held before professional judges and not a jury. In the case that evidence may be admissible against one accused and not the other, the Chamber will be in a position to guard itself against any potential prejudice.³⁰ Additionally,

²⁷ ICTR: *The Prosecutor v. Ndayambaje*, Decision on Defence Motion for Separate Trial, 25 April 2001, paras 16-20; cited in Archbold: International Criminal Courts, Practice, Procedure & Evidence, Sweet & Maxwell, 2003, Chapter 8, p. 207. At para.19, the Chamber noted: "[T]he European Court of Human Rights held that the fact that an accused might be tried faster, should severance be granted, does not *per se* render unreasonable the length of the proceedings. Indeed, the Court held in the *Neumeister v. Austria* case, which involved 11 co-accused, that: 'the course of the investigation would probably have been accelerated had the applicant's case been severed from those of his co-accused, but nothing suggests that such a severance would have been compatible with the good administration of justice.'" *The Prosecutor v. Bagosora*, ICTR-96-7, *Kabiligi*, ICTR, 97-34, *Ntabakuze*, ICTR-97-30, and *Nsengiyumva*, ICTR-96-12, 29 June 2000, para.148: "It is necessary to look at the totality of the situation and the legal reasons for joinder in spite of some amount of delay."

²⁸ See ICTY: *Prosecutor v. Delalić et al.*, Decision on the Motion by Defendant Delalić Requesting Procedures for Final Determination of the Charges against Him, 1 July 1998, para.35.

²⁹ *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07-257, Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI, 10 March 2008, p.8.

³⁰ SCSL: *Prosecutor v. Norman, Fofana and Kondewa*, Decision and Order on Prosecution Motion's for Joinder, 27 January 2004, p.9, 10, para.18(k).

the Prosecution notes that the possibility of antagonistic defences does not constitute *per se* a conflict of interests capable of causing serious prejudice.³¹

Conclusion

23. For the foregoing reasons, the Prosecution respectfully requests the Chamber to join the cases of *the Prosecutor vs Messrs GBAGBO and BLÉ GOUDÉ*, as soon as practicable.



Fatou Bensouda, Prosecutor

Dated this 16th day of December 2014

At The Hague, The Netherlands

³¹ ICTY: *The Prosecutor v. Brdanin and Talic*, IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002, para.21; *The Prosecutor v. Vujadin Popovic et al.*, IT-02-57, Decision on Motion of Joinder, 21 September 2005, para.33.