Trial Chamber I of ICC merges the cases concerning Laurent Gbagbo and Charles Blé Goudé

To ensure effectiveness, consistency and maximisation of resources, the Trial Chamber I of the International Criminal Court (ICC) today the 11th of March 2015 has decided upon the request of the prosecutor to join the cases concerning Messrs. Laurent Gbagbo and Charles Blé Goudé. The two accused faced similar charges of crimes against humanity (murder, rape, other inhumane acts or attempted murder, and persecution). Laurent Gbagbo was handed to the ICC custody on 30 November 2011 and his first appearance before the Pre-Trial Chamber was on 05 December 2011 and on 12 June 2014, Pre-Trial Chamber I by a majority affirmed the charges against him while Charles Blé Goudé on the other hand was also surrendered to the ICC on 22 March 2014 by the national authorities of Côte d' Ivoire in accordance with the warrant of arrest issued by the ICC on 21 December 2011, and on 11 December 2014 the Pre-Trial Chamber I confirmed the charges against him. This piece will assume a binary structure; it intends to examine the grounds for joinder of the cases but before we consider that, it is worthwhile to look at the submission of the parties.

The Crimes allegedly committed by the accused in Côte D'Ivoire took place sometimes between 16 December 2010 and 12 April 2011.

After consideration of the request for merger of the cases by the Prosecutor, the Defence team for both accused, the Chamber and the Legal Representative of victims found it necessary that a joint trial will ensure fair and expeditious trial. This position of the Pre-Trial Chamber to join the cases of Gbagbo and Charles Blé is sanction by Articles 64, 67 and 68 of the Rome Statute ('Statute'), Rules 121(10), 131, 132, 132*bis* and 136 of the Rules of Procedure and Evidence ('Rules'), Regulations 20, 21 and 22 of the Regulations of the Registry. We shall in the subsequent paragraphs examine their submissions.

I Submissions of the Parties

As indicated earlier the purpose for joinder of the cases is to ensure fair and expeditious trial. In this light, the Chamber considered the submission of the Prosecution, the Legal Representative for Victims (LRV) and the Defence of Mr. Gbagbo and Mr. Charles Blé.

A. The Submission of the Prosecution

The Prosecution contend that it is plausible to join the cases because according to her, the charges against Mr. Gbagbo and Mr. Blé Goudé are largely similar and the majority of the witnesses and other issues such as the evidence to rely on by her at trial will ease her work. The Prosecution further submit that the Pre-Trial Chamber has affirmed the similarity of both cases.[1] Again, the charged crimes were committed in the same course of transaction and that both Accused allegedly share a common plan and acted in a coordinated manner to execute these crimes.[2] She further instruct that a joint prosecution will avoid duplication of evidence, save time and resources, differential treatment of the accused, minimise hardship to witnesses and the risk that witnesses may be unavailable after testifying in one trial, in this light the likely hood of delay and/or prejudice will be averted.[3]

B. Submission of Legal Representative of Victims

Cognisant of the benefit of join trial and in line with the Prosecution's request, the LRV contend that joinder of the cases will guarantee the safety of victims and witnesses regarding their participation without affecting the rights of the defence because the cases are similar thus other aspects such as duplication and cost will be minimise.[4] It should be noted that as early as Nuremberg, joinder of cases was the rule and not the exception.[5]

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[1] *Gbagbo et Blé Goudé* Decision on Prosecution Request to join cases, ICC-02/11-02/11-222, paras 10 – 11.
[2] *Gbagbo* Prosecution Request, ICC-01/11-01/11-738, paras 1 and 14-16; *Blé Goudé* Prosecution Request, ICC-01/11-02/11-194, paras 1 and 14-16; *Gbagbo et Blé Goudé* Decision on Prosecution Request to join cases, ICC-02/11-02/11-222, para 12.
[3] ICC-02/11-02/11-222, paras 13 – 14 ; See generally joinder or severance of charges in *William A. Schabas*, "The International Criminal Court: A Commentary on the Rome Statute", *Oxford Commentaries on International Law,* Oxford University Press, New York 2010, p. 767.
[4] ICC-02/11-02/11-222, paras 15 – 16.
[5] *William A. Schabas*, "The International Criminal Court: A Commentary on the Rome Statute", *Oxford Commentaries on International Law,* Oxford University Press, New York 2010, p. 767.

C. The Defence Submission of Mr. Gbagbo and Mr. Charles Blé Goudé

(a) Gbagbo Defence Submission

Contrary to the argument of the Prosecution and the LRV, the Defence for Gbagbo argue that the Prosecution has failed to outline the pros and cons of joinder of the cases; and that she has not provided sufficient legal or factual basis for its similarity.[6] The Gbagbo Defence further states that based on the plain language of the provisions, the charges against Gbagbo must first be joined under Article 64(5) of the Statute before trials may be joined under Rule 136 of the Rules, so therefore it is insufficient for unrelated charges to be joint and that if there are differences then joinder *de facto* leads to amendment of charges; in this light she argue that the Prosecution request be denied because the legal argument is weak and certainly not in the interest of justice.[7]

The Gbagbo Defence pointed out that the charges in the Confirmation Decisions are different and that although 4 events underlie the charges against both Accused, the incidents referred to in the context of these events are understood differently in the Confirmation Decision; she proceeds further that the 2011 incident at Yopougon are charged for Mr. Blé and not Mr. Gbagbo; as a consequence she submits that joinder of the cases would result in modification of charges and require the Accused to defend against unconfirmed charges.[8] The Defence further pointed that joinder will negatively affect the administration of justice as some evidence may be relevant for only one Accused; also witnesses will be relied on differently and there will be different Defence cases and possibly different Prosecution cases.[9]

(b) Blé Goudé Defence Submission

The Defence argue that the Prosecution fail to substantiate the similarity of the cases and incorrectly assumed that Rule 136 of the Rules creates a presumption of joinder that ordain the Chamber as the only body to join or serve charges after they are confirmed; she proceed that the charges are not the crimes alleged in the arrest warrant or document containing the charges, but

[6] ICC-02/11-02/11-222, paras 17.
[7] ICC-02/11-02/11-222, paras 18 – 19.
[8] ICC-02/11-02/11-222, paras 20 – 21.
[9] ICC-02/11-02/11-222, para. 23.

only those found in the Confirmation Decisions.[10] She argues that the charges are neither identical nor similar; the events and modes of liability are different; and that the formulation that the crimes were committed in the "same transaction" is derived from the provision in the ICTY Rules of Procedure and Evidence which has no equivalence in the Rome Statute.[11]

Blé's Defence further argue that joint trial will violate his right of adequate time to prepare for trial hence compromising the principle of equality of arms because he has recently appointed a new Defence team that needs to familiarise itself with the complex case; again the Defence team noted that they have to equally familiarise themselves with the Gbagbo's Case, this position is equally share by the Gbagbo's team that have to also familiarise themselves with the Blé' Case.[12]

II Grounds for Joinder of the Cases

As early as Nuremberg the tradition has been joinder of cases for the purpose of fair trial.[13] In the case at hand the applicable law for joinder of cases is Article 64(5) of the Statute that instruct 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" and Rule 136 of the Rules that stipulate further that:

> 1. Persons accused jointly shall be tried together unless the Trial Chamber, on its own motion or at the request of the Prosecutor or the defence, orders that separate trials are necessary, in order to avoid serious prejudice to the accused, to protect the interests of justice or because a person jointly accused has made an admission of guilt and can be proceeded against in accordance with article 65, paragraph 2.
> 2. In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.[14]

The Prosecution contend that contrary to the interpretation of Gbagbo's Defence which undermines the object and purpose of Article 64(5) of the Statute; that in fact the Statute gives

[10] ICC-02/11-02/11-222, para. 24 – 25.
[11] ICC-02/11-02/11-222, para. 26.
[12] ICC-02/11-02/11-222, paras 27 – 28.
[13] *William A. Schabas*, "The International Criminal Court: A Commentary on the Rome Statute", *Oxford Commentaries on International Law,* Oxford University Press, New York 2010, p. 767.
[14] ICC-02/11-02/11-222, paras 40, 41, 44.

the Chamber broad discretion to ascertain whether join charges is appropriate and Rule 136 of the Rules creates a presumption of severance wherein persons are jointly accused.[15] In this light, the Chamber instruct that the above provisions must be read together to give a purposive meaning to the provisions because if it were to construe Article 64(5) of the Statute and Rule 136 of the Rules as submitted by the Defence, then the Chamber's powers to joint persons charged in different confirmation decisions will be rendered sterile unless the facts and circumstances described in these charges are identical; in a nutshell, the Defence erred in its interpretation because in practice it will mean that the Chamber cannot order joinder of charges and trials under Article 64(5) of the Statute and Rule 136 of the Rules.[16] Building from this argument, the Chamber considers that the afore mentioned provisions must be read in line with Article 64(2) of the Statute that commands the Chamber to ensure fair and expeditious trial that is conducted with full respect of the rights of the accused with due regards to the protection of victims and witnesses; this line of reasoning is consonant with the position of Pre-Trial Chamber I, that joint proceedings are consistent with the object and purpose of the Statute and Rules provided it enhance fairness and expeditiousness of the proceedings by eschewing inconsistency in the presentation and assessment of evidence, duplication of evidence, undue impact on victims and witnesses and unnecessary expense.[17]

The Chamber further notes that it has the power to join cases according to the provisions above; she took this position recalling the decision taken in the Katanga Joinder Decision[18] by the Pre-Trial Chamber I that had made a joint application for arrest warrants for alleged crimes arising from the same incident committed by both Accused; she further note that the 'same transaction'[19] test have been applied by the following ad hoc tribunals sanction with the accompanied provisions: ICTY in its Rule 48 of its Rules of Procedure and Evidence; ICTR in Rule 48 of its

[15] ICC-02/11-02/11-222, paras 31 – 32.
[16] ICC-02/11-02/11-222, paras 45 – 46.
[17] ICC-02/11-02/11-222, para. 47, 63.
[18] ICC, http://www.icc-cpi.int/EN_Menus/Search/Pages/results.aspx?k=ICC-01/04-01/07-307 [Access 27 April 2015].
[19] According to Rule 2 (A) of the RPE of ICTY a transaction is defined as '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'.

Rules of Procedure and Evidence; and SCSL in Rule 48 of the SCSL Rules of Procedure and Evidence.[20]

The European Court of Human Rights alluded that proper administration of justice may best be served by joint and parallel progression of cases involving charges which are interdependent and closely related.[21]

Conclusion and Recommendation

It is widely known and acceptable that international criminal law and procedure *prima facie* deals with crimes involving several aspects and multiple charges[22]; for this reason, commonsense dictates that for the purpose of efficiency, time constraint and duplications of materials and evidence and even shielding witnesses and victims from the shackles of trials inherent in this form of procedure as explained above, the plausible and sensible thing to do is to joint cases where appropriate and where it is sanction by the law. A vivid example in this situation is the Nuremberg Trials against the major German war criminals wherein the allied powers developed a policy in the Moscow Declaration of November 1943 under the auspices of Rooselvelt, Churchill, and Stalin; they arrogated to themselves to assemble twenty four persons who should be held responsible for crimes that could not be attributed to a specific geographical setting and would thus have to be tried by common enterprise; as a result, the charges covered a wide range of offences: from crimes against peace and crimes of conspiracy, to incitement to commit war crimes and crimes against humanity, to forced labour programme.[23]

Recent developments in international criminal procedure requires joinder of several cases because of the complexity of the incident and procedure involved; for instance the Prosecutor will be require to merge two or more indictments into a single joint indictment as the basis of a

[20] ICC-02/11-02/11-222, paras 48 – 49.
[21] ICC-02/11-02/11-222, para. 50.
[22] *Safferling Christoph et al*., "The Trial"; International Criminal Procedure, *Oxford University Press*, United Kingdom 2012, p. 431.
[23] *Safferling Christoph et al*., "The Trial"; International Criminal Procedure, *Oxford University Press*, United Kingdom 2012, p. 431.

single trial against several accused persons[24] to do this, the Chamber will have to review the request for joinder by ascertaining whether (i) the rules allow for joinder of the indictments; that is, do the event relate to the 'same transaction' as provided by Rule 48 of the Rules of Procedure and Evidence of ICTY and ICTR, and (ii) should the Chamber deny joinder according to its discretion? On the question of exercising discretion, the following parameters are employed to determine the feasibility of joinder as follows:

> "(a) The joinder of the Accused would avoid duplication of the presentation of evidence related to underlying crimes and to some extent to the criminal responsibility of several of the Accused; minimise hardship to witnesses; and would be in the interests of judicial economy, since, on the basis of the Prosecution's submissions, the length of one joint trial is likely to be significantly shorter than the combined period necessary for two separate trials;
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> (b)That no basis has been identified for concluding that joinder would create a conflict of interest or otherwise prejudice the right of any of the Accused to a fair and expeditious trial, and no basis has been advanced to persuade the Trial Chamber that it is not able to manage the conduct of a joint trial adequately; moreover, the Trial Chamber is confident that by applying existing Rules of Procedure and Evidence, it will be able to ensure to the Accused a fair and expeditious trial..."[25]

Furthermore, Article 64(5) of the Statute as explained above gives the Prosecutor *proprio muto* authority to join or serve proceedings in respect of charges against more than one accused; this position of the ICC to traditionally follow the practice of the UN Tribunals is sanction by Rules 48 and 72 of the Rules of Procedure and Evidence (RPE) of the ICTY.[26]

In sum, it is overwhelmingly clear from the discussion that joinder of cases for the purpose of fairness, judicial economy, minimisation of potential impact on witnesses and victims and concurrent presentation of evidence is not nouvelle in the practice of international criminal procedure; in fact in the recent cases of *Katanga* and *Chui*, the Chamber ordered joinder of the

[24] *Safferling Christoph et al*., "The Trial"; International Criminal Procedure, *Oxford University Press*, United Kingdom 2012, p. 432.

[25] *Safferling Christoph et al*.,"The Trial"; International Criminal Procedure, *Oxford University Press*, United Kingdom 2012, p. 432 – 433.

[26] *Safferling Christoph et al*., "The Trial"; International Criminal Procedure, *Oxford University Press*, United Kingdom 2012, p.433.

cases[27], to this effect the cases of *Gbagbo* and *Blé* should not be an exception provided fairness and the rule of law prevail.

[27] *Safferling Christoph et al*., "The Trial"; International Criminal Procedure, *Oxford University Press*, United Kingdom 2012, p. 33 ; ICC, http://www.icc-cpi.int/EN_Menus/Search/Pages/results.aspx?k=ICC-01/04-01/07-307 [Access 27 April 2015].