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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 COTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

**Reply of the Common Legal Representative of victims to the "Réponse de la
Défense à la « Demande de jonction des affaires *Le Procureur c. Laurent Gbagbo et
Le Procureur c. Charles Blé Goudé* » (ICC-02/11-01/11-738-tFRA)
déposée par l'Accusation." (ICC-02/11-01/11-765)**

Source: Office of Public Counsel for Victims

Document 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
Mr. Eric Macdonald

Counsel for the Defence

Mr. Emmanuel Altit
Ms. Agathe Bahi Baroan

Legal Representatives of the Victims

Ms. Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda
Mr. Enrique Carnero Rojo

**The Office of Public Counsel for the
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**

Other

Mr. Geert-Jan-Alexander Knoops
Mr. Claver N'Dry

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 17 September 2014, the Presidency reconstituted Trial Chamber I (the “*Chamber*”) and referred the case of *The Prosecutor v. Laurent Gbagbo* to it for trial.²

3. 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*”).³

4. On 16 December 2014, the Prosecutor filed a request to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* (the “*Joinder Request*”).⁴

5. On 6 January 2015, the Principal Counsel of the Office of Public Counsel for Victims, acting as Common Legal Representative of the victims authorised to participate in the case (the “*Common Legal Representative*”),⁵ filed a response supporting the Joinder Request.⁶

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 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.

³ 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*”).

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 (the “*Joinder Request*”).

⁵ See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012, pp. 25-26; and the “Second decision on victims’

6. On 12 February 2015, the Defence filed a response opposing the Joinder Request (the “Defence Joinder Response”).⁷

7. On 17 February 2015, the Prosecution filed an application for leave to reply to the Defence’s Response (the “Prosecution Reply Request”).⁸

8. On 19 February 2015, the Defence filed a response opposing the Prosecution Reply Request.⁹ On the same date, the Common Legal Representative filed a response supporting the Prosecution Reply Request, and requesting leave to reply to the Defence Joinder Response (the “Common Legal Representative Reply Request”).¹⁰

9. On 20 February 2015, the Single Judge granted the Prosecution Reply Request and the Common Legal Representative Reply Request, setting the deadline of 23 February 2015 for the filing of replies to a discrete portion of the Defence Joinder Response, namely the portion addressing the interpretation and application of article 64(5) of the Rome Statute and rule 136 of the Rules of Procedure and Evidence (the “Decision on Reply Requests”).¹¹

10. Pursuant to the Decision on Reply Requests, the Common Legal Representative submits her reply to the Defence Joinder Response.

participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384, 6 February 2013, pp. 22-23.

⁶ See the “Consolidated Response of the Common Legal Representative of victims to the Prosecution’s request to join the *Gbagbo* and *Blé Goudé* cases (ICC-02/11-01/11-738) and to the subsequent Defence’s request (ICC-02/11-01/11-742)”, No. ICC-02/11-01/11-743, 6 January 2015.

⁷ See the “Réponse de la Défense à la « Demande de jonction des affaires *Le Procureur c. Laurent Gbagbo* et *Le Procureur c. Charles Blé Goudé* » (ICC-02/11-01/11-738-tFRA) déposée par l’Accusation.”, No. ICC-02/11-01/11-765, 12 February 2015 (the “Defence Joinder Response”).

⁸ See the “Prosecution application for leave to reply to Defence response ICC-02/11-01/11-765”, No. ICC-02/11-01/11-771, 17 February 2015 (the “Prosecution Reply Request”).

⁹ See the “Réponse de la Défense à la « Prosecution application for leave to reply to Defence response ICC-02/11-01/11-765 » (ICC-02/11-01/11-771)”, No. ICC-02/11-01/11-773, 19 February 2015.

¹⁰ See the “Response of the Common Legal Representative of victims to the ‘Prosecution application for leave to reply to Defence response ICC-02/11-01/11-765’ (ICC-02/11-01/11-771)”, No. ICC-02/11-01/11-772, 19 February 2015 (the “Common Legal Representative Reply Request”).

¹¹ See the “Decision on requests for leave to reply to Defence response ICC-02/11-01/11-765” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-775, 20 February 2015 (the “Decision on Reply Requests”).

II. REPLY OF THE COMMON LEGAL REPRESENTATIVE

A. On the Defence's interpretation of article 64(5) of the Rome Statute and rule 136 of the Rules of Procedure and Evidence

11. The Common Legal Representative disagrees with the Defence's interpretation of article 64(5) of the Rome Statute and rule 136 of the Rules of Procedure and Evidence (the "Rules") pursuant to which cases cannot be tried together unless the charges are identical.¹² This reading of the law is inconsistent with the interpretation required by the Vienna Convention on the Law of Treaties (the "Vienna Convention").¹³ The Defence makes a very narrow reading of article 64(5) and rule 136(1), limiting their scope of application in a manner contrary to their literal wording, context, purpose and drafting history. Moreover, the Common Legal Representative submits that the Defence's contention that the Chamber may not rely on the jurisprudence of other international criminal tribunals to decide on the procedural issue at hand is inconsistent with article 21(1)(b) of the Rome Statute. Accordingly, the Common Legal Representative contends that the Defence's interpretation of article 64(5) and rule 136 must not be endorsed by the Chamber.

12. Firstly, the interpretation of article 64(5) of the Rome Statute and rule 136(1) of the Rules must follow the rules of interpretation contained in articles 31 to 33 of the Vienna Convention. As stated by the Appeals Chamber, "[t]he interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties [...] The principal rule of interpretation is set out in article 31(1) that reads: '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.' [...] The context of a given legislative provision is defined by the particular sub-section of the law read

¹² See the Defence Joinder Response, *supra* note 7, para. 29.

¹³ See Vienna Convention on the Law of Treaties, UN Doc. A/Conf.39/27, 1155 UNTS 331, 23 May 1969 (entered into force on 27 January 1980) (the "Vienna Convention").

*as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty”.*¹⁴

13. The Common Legal Representative submits that the literal tenor of article 64(5) of the Rome Statute allows for the joinder of cases without the need for the charges to be identical (“[t]he Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused”), and that the wording of rule 136(1) of the Rules directs the Chamber to hold joint trials where more than one person has been charged jointly but does not prohibit a joint trial in different circumstances (“[p]ersons accused jointly shall be tried together [...]”). In other words, the literal wording of these provisions does not support the Defence’s contention that joint trials pursuant to rule 136(1) can take place only if the charges are identical and are previously joined under article 64(5).¹⁵

14. Indeed, ruling on the *Katanga and Ngudjolo* decision considered inapplicable by the Defence,¹⁶ the Appeals Chamber expressly found in general terms that a joint trial is the normal consequence of accused persons being jointly charged, and impliedly concluded that joint trials may also be ordered where the accused persons have not been jointly charged: “[t]he power to sever charges against more than one accused [under article 64(5)] presupposes that the charges levied against them are the subject of the same accusation. [...] [t]he phrase “persons accused jointly shall be tried together” [in rule

¹⁴ See the “Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases” (Appeals Chamber), No. ICC-01/04-01/07-573 OA6, 9 June 2008, para. 5. 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, para. 33; and the “Judgement on the Appeal of the Prosecutor Against the ‘Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules’ of Pre-Trial Chamber I” (Appeals Chamber), No. ICC-01/04-01/07-776 OA7, 26 November 2008, para. 82.

¹⁵ See the Defence Joinder Response, *supra* note 7, paras. 26, 32 and 35.

¹⁶ *Idem*, para. 31.

136(1)] is, founded on the premise that joinder of more than one person in the same document containing the charges, is the norm".¹⁷

15. Addressing the teleological interpretation of the abovementioned provisions, the Appeals Chamber concluded in the same judgment that "[t]he 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".¹⁸ This finding is consistent with the argument raised by the Defence that rule 136 of the Rules requires examining whether joining the adjudication of the case against Mr. Gbagbo with that of the case against Mr. Blé Goudé "*permettrait une meilleure administration de la Justice et un meilleur respect des droits de la défense*".¹⁹

16. In this regard, the Common Legal Representative agrees with the submissions made by the Prosecution in the Joinder Request,²⁰ and reiterates her prior submissions regarding the victims' interests in the expeditiousness of the proceedings.²¹

17. Lastly, the contextual interpretation of article 64(5) of the Rome Statute and rule 136(1) of the Rules required by the Vienna Convention also runs against the Defence's reading of the former provision as a condition prior to the application of the latter provision.²² The Common Legal Representative submits that other subsections of article 64 of the Rome Statute clearly indicate that the power of the Trial Chamber to order the joinder of trials is not limited to the instances identified by the Defence, namely where the charges are identical and have been previously joined.

¹⁷ See the "Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases", *supra* note 14, para. 7 (emphasis added).

¹⁸ *Idem*, para. 8.

¹⁹ See the Defence Joinder Response, *supra* note 7, para. 30.

²⁰ See the Joinder Request, *supra* note 4, para. 22.

²¹ See the Common Legal Representative Reply Request, *supra* note 10, para. 11.

²² See the Defence Joinder Response, *supra* note 7, para. 34.

For instance, article 64(6)(f) expressly grants the Trial Chamber the power to “*rule on any other relevant matter*”, without attaching any conditions. If any conditions were to apply to the joinder of trials, at most they would be limited to those mentioned in article 64(2), namely ensuring the “*respect for the rights of the accused and [have due regard] for the protection of victims and witnesses*”. In fact, the very Defence concedes this point, noting that the respect of the rights of the defence must be observed before trials can be joined.²³

18. Moreover, pursuant to article 32 of the Vienna Convention, the Common Legal Representative submits that the meaning resulting from the literal, contextual and teleological interpretation of article 64(5) of the Rome Statute and rule 136(1) of the Rules provided in paragraphs 12 to 17 above is supported by the preparatory works of the Rome Statute and the Rules of Procedure and Evidence.

19. In particular, it must be noted that the initial proposal by the International Law Commission on the eventual article 64(5) of the Rome Statute provided that “[t]he Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation”,²⁴ but this text was subsequently amended on the basis of the rules of procedure and evidence of the *ad hoc* tribunals to read as follows: “The Trial Chamber may direct that there be joinder or severance in respect of charges against more than one accused arising out of the same or related factual situations”.²⁵ This text was eventually amended into its current wording. Accordingly, there is no basis in the drafting history supporting the Defence’s contention that charges must be the same for the charges to be joined under article 64(5) of the Rome Statute.

²³ *Idem*, paras. 30 and 36.

²⁴ See the Report of the International Law Commission on Its Forty-Sixth Session, Draft Statute for An International Criminal Court, 2 May-22 July 1994, UN doc. A/49/10(SUPP), September 1994, article 38(3) (emphasis added).

²⁵ See the text put forward by a group of interested delegations on Article 64, UN doc. A/CONF.183/C.1/WGPM/L.41, 4 July 1998, article 64(5) (emphasis added). See also the Draft Set of Rules of Procedure and Evidence for the International Criminal Court, Working paper submitted by Australia and the Netherlands, UN doc. A/AC.249/L.2, 26 July 1996, rule 62; and the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II, Compilation of Proposals, UN doc. A/51/22, Volume II, 13 September 1996, p. 181.

20. Similarly, the negotiation process of rule 136(1) of the Rules does not support the Defence's contention that trials can be joined only if the charges have been previously joined. In fact, the original proposal behind this rule expressly indicated that "[t]his rule seeks to identify grounds upon which the Trial Chamber may direct that there be severance in respect of charges against more than one accused pursuant to article 64, paragraph 5. It follows closely rule 82 (B) of the ICTY Rules".²⁶ In turn, rule 82(B) of the ICTY Rules of Procedure and Evidence provides that "[t]he Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice".²⁷ This draft was eventually rephrased into the current wording of rule 136(1) of the Rules.²⁸ Accordingly, there is no basis in the drafting history supporting the Defence's contention that trials can be joined pursuant to said rule only if the charges are the same.

21. Secondly, contrary to the Defence's contentions,²⁹ it is the view of the Common Legal Representative that although the Chamber is bound, in the first place, to apply the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence pursuant to article 21(l)(a) of the Rome Statute, it may also rely on the relevant practice of other international criminal tribunals when adopting its decisions—for "informative purposes" or as a "persuasive authority".³⁰

²⁶ See the Draft Rules of Procedure and Evidence of the International Criminal Court: Proposal Submitted by Australia, UN doc. PCNICC/1999/DP.1, 26 January 1999, rule 81.

²⁷ See the ICTY Rules of Procedure and Evidence, doc. No. IT/32/Rev. 14, 17 December 1998, rule 82(B).

²⁸ See the Proceedings of the Preparatory Commission at its second session (26 July–13 August 1999), UN doc. PCNICC/1999/L.4/Rev.1, 18 August 1999, rule 6.15 (joint and separate Trials).

²⁹ See the Defence Joinder Response, *supra* note 7, para. 45.

³⁰ See NERLICH (V.), 'The status of ICTY and ICTR precedent in proceedings before the ICC', in STAHN (C.) and SLUITER (G.) (eds.), *The Emerging Practice of the International Criminal Court*, Leiden: Koninklijke Brill, 2009, pp. 317-332; and GOY (B.), 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *Ad Hoc* Tribunals', 2012 *International Criminal Law Review*, n. 12, pp. 3-5. See also DZEHTSIAROU (K.), 'Comparative Law in the Reasoning of the European Court of Human Rights', 2010 *University College Dublin Law Review*, n. 10, pp. 129 and 139, referring to the consideration of national law by the European Court of Human Rights.

22. Admittedly, the Appeals Chamber noted *“the different statutory provisions that apply to [the ICTY], [and the] non-binding nature of [its] jurisprudence upon this Court”* pursuant to article 21 of the Rome Statute.³¹ As a consequence, the Appeals Chamber found that the Court cannot go beyond the scope of its very Statute relying on the legal instruments of other tribunals, irrespective of whether the particular provision raised before it is identical to the one in the Statute.³² Following the same logic, the Appeals Chamber found that the *“jurisprudence [of other international tribunals, including the ICTY], which is based on specific provisions in those tribunals’ legal texts, cannot overrule statutory requirements for the proceedings at this Court”*.³³

23. However, several Trial Chambers considered the law and practice of the other international criminal tribunals in circumstances where, as pointed out by the Defence,³⁴ the legal instruments of the Court are not exhaustive and there is no precedent before another Chamber. In said situations, Chambers of this Court found that *“jurisprudence from the ad hoc tribunals may assist the Chamber in its interpretation of the Statute”*³⁵ because *“[a]lthough the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the ad hoc tribunals are in a clearly comparable position to the Court”* in some particular contexts and therefore *“their experience is potentially of [direct] relevance”*.³⁶ Other Chambers simply

³¹ See the “Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’” (Appeals Chamber), No. ICC-01/09-01/11-414 OA3 OA4, 24 May 2012, para. 31; and the “Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome’” (Appeals Chamber), No. ICC-01/09-02/11-425 OA4, 24 May 2012, para. 37.

³² See the “Decision on the ‘Registrar’s Submissions under Regulation 24bis of the Regulations of the Court in Relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800’ of 5 October 2011” (Appeals Chamber), No. ICC-01/04-01/06-2823 OA20, 21 November 2011, para. 16.

³³ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 56.

³⁴ See the Defence Joinder Response, *supra* note 7, paras. 25 and 31.

³⁵ See the “Corrigendum to Redacted Decision on the defence request for the admission of 422 documents” (Trial Chamber I), No. ICC-01/04-01/06-2595-Red-Corr, 8 March 2011, para. 54.

³⁶ See the “Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010” (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, para. 15. See also the

clarified that they do “not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis”,³⁷ but that “[t]he jurisprudential legacy of such other tribunals and courts, which is not as such applicable law before the Court, may be referred to by chambers of this Court within the parameters of article 21 of the Statute [...] to overcome possible shortcomings of the Court’s primary legal texts and embed[s] the Statute in the broader normative environment of international criminal law”.³⁸

24. Against this background, the Common Legal Representative disagrees with the Defence that article 21 of the Rome Statute and the jurisprudence of the Court prohibit any reliance by the Chamber on the statutory or case law of other international criminal tribunals for the interpretation and application of article 64(5) and rule 136(1).³⁹ In particular, the Common Legal Representative contends that the ICTY concept of “same transaction” may indeed serve as an aid for the interpretation and application of the provisions of the Court regulating the joinder of trials, as suggested by the Prosecution.⁴⁰ The reasons provided by the Defence to reject the consideration of the concept of “same transaction” when applying article 64(5) of the Rome Statute and rule 136(1) of the Rules are merely formal and not substantive.

25. The Defence argues that the “same transaction” concept is only applicable in proceedings such as those before the ICTY, where the charges are not examined in front of the Defence before the start of the trial.⁴¹ However, the Defence fails to notice

“Redacted Decision on the Prosecution’s Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005” (Trial Chamber I), No. ICC-01/04-01/06-2727-Red, 28 April 2011, para. 41; the “Public Redacted Decision on the prosecution’s request for non-disclosure or redactions of material relating to Witnesses 304, 305, 306 and 312” (Trial Chamber IV), No. ICC-02/05-03/09-265-Red, 28 February 2012, para. 20; and the “Decision on Sentence pursuant to Article 76 of the Statute” (Trial Chamber I), No. ICC-01/04-01/06-2901, 10 July 2012, para. 12.

³⁷ See the “Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial” (Trial Chamber I), No. ICC-01/04-01/06-1049, 30 November 2007, para. 44.

³⁸ See the “Dissenting Opinion of Judge Hans-Peter Kaul to the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya” (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 1 April 2010, para. 30.

³⁹ See the Defence Joinder Response, *supra* note 7, paras. 43-46.

⁴⁰ See the Joinder Request, *supra* note 4, para. 15.

⁴¹ See the Defence Joinder Response, *supra* note 7, para. 43.

that the charges need not be examined during contradictory proceedings before the Court. Indeed, the suspect may simply not challenge the evidence or otherwise respond,⁴² and the suspect need not even be present during the confirmation proceedings.⁴³ In said instances, the trial of the accused may still be joined with the trial of another person.

26. Similarly, the Defence claims that article 64(5) of the Rome Statute is not imprecise enough to require a reference to other sources of law. This statement is in clear contradiction with the previous statement by the Defence according to which this provision, together with rule 136 of the Rules, does not indicate the time where a request for joinder must be made, the Chamber competent to rule on said request and, more importantly, *“il n’est d’ailleurs pas précisé sur quel fondement juridique une jonction peut être demandée”*.⁴⁴ It is precisely to clarify the content of article 64(5) and rule 136(1) that the concept of “same transaction” envisaged in ICTY rule 48 was suggested.

27. In fact, as indicated in paragraph 19 above, the drafters of article 64(5) of the Rome Statute had the concept of “same transaction” in their minds from the very first moment of the negotiations, as the original proposal of the International Law Commission made express reference to ICTY rule 48.⁴⁵

28. In these circumstances, the Common Legal Representative submits that, contrary to the Defence’s contention, the Chamber may rely on the jurisprudence of the ICTY on the concept of “same transaction” pursuant to article 21 of the Rome Statute in order to rule on the procedural issue at hand.

29. In this regard, the ICTY indicated that “[t]here is no requirement that the acts or omissions alleged to form the same transaction took place at the same “exact” time or were

⁴² See the “Corrigendum of the ‘Decision on the Confirmation of Charges’” (Pre-Trial Chamber I), No. ICC-02/05-03/09-121-Corr-Red, 8 March 2011, para. 21.

⁴³ See Rome Statute, article 61(2).

⁴⁴ See the Defence Joinder Response, *supra* note 7, para. 25.

⁴⁵ See the Report of the International Law Commission on Its Forty-Sixth Session, *supra* note 24, p. 55.

*committed together in the same “exact” place. What is essential is that there are factual allegations in the indictment sufficient to support a finding that the alleged acts or omissions form part of a common scheme, strategy or plan”.*⁴⁶ Moreover, “[t]here is no requirement that the events constituting the “same transaction” take place at the same time or be committed together”.⁴⁷

30. In conclusion, the Defence’s contention that the Prosecution must justify why the charges against Mr. Gbagbo and Mr. Blé Goudé must be joined and, thereafter, why these charges must be jointly tried is premised on a misinterpretation of the Rome Statute and the Rules of Procedure and Evidence. Contrary to the Defence’s contention,⁴⁸ the Joinder Request is properly based on rule 136 of the Rules. Similarly, the Chamber may consider the law and practice of the ICTY on the concept of “same transaction” when ruling on the Joinder Request.

B. On the Defence’s application of article 64(5) of the Rome Statute and rule 136 of the Rules of Procedure and Evidence

31. The Common Legal Representative disagrees with the Defence’s contention that the charges against Mr. Gbagbo and against Mr. Blé Goudé are not close enough to merit a joinder of their respective trials.⁴⁹ Pursuant to the interpretation of article 64(5) of the Rome Statute and rule 136 of the Rules provided in section A above, the alleged existence of a common plan between Mr. Gbagbo and Mr. Blé Goudé confirmed by the Pre-Trial Chamber suffices as such to order the joinder of the cases for trial, and it is not required for this purpose that the facts underlying each charge confirmed against each Accused be exactly identical.⁵⁰ Moreover, the charges

⁴⁶ See ICTY, *Prosecutor v. Gotovina, Prosecutor v. Čermak and Markač*, Cases Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR.2, Decision on Interlocutory Appeals against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 21.

⁴⁷ See ICTY, *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal against Decision on Joinder of Accused, 27 January 2006, para. 7.

⁴⁸ See the Defence Joinder Response, *supra* note 7, paras. 39 and 110.

⁴⁹ *Idem*, paras. 63 and 89.

⁵⁰ *Ibid.*, paras. 69, 78 and 82.

confirmed against each Accused are similar enough to grant the Joinder Request, considering the almost identical crimes alleged against each Accused and the complementary nature of the modes of liability alleged against each Accused. Accordingly, the Common Legal Representative contends that the Defence's application of article 64(5) and rule 136 must be disregarded by the Chamber.

32. As submitted by the Defence,⁵¹ at the current stage of the proceedings any discussion on the application of article 64(5) of the Rome Statute and rule 136 of the Rules to the current case must rely on a comparison of the *Gbagbo* Confirmation Decision and the *Blé Goudé* Confirmation Decision. However, the Common Legal Representative submits that it is not necessary that the charges confirmed against each Accused be exactly identical in order for the Chamber to grant the Joinder Request.

33. As argued in paragraphs 28 and 29 above, article 64(5) of the Rome Statute and rule 136 of the Rules only require that the charges confirmed against both Accused are sufficiently related, for instance by forming part of a common scheme, strategy or plan. Accordingly, contrary to the Defence's contention,⁵² the Common Legal Representative submits that the reference to a "common plan" between Mr. Gbagbo and Mr. Blé Goudé must not be read in this context as an element of the mode of liability of co-perpetration under article 25(3)(a) of the Rome Statute but as a factor supporting the Joinder Request pursuant to the abovementioned provisions. In fact, the Defence concedes that the alleged "common plan" is a way used by the Prosecution to link the alleged conduct of Mr. Gbagbo with that of Mr. Blé Goudé.⁵³

34. Moreover, the related arguments of the Defence are equally flawed from the outset, since they also rely on a misunderstanding of the applicable legal framework discussed in paragraph 11 above.

⁵¹ *Ibid.*, paras. 55 and 70.

⁵² *Ibid.*, paras. 69 and 86.

⁵³ *Ibid.*, para. 71.

35. Contrary to the submissions of the Defence, the fact that the particular facts underlying each of the charges confirmed against Mr. Gbagbo are not identical to those of the charges confirmed against Mr. Blé Goudé does not necessarily mean that their trials cannot be joined. In fact, if a perfect match of the incidents underlying the charges were required, a very limited number of trials could ever be joined pursuant to rule 136 of the Rules, as implicitly pointed out by the Defence by referring to “*l’identité parfaite des charges qui avait permis la jonction dans les affaires Katanga et Chui [...] poursuivis comme co-auteurs indirects pour exactement les mêmes faits*”.⁵⁴

36. The practice of the ICTY is illustrative in this regard because it has established that it is sufficient for ordering the joinder of trials that the persons be accused of facts that, if not identical, are sufficiently related in time and space.⁵⁵

37. Applying this approach to the present case, the Common Legal Representative submits that the underlying facts of the incidents confirmed in the *Gbagbo* Confirmation Decision and the *Blé Goudé* Confirmation Decision are sufficiently related to be adjudicated in a joint trial pursuant to rule 136 of the Rules.

38. In particular, the *Gbagbo* Confirmation Decision makes reference to four incidents also mentioned in the *Blé Goudé* Confirmation Decision, namely i) the sexual violence perpetrated during and after the demonstrations before the seat of the *Radiotélévision ivoirienne* in Abidjan between 16 and 19 December 2010,⁵⁶ ii) the attack against a women’s demonstration in Abobo on 3 March 2011,⁵⁷ iii) the shelling

⁵⁴ *Ibid.*, para. 73. See also *ibid.*, para. 19.

⁵⁵ See for instance ICTY, *Prosecutor v. Milutinović et al.*, *Prosecutor v. Pavković et al.*, Case Nos. IT-99-37-PT and IT-03-70-PT, Decision on Prosecution Motion for Joinder, 8 July 2005.

⁵⁶ See the *Gbagbo* Confirmation Decision, *supra* note 1, paras. 25-41; and the *Blé Goudé* Confirmation Decision, *supra* note 3, paras. 18-25.

⁵⁷ See the *Gbagbo* Confirmation Decision, *supra* note 1, paras. 43-51; and the *Blé Goudé* Confirmation Decision, *supra* note 3, para. 40.

of a market and its surroundings in Abobo on 17 March 2011,⁵⁸ and iv) the sexual violence inflicted in Yopougon on or around 12 April 2011.⁵⁹

39. As argued in paragraphs 12 to 17 above, article 64(5) of the Rome Statute and rule 136(1) of the Rules do not require that the particular conduct alleged against each accused be the same regarding each of the abovementioned incidents for the their trials to be joined. Accordingly, it is irrelevant that Mr. Blé Goudé has not been charged as an indirect co-perpetrator under article 25(3)(a) of the Rome Statute for three of the four incidents mentioned above.⁶⁰

40. In this regard, contrary to the Defence's contention,⁶¹ the fact that the particular modes of liability for each of the abovementioned incidents confirmed against Mr. Gbagbo are not identical to those in the charges confirmed against Mr. Blé Goudé does not necessarily mean that their trials cannot be joined. In fact, requiring a perfect identity in the modes of liability as argued by the Defence for a joinder of trials would be contrary to the literal, contextual and teleological interpretation of article 64(5) of the Rome Statute and rule 136(1) of the Rules provided in paragraphs 12 to 17 above.

41. Moreover, requiring a perfect identity in the modes of liability confirmed by the Pre-Trial Chamber would mean that principals and accessories could never be tried together before the Court. By contrast, other international criminal tribunals held joint trials in cases concerning some persons accused as principals and other persons accused as accessories of the same crimes.⁶²

⁵⁸ See the *Gbagbo* Confirmation Decision, *supra* note 1, paras. 53-63; and the *Blé Goudé* Confirmation Decision, *supra* note 3, paras. 42-43.

⁵⁹ See the *Gbagbo* Confirmation Decision, *supra* note 1, paras. 65-72; and the *Blé Goudé* Confirmation Decision, *supra* note 3, paras. 45-50.

⁶⁰ See the Defence Joinder Response, *supra* note 7, paras. 65, 70 and 72.

⁶¹ *Idem*, paras. 66 and 78.

⁶² See ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, Volume 3 of 4, 26 February 2009, paras. 287, 458, 612, 768, 913 and 1114.

42. Against this background, the Common Legal Representative submits that instead of “*un lien suffisamment fort entre les accusés qui expliquerait qu’ils aient eu un comportement semblable dans les mêmes circonstances*”,⁶³ it suffices that Mr. Gbagbo and Mr. Blé Goudé are alleged to have played a role in some of the incidents contained in the charges confirmed against them. This is the scenario presented in the case at hand, where, as implicitly conceded by the Defence,⁶⁴ the responsibility of Mr. Blé Goudé may be properly understood for some incidents as that of an accessory to Mr. Gbagbo pursuant to the *Blé Goudé* Confirmation Decision. In these circumstances, far from leading to “*une vraie cacophonie*”,⁶⁵ the joint trial of the cases against Mr. Gbagbo and against Mr. Blé Goudé would allow the Prosecution and the Chamber to comply with their duty to establish the truth of what happened during the post-electoral violence in Côte d’Ivoire.⁶⁶

43. In conclusion, the Defence’s contention that cases against Mr. Gbagbo and Mr. Blé Goudé cannot be joined because the charges are not the same is premised on the misinterpretation of the Rome Statute and the Rules addressed in section A above. Contrary to the Defence’s contention,⁶⁷ the Joinder Request is properly based on the fact that the case against Mr. Gbagbo and the case against Mr. Blé Goudé can reasonably be seen as sufficiently related.

⁶³ See the Defence Joinder Response, *supra* note 7, para. 86.

⁶⁴ *Idem*, para. 72.

⁶⁵ *Ibid.*, para. 88.

⁶⁶ See Rome Statute, articles 54(1)(a) and 69(3).

⁶⁷ See the Defence Joinder Response, *supra* note 7, paras. 39 and 110.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Trial Chamber to grant the Joinder Request.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 23rd day of February 2015

At The Hague, The Netherlands