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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 Document

Defence Response to *Prosecution's Request to join the cases of "The Prosecutor v. Laurent Gbagbo" and "The Prosecutor v. Charles Blé Goudé" (ICC-02/11-01/11-738)*

Source: Defence team for Laurent Gbagbo

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart

Counsel for the Defence

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Legal Representatives of the Victims

Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

M. Herman Von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr Geert-Jan Alexander Knoops

Introduction

1. The Defence submits: (1) that the Prosecution request should be dismissed *in limine* for lack of grounds or rationale.

2. Should the Chamber deem it necessary to consider the request for joinder, based on the scanty information presented by the Prosecution, the Defence would: (2) argue, that the Prosecution departed from the applicable law; (3) subsequently, examine whether Prosecution allegations about the joinder of charges are correct; and (4) then analyse the legal implications of the joinder of cases.

1. *In limine*: as to dismissal of the Prosecution request for lack of grounds and rationale.

3. The Defence notes the brevity of the Prosecution's request. The request is notably short, indeed too short to have been based on a proper rationale, and in any event, too short to present real grounds.

4. At this juncture, it should be noted that the Gbagbo case has been particularly complex: the pre-trial stage of the case has been the longest in the history of the ICC; close to 34 months between the first appearance before the Pre-Trial Chamber and the constitution of a Trial Chamber,¹ whereas the average duration of the confirmation of the charges phase is approximately 11 months.²

5. It should be pointed out that, to date, this is the most significant and the most complex case to be tried by the ICC, in terms of its challenges, the identities and sheer number of people involved in the post-election violence and the fact that it has

¹ ICC-02/11-01/11-682.

² *Lubanga Dyilo* case: 14 months; *Katanga* case: 12 months; *Ngudjolo Chui* case: 8 months; *Bemba* case: 14 months; *Abu Garda* case: 11 months; *Banda Abakaer Nourain* case: 8 months; *Mbarushimana* case: 11 months; *Ruto and Sang* case: 10 months; *Kenyatta* case: 13 months.

recorded the largest volume of documents exchanged at this stage: 624 filings amounting to 25 407 pages have been shared between the parties, generating 247 decisions which amount to 3 249 pages. The Prosecution has filed three different Documents Containing the Charges (DCC).³

6. The decision on the confirmation of charges in *Gbagbo* attests to the complexity of this case. In 143 pages, it reviews and analyses all the allegations, relying on evidence relating to 39 events, including four main events,⁴ which cover numerous incidents. Furthermore, the Judges maintained six different modes of liability, considering the various forms of liability listed in article 25(3)(b). In addition to that decision, there is a singularly edifying dissenting opinion.⁵

7. The *Blé Goudé* case is just as complex. The confirmation of charges decision is 90 pages long.⁶ The Judges relied on 5 major events composed of several incidents, each of which falls under one or several specific modes of liability.

8. Recently, the Trial Chamber in *Kenyatta* reminded both the Defence and the Prosecution of their duty to make clear and precise submissions, in particular, when dealing with a matter yet to be considered by the Judges. The Chamber noted that since “the submissions of the Prosecution and Defence [...] lack sufficient reasoning regarding the legal basis for the remedies being sought”,⁷ “[g]iven the seriousness of the remedies requested, it should have been incumbent upon the parties to thoroughly support those requests, by reference not just to the factual circumstances but also to applicable legal standards, principles and authorities.”⁸

³ ICC-02/11-01/11-124-Conf-Anx1; ICC-02/11-01/11-357-Conf-Anx1; ICC-02/11-01/11-592-Conf-Anx2-Corr2.

⁴ ICC-02/11-01/11-656-Conf.

⁵ ICC-02/11-01/11-656-Anx.

⁶ ICC-02/11-02/11-186.

⁷ ICC-01/09-02/11-981, para. 41.

⁸ ICC-01/09-02/11-981, para. 41.

9. Yet, in the instant case, at no time does the Prosecution develop reasoning, in sufficient and precise detail, to clarify the legal basis for its request. Furthermore, it has not presented any argument based on fact. In fact, it has failed to analyse, in sufficient detail, the charges made in either cases in order to prove any similarities. The Prosecution merely submits opinions to the Judges. This is inadequate from a legal standpoint especially with respect to a decision as important as the decision on joinder.

10. As a matter of fact, a decision on joinder triggers a change in the procedural framework and in perspective:

11. Laurent Gbagbo was transferred to the Detention Centre on 30 November 2011 and made his first appearance before the ICC on 5 December 2011. For over 3 years therefore, he has been prosecuted alone before the Court. In requesting a joinder with another case, the Prosecution is asking for the terms of the trial to be modified. In fact, a joinder sets a new procedural and factual framework for a case.

12. Consequently, it is critical to verify whether the joinder could “cause serious prejudice to the accused,” and whether it is not “in the interests of justice” to “order separate trials” in accordance with rule 136(1).

13. Any joinder would equally alter the perspective for understanding the proceedings.

14. In fact, the decision on joinder will have an immediate impact on how this case will be understood by the bench and by opinion outside the Court. In a joint case, accusations made against one of the suspects “colour” perception of the role that the other suspect may have played in the events. The decision on joinder will therefore have an immediate impact on the merits of the case. Often, a decision on joinder reveals a bias or at least, a certain perception of the case prior to any hearing

although such perception may be challenged at trial, such that the joinder appears, *a posteriori*, counterproductive. In any event, it is often difficult to ensure respect for the rights of the Defence where the configuration of the case is, by definition, unfavourable to any of the accused.

15. That is why a decision on joinder must be made only after careful review of pending matters and of its potential impact on the conduct of proceedings against the accused.

16. In fact, on several occasions the Single Judge has noted “the crucial importance of the issue [of joinder] and the potential impact the Chamber's decision could have on the conduct of proceedings and the rights of the accused”.⁹

17. Hence, the Prosecution should have conducted a thorough assessment of the advantages and disadvantages of the requested joinder in order to present a cost-benefit analysis to the Judges. This, however, was not done. Rather, the Prosecution merely states, without any substantiation and relying solely on jurisprudence from the *ad hoc* tribunals, that the joinder would be advantageous.¹⁰

18. It was all the more necessary for the Prosecution to present a cost-benefit analysis of a joinder, since experience from the *ad hoc* tribunals has shown that joinders can complicate proceedings to the extent of undermining the proper administration of justice.¹¹

19. Further, the Prosecution’s premise is that the charges are allegedly the same. Yet, this premise is only a mere statement which the Prosecution ought to have substantiated, especially as the charges are, in fact, dissimilar as shown below.

⁹ ICC-02/11-01/11-744, para.10; *Blé Goudé* case, ICC-02/11-02/11-200, para. 5 and ICC-02/11-02/11-209, para. 13.

¹⁰ See Section 3.1.2

¹¹ Regarding issues raised in *ad hoc* tribunals relating to the joinder of cases, See Sluiter et al. (eds.), *International Criminal Procedure: Principles and Rules* (OUP, 2013) 491-534.

20. It was all the more crucial for the Prosecution to take time to explain how and why the joinder is necessary and relevant, as this is the first debate of this nature before the Court. In fact, this is the first time that a Trial Chamber has to rule on the joinder of two cases in the trial phase. As the Statute and the Regulations provide little guidance to the Judges on the requisite procedure and the criteria for ordering such a joinder, the Prosecution has a duty to present highly rigorous and flawless arguments which provide the Defence with relevant points for discussion and the judges with material they can rely on to make an informed decision.

21. The Prosecution having failed to accomplish its duty, the Defence requests the Chamber to dismiss the Prosecution application *in limine* and prays it to instruct the Prosecution to file a new application that sufficiently satisfies the criteria of clarity and proper reasoning to prompt an effective debate on the matter.

2. Applicable law for the joinder procedure.

22. Should the Chamber wish to consider whether it is appropriate to have a joinder at this stage, the Defence would present a certain number of arguments in response to the Prosecution request. In the interim, to facilitate understanding of the submissions below, it is necessary first to examine the law applicable to a request for joinder.

23. Only one provision of the Statute, article 64(5), mentions the issue of joinder. It states 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.”

24. According to rule 136 of the RPE, titled “Joint and separate trials”:

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. In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.¹²

25. These two provisions address neither the procedural aspects of a joinder – in particular those relating to the timeframe for submission of the request or the Chamber that has jurisdiction to rule on the request - nor substantive matters. Furthermore, they do not state the legal grounds on which a joinder may be requested. To determine such grounds, it is important to analyse both provisions carefully.

26. It is evident from rule 136 that there are, indeed, two stages in succession in the joinder procedure, namely: the joinder of **charges** under article 64(5) of the Statute; and the joinder of **trials** under rule 136. This analysis stems from the wording of the two provisions: in fact rule 136 begins with the words “[p]ersons accused jointly,” implying that for the rule to apply there needs to have been a prior joinder of the charges.

27. It follows therefore that it does not suffice for two persons to be accused of related offences within the same case situation, for there to be an automatic joinder of charges and, *a fortiori*, of trials. In making a determination the Judges must be mindful solely of the proper administration of justice. Should they fail to conduct a detailed analysis of the Prosecution request, this could pave the way for all types of abuse. For instance, the Prosecution would only have to claim that a joinder of trials is useful for the joinder to be ordered, whereas it could subsequently emerge that the accusations against each of the accused are different and relate to different facts. Failing a critical and rigorous test by the Defence and then by the Judges of the

¹² Emphasis added.

Prosecution's justification for the request on joinder, there would be no safeguards to decisions on joinder which could later turn out to be abusive and, more importantly, counterproductive. That is why article 64(5) vests the Judges, and not the Prosecutor, with the powers to order a joinder. Consequently, it is incumbent on the judges to determine the relevance and need for such a joinder.

28. Furthermore, the Prosecution has even less reason to decide on a joinder because such joinder, at the trial stage, is no longer based on the allegations contained in the DCC, but on the charges confirmed by the Pre-Trial Chamber. Consequently, it is incumbent on the judges to make a determination based on those decisions and not for the Prosecution to ask for a joinder based on allegations.

29. Regarding the first issue, namely the joinder of charges, such a joinder cannot result automatically from the fact that two individuals are allegedly accused of the same offences within the same case situation. In order for a joinder to be ordered, the charges must be the same. Yet, the notion of "charge" is a complex one: it comprises the facts, the legal characterisation of the facts and the mode(s) of liability.

30. Regarding the second issue, namely the joinder of trials, it is the second stage of the argumentation, which examines whether a joint hearing of the cases of several accused persons would ensure more efficient administration of justice and greater respect for the rights of the defence.

31. It is important to make a distinction between this case and the *Katanga and Chui* case. In fact, in the latter case, the Pre-Trial Chamber used its discretion to order the joinder of the two cases during the confirmation of charges phase.¹³ As no charge had yet been confirmed at the time, this could not amount to a joinder of charges. Hence, it was a very different context from the one we have today. In *Katanga and Chui*, the Pre-Trial Chamber took a decision to streamline pre-trial proceedings

¹³ ICC-01/04-01/07-307.

without making any commitments as to the nature of the trial proceedings, as there was a possibility that the charges could end up not being confirmed.

32. Having clearly defined the two steps which ought to be followed in a joinder procedure, the Defence will demonstrate that the Prosecution provides no grounds for a joinder of charges, let alone a joinder of the trials.

3. The Prosecution fails to prove that the charges are the same in both cases.

3.1 The Prosecution's reasoning lacks a legal basis.

3.1.1 On the Prosecution claim regarding the Chamber's lack of latitude: The Prosecution postulates that there is a presumption of joinder of charges whereas the provisions stipulate only a presumption of joinder of trials while allowing the judges to decide on the relevance of the joinder at discretion.

33. Whereas in its request the Prosecution recalls the Trial Chamber's power, under article 64(5), to join the charges brought against more than one accused,¹⁴ its submission is founded on rule 136. In fact, the Prosecution relies on rule 136 to infer that there is a presumption of joinder when persons are "charged in relation to the same alleged conduct and crimes".¹⁵ In other words, the Prosecution considers that the joinder is the logical outcome of the fact that it has accused these individuals jointly.¹⁶

34. Such reasoning by the Prosecution disregards the letter of both the Statute and the Rules and confuses joinder of **charges** under article 64(5) of the Statute with joinder of **trials** under rule 136. In other words, rule 136 provides no useful guidance

¹⁴ ICC-02/11-01/11-738, para. 7.

¹⁵ ICC-02/11-01/11-738, para. 7.

¹⁶ ICC-02/11-01/11-738, para. 7.

on the joinder of **charges** which is, nevertheless, the preliminary stage to a joinder of **trials**.

35. However, regarding the joinder of charges, the wording of article 64(5) suggests no “presumption” on which the Prosecution could found its reasoning. There can therefore be no automatic consequence (much less, any presumption of joinder) based on the similarity of accusations against several suspects within the same case situation. The Prosecution has the duty to transcend appearances and to establish that the charges – and not merely the accusations – are the same, and constitute grounds for a request for joinder. This is all the more important as the same event may give rise to very different accusations and trigger different modes of liability.

36. Regarding the joinder of trials, the only point that may be inferred from rule 136 is that the joinder of trials may be a logical outcome and hence a form of “presumption” - under certain conditions¹⁷ – of the decision on joinder of charges.

37. In any event, any discussion of a possible “presumption” may be entertained only with respect to the provisions of the Statute which clearly provide that it is incumbent on the Chamber to decide discretionarily on the joinder of charges and, subsequently, the joinder of trials. Yet, the Prosecution appears to suggest that the Chamber may have no other choice than to order a joinder, without distinction as to charge or trial, when persons are accused of “the same alleged ...crimes” within the same case situation. It would appear that, in this matter, the Prosecution wants to deprive the judges of their discretion, which is the very bedrock on which the judicial function is founded. Furthermore, the legal texts are clear on this point: it is the duty of the Chamber to judiciously examine, not only the potential impact that a joinder may have on the proper administration of justice but also the premise and grounds of the Prosecution’s reasoning. Hence, there can be no “presumption”, according to the Prosecution’s apparent understanding of the term, because condoning that

¹⁷ See *Infra*.

Prosecution position tantamounts to depriving the judges of the possibility of deciding, *in fine*, on the relevance of the joinder of charges and of trials.

38. The Prosecution's reasoning based on a purported general "presumption" also seems designed to conceal its failure to prove the relevance of a joinder. Yet, as the applicant, the Prosecution has a duty to prove that the joinder is legally grounded, practically justified and consistent with the interests of justice. That has not been done.

39. The Prosecution does not take the trouble to provide any legal grounds for its contention that similar accusations within the same case situation should *ipso facto* trigger a joinder of charges. Rather, it simply states that the "presumption" it refers to "should" apply in the instant case, without any substantiation or argumentation founded on law.

3.1.2 Lack of justification for the joinder.

40. The Prosecution merely makes general and vague remarks on the similarity of both cases, claiming: that "the charges confirmed against them are largely the same;"¹⁸ "[t]he cases against Mr Gbagbo and Mr Blé Goudé are essentially one and the same;"¹⁹ "section 4 of the respective decisions, which spells out the facts and circumstances and their legal characterisation confirmed by the Chamber, is almost identical;"²⁰ and "the charged crimes in both cases were committed in the course of the same factual transaction."²¹ In so doing, the Prosecution seeks to paint an impressionistic picture of similarity between both cases. Instead of relying on specific criteria, the Prosecution merely reels off a series of unsubstantiated statements.

¹⁸ ICC-02/11-01/11-738, para. 1.

¹⁹ ICC-02/11-01/11-738, para. 10.

²⁰ ICC-02/11-01/11-738, para. 14.

²¹ ICC-02/11-01/11-738, para. 15.

41. The Prosecution does not, at any point, analyse the **charges** and their content from a technical and legal standpoint. For example, whereas the Prosecution claims to have carried out a thorough comparison of the contents of both confirmation of charges decisions,²² this does not, in fact, appear to be the case, as the footnotes which the Prosecution cites as references to details about such a comparison merely refer to the general text of decisions, not to any paragraphs in particular.²³

42. Similarly, the Prosecution claims that “the charged crimes in both cases were committed in the course of the same factual transaction”²⁴ without bothering to explain what “the same factual transaction” is or providing details about the “crimes” which were allegedly committed, not to mention the role of the accused persons in their commission.

43. In fact, the Prosecution apparently wants to distort the reality in claiming that “[t]his [factual transaction] was considered by other international courts and tribunals as a reason for joining cases.”²⁵ The Prosecution avoids indicating that in the jurisprudence of the *ad hoc* tribunals, the formulation “same factual transaction” refers to a specific legal notion which is one of the criteria used to determine the possibility of a joinder, depending on the applicable law before these tribunals.²⁶ In fact, not only does the Prosecution not take the time to explain what “same factual transaction” could mean or verify if the constituent elements of the notion exist, it also misapplies this concept which is not relevant to the applicable law before the ICC. The Statute is clear: the point is to verify whether the “charges” can be joined. It is about a comparison of the charges within the meaning of the Statute, (facts, legal characterisation of the facts, mode of liability) not the use of a concept which is alien to the Statute. Furthermore, it should be noted that proceedings before the *ad hoc*

²² ICC-02/11-01/11-738, para. 14.

²³ ICC-02/11-01/11-738, footnotes 16 and 17.

²⁴ ICC-02/11-01/11-738, para. 15.

²⁵ *Idem*.

²⁶ See rule 48 of the RPE of ICTY: “Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.”

tribunals and those before the ICC are very dissimilar. Before the ICC, the confirmation of charges phase allows for specific determination of the charges which will found the trial, after an adversarial hearing. Before the *ad hoc* tribunals, the concept of a charge within the strict meaning of the Statute does not exist and the Judge relies, without an adversarial hearing, on the indictment as submitted by the Prosecution. Consequently, the use of a more general and vaguer criterion (“same factual transaction”) which has not been tested in adversarial proceedings is understandable before the *ad hoc* tribunals but irrelevant before the ICC.

44. It should be noted that the Prosecution does not justify its systematic reliance on the jurisprudence and applicable laws of other international criminal courts. Whereas the Prosecution’s request has a footnote reference to article 21 of the Statute (regarding the applicable law),²⁷ apparently included to refer to other sources of law, that footnote is not pertinent as article 21 clearly states that the Statute shall apply in the first place.²⁸ Only in situations where the Statute is too imprecise can reference be made to other sources of law. In fact, there is no imprecision as article 64(5) explicitly refers to the notion of “charge”, which is peculiar to the ICC.

45. Furthermore, even considering that there are lacunae in the Statute to justify reliance on other sources of law, the sources listed under article 21 do not include the jurisprudence of the *ad hoc* tribunals. In fact, article 21(1)(b) refers to “applicable treaties and the principles and rules of international law” while article 21(1)(c) refers to “principles of law derived by the Court from national laws of legal systems of the world.” None of these two provisions refer to the jurisprudence or the practice of other international tribunals and the Prosecution should have demonstrated how its proposed criterion originates from a treaty, a principle or rule of international law, or a general principle of law.

²⁷ ICC-02/11-01/11-738, footnote 7.

²⁸ Article 21(1)(a).

46. Not having relied on any pertinent legal basis, the Prosecution therefore failed to ground its claims in law. To be more precise, it failed to follow the appropriate procedure. Actually, it should have applied the Statute “[i]n the first place.”²⁹ That was not done. It should then have proven the existence of a lacuna in the Statute in order to cite other sources of applicable law. That was not done. Lastly, it should have explained why its proposed test, based on ICTY practice could be acceptable and how such a practice could serve as an alternative source of law applicable to the ICC. That too was not done. It should be noted, that for the first time, the Statute of an international criminal court contains an article explicitly stating the applicable law. This progress must be commended and respected.

47. Ultimately, the Prosecution’s “reasoning” is summed up in seven short paragraphs³⁰ which are not an argumentation but mere statements containing random and unjustified references to criteria for a joinder which do not exist in the Statute. Above all, in these paragraphs, the Prosecution fails to present a comparative analysis of the content of the charges, which should indeed have formed the basis of its reasoning under article 64(5).

3.2 Any request for joinder should be founded on a comparison of charges within the meaning of the Statute.

48. The Prosecution’s request does not explain what a “joinder of charges” should be. The Prosecution at no point examines the notion of “charges” within the meaning of the Statute. It would appear in the request that, according to the Prosecution, the word “charge” has no specific meaning and is merely a substitute for the word “accusation” or the term “factual transaction”. Yet, “charge” is not merely a word, but rather a legal term whose definition should, perforce and logically, constitute the starting point of any discussion on a possible joinder.

²⁹ *Idem.*

³⁰ ICC-02/11-01/11-738, paras. 10-16.

3.2.1 What is a “charge”?

49. According to regulation 52 of the Regulations of the Court:

The document containing the charges referred to in article 61 shall include:

- (a) The full name of the person [...]
- (b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;
- (b) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

50. Consequently, it follows from the wording adopted by the drafters of the Regulations, namely the Judges, that a charge comprises two components, namely: (1) a statement of the facts underpinning the charge and (2) the legal characterisation of the facts.

51. Regarding the legal characterisation of facts, it also comprises two aspects: (1) firstly, a crime within the jurisdiction of the Court should be specifically targeted; and (2) the accused’s form of participation in this crime – as stipulated in articles 25 and 28 of the Statute – must be clearly determined.

52. The above definition of a charge is enshrined in the jurisprudence of the Court.³¹ In the *Bemba* case, Pre-Trial Chamber III considered that modification of the mode of liability would transform the charge.³²

53. In light of the foregoing, a charge comprises three components: (1) the facts; (2) the legal characterisation and (3) a specific mode of liability. These three components must all be present before a charge can be established. Consequently, in the absence of any of them, there would be no “charge”.

³¹ ICC-01/05-01/08-388.

³² ICC-01/05-01/08-388, para. 28.

54. With respect to the joinder, three significant consequences may be drawn from the definition of a charge, as understood from the legal texts and jurisprudence: (1) any discussion on a joinder of “charges” must include a clear and systematic comparison of the charges in the respective cases for which a joinder is sought and, more precisely, a comparison of the three components of a charge, namely: the facts, their legal characterisation and the mode of liability; (2) there can be no joinder of charges without the established similarity of the facts, their legal characterisation and the mode of liability; in other words, between the charges in the two cases; (3) a joinder of “charges” ordered in spite of the differences would *de facto* lead to a modification of the charges against the two accused.

3.2.2 Determination of the charges by the Judges.

55. In the decision on the confirmation of charges, the judges specifically determine the content and the scope of each charge which they decide to confirm. During the confirmation of the charges hearing, the judges fine-tuned their understanding of the contents of each charge. Consequently, it is possible for a charge to be confirmed when it does not cover exactly the same facts as those presented by the Prosecution in the DCC and/or when the targeted mode of liability is not based on the same allegations. It is on these charges that the trial will be founded. Consequently, these charges, as presented in each of the confirmation of the charges decisions, and their specific contents have to be compared before any determination is made on a joinder. At this stage, the focus should no longer be on the charges as formulated in the Prosecution’s DCC or as understood by the judges in decisions which predate the confirmation of charges decision.

56. Yet, the Prosecution mostly relies on the content of the charges as formulated and set out in its applications for warrant of arrest and, subsequently, in the DCCs of each of the two cases. For example, the Prosecution’s request relies on the fact that

“the alleged facts and circumstances against both Accused are identical”³³ in both warrants of arrest. In so doing, the Prosecution curiously refers back to October³⁴ and December 2011,³⁵ as though there had been no further adversarial discussions since then and as if such discussions had changed nothing in the present perception of the case by all involved, notably the judges. However, regarding the *Gbagbo* case, the situation is very dissimilar to what it was in October 2011. The confirmation of charges hearing revealed that the situation was far more complex and different from the assessment the Prosecution had made of it at the time. The Prosecution’s claims on some points were disproved. The confirmation of charges decisions, especially in the *Gbagbo* case are only a pale reflection of the Prosecution’s allegations. In fact, the Prosecution significantly altered its allegations in three successive DCCs. So, why does it revisit the past given the above-mentioned circumstances? The reason is that, although the Prosecution approached both cases from the same angle, the hearing revealed that they are, indeed, different, as confirmed by the judges in two very different confirmation of charges decisions.

57. The Prosecution also relies on the Pre-Trial Chamber’s decisions on the warrants of arrest³⁶ whereas the Pre-Trial Chamber only had to rule on the appropriateness of issuing such warrants, without an adversarial hearing and based on limited evidence and a low standard of proof. The Pre-Trial Chamber was not supposed to rule on the merits and the Prosecution’s submission of two applications for warrants of arrest drafted in a similar manner, as it states,³⁷ does not mean that the charges can presently be considered to be similar.

58. In fact, in its decisions to issue warrants of arrest, the Pre-Trial Chamber did not, at any point, directly note the alleged similarity between the two cases as

³³ ICC-02/11-01/11-738, para. 11.

³⁴ ICC-02/11-01/11-87-Conf.

³⁵ ICC-02/11-01/11-32-US-Exp.

³⁶ ICC-02/11-01/11-738, para. 12.

³⁷ ICC-02/11-01/11-738, para. 11.

claimed by the Prosecution in its request for joinder.³⁸ Rather, it noted the similarity in the Prosecutor's wording of both applications ("Given the extensive similarities **between the present Application and the Gbagbo Application...**"³⁹). This similarity in the wording of the Prosecution applications accounts for the similarity of wording, for reasons of consistency, by the judges. The wording adopted by the judges does not result from a determination based on a comparison of both cases on the merits. It could not have been otherwise at the warrant of arrest stage, when there is no adversarial hearing.

59. The Prosecution's arguments show that it is unable to develop argumentation based on the current charges as confirmed by the judges. However, the Prosecution's approach to the matter at the time of the arrest of both accused persons is irrelevant to the discussion on a joinder. What is relevant is the ruling of the judges in their decision on the confirmation of charges. It is quite revealing that, in all, the Prosecution devotes only one paragraph to what it presents as a comparison of the confirmation of the charges decisions (which turned out to be inaccurate, see *supra*).⁴⁰ Rather, it clearly chose to rely on its own interpretation of the case instead of that of the judges.

60. In fact, the Prosecution seems to believe that it would be able to decide on and control the joinder process based on its own interpretation of the case and that it suffices for it to couch its accusations in the same wording for both cases to be joined. Unfortunately, this is inconsistent with both the letter and the spirit of the Statute.

61. Had the Prosecution not restricted itself to interpreting the case from its own viewpoint, instead of examining in detail each charge against both accused as contained in the confirmation of charges decisions, it would have noticed the differences.

³⁸ ICC-02/11-01/11-738, para. 12.

³⁹ ICC-02/11-02/11-3, para. 9 (emphasis added).

⁴⁰ ICC-02/11-01/11-738, para. 14.

3.3 The charges against the accused persons are not the same and do not warrant a joinder of the charges.

62. To ensure clarity, it is appropriate to conduct a detailed comparison of the charges against both accused. It should be recalled that a charge comprises three specific components, namely:⁴¹ (1) the facts; (2) the legal characterisation of those facts; and (3) a mode of liability. It is the combination of these three components, which are inseparable, that establishes a charge.

63. When each of these components is analysed for each charge, it becomes clearly evident that the charges are not the same and that the two confirmation of charges decisions cover neither the same facts exactly nor the same modes of liability. As a result, it is quite clear that each of the events targeted is interpreted differently in each of the confirmation of charges decisions, with respect to the facts and, even more evidently, with respect to the main mode of liability sought (25(3)(a)) or the other modes of liability confirmed.

3.3.1 No similarity of charges under the mode of liability mentioned in article 25(3)(a).

64. It should be recalled that in both *Gbagbo* and *Blé Goudé*, the Prosecution founds its case essentially on the idea that both accused are primarily liable under article 25(3)(a), indirect co-perpetration, making virtually no submissions on the other modes of liability in each of the DCCs. In both DCCs, the Prosecutor tersely states that “[w]hereas the Prosecution has framed the presentation of facts to accord with the constituent elements of article 25(3)(a), these facts apply, where relevant, to the other grounds of criminal responsibility alleged, as detailed in the Statement of the Charges”.⁴² Accordingly, indirect co-perpetration is clearly the mode of liability on

⁴¹ Regulation 52.

⁴² ICC-02/11-01/11-592-Anx1, para. 130; ICC-02/11-02/11-124-Anx1-Corr, para. 172.

which the Prosecution based its case during the confirmation of charges phase. The Prosecution is currently requesting for a joinder because its understanding of the case is founded on that mode of liability. It is actually the only mode of liability on which it bases its claim of an alleged link between the two accused. The Prosecution's problem is that the Pre-Trial Chamber judges did not endorse its approach which is based on the article 25(3)(a).

65. It should be recalled first of all that, although the same four main events constitute the basis of the charges in the *Gbagbo* and *Blé Goudé* cases, the incidents mentioned under each of these events are either different or understood differently.

66. Above all, in both cases these events (or more precisely, the incidents mentioned) have not been analysed from the same perspective, under the same mode of liability. However, a different mode of liability implies that the charges are different, and this constitutes a major obstacle to the joinder of charges.

67. More precisely, only the charges relating to incidents which allegedly occurred in Yopougon in April 2011 are analysed under the same mode of liability for both accused persons, namely that of indirect co-perpetration under article 25(3)(a). In other words, the Chamber considered that the alleged link between the two accused persons was not relevant to establish their individual responsibility for the other events. To put it differently again, the Chamber undermined the Prosecution's case which is built solely on the idea of a common approach adopted by the accused persons.

68. It is important to stress, at this juncture, that the trial proceedings will essentially focus on different charges for each accused person, even though the charges relate to the same events. Consequently, the proceedings could be particularly obscured by the confusion which will definitely arise from the examination of each witness from two different perspectives. Under these

circumstances, it is not possible to present the two cases as identical or having enough similarities to justify a joinder.

69. The Prosecution, however, is trying to ignore this judicial reality as reflected in the confirmation of charges decisions. While acknowledging that there are significant differences between the two confirmation of charges decisions regarding modes of liability,⁴³ the Prosecution does not consider that these differences should be the criterion to be taken into consideration. Indeed, the Prosecution submits that “the critical consideration is that the Pre-Trial Chamber found that the both Accused shared a common plan or purpose and that they acted in a coordinated manner to implement the common plan, which resulted in the commission of the crimes charged”.⁴⁴ By adopting this stance, instead of relying on objective criteria to establish the existence of each mode of liability, the Prosecution is resorting to a notion which is, in itself, an allegation. The Prosecution’s assertion, equally made at the onset of the *Gbagbo* case, that there allegedly exists a common purpose evidenced by joint action, is not an objective conclusion. The possible existence of a common plan is only one of the many elements needed to establish the mode of liability for indirect co-perpetration under article 25(3)(a), and not a mode of liability *per se*, as the Prosecution seems to suggest by basing its arguments on the existence of such a common plan. In other words, an allegation of the existence of a common plan will be relevant to this discussion only if it is analysed jointly with all the constituent elements of that mode of liability. This is what the Prosecutor has consistently failed to do. To prove the relevance of a joinder, the Prosecution should have analysed all the constituent elements of that mode of liability before concluding that the charges are similar. The Prosecutor cannot replace such analysis with a mere statement based on a single constituent element of one mode of responsibility.

70. The judicial reality is at variance with the arguments advanced by the Prosecutor: in the *Blé Goudé* case, the Pre-Trial Chamber did not accept the mode of

⁴³ ICC-02/11-01/11-738, para. 14.

⁴⁴ ICC-02/11-01/11-738, para. 14.

liability under article 25(3)(a) for charges relating to three of the four main incidents mentioned in the *Gbagbo* case. In the *Gbagbo* case, however, article 25(3)(a) was accepted as a mode of liability for charges relating to the four main incidents. Consequently, the issue of the possible existence of a common plan to justify the joinder does not arise. The Prosecution based its arguments on its own perception of the case as presented in its successive DCCs, not on the confirmation of charges decisions. As regards Charles Blé Goudé, the Chamber, when confirming the charges, considered that the issue of the common plan was no longer relevant for three of the four main incidents common to both cases, since it did not confirm the mode of liability under 25(3)(a) for these three incidents.

71. The Prosecution's insistence on basing its case on the possible existence of a common plan is understandable because such a plan is the key to understanding the entire Prosecution case. However, basing the Prosecution case on that notion does not, in any way, reflect the judicial reality in both cases, since each of them was determined differently by the Pre-Trial Chamber. It is clear that a joinder of the two cases is the only way for the Prosecution to preserve its initial narrative which has been undermined by the decisions of the judges. Under these circumstances, the consequences of a possible joinder are quite clear: the Prosecution could then resurrect the notion of a common plan in the *Blé Goudé* case if there is a joint trial, because that would be the only way for it to establish a link between the conducts of both accused. Such a situation would be clearly inconsistent with the rights of Charles Blé Goudé who would then be forced to defend himself against charges which have, in fact, not been confirmed.

72. Moreover, it should be noted, that the content of the Prosecutor's allegation and the scope covered by the notion of common plan may vary depending on the charges brought against each accused person. Even within the alleged common plan, the conducts ascribed to each of the accused are not the same. For instance, during the confirmation of charges against Charles Blé Goudé, his role vis-à-vis the so-called

pro-Gbagbo youth seemed to have been the focus of the Pre-Trial Chamber's attention and to have formed the essential basis of its confirmation of charges decision.⁴⁵ In other words, apart from the general allegations on the existence of a common plan between the accused, the concrete acts ascribed to each of them are very different. For instance, it is quite telling that the Pre-Trial Chamber in *Blé Goudé* found that the contribution of the accused to the common plan was insufficient to establish his responsibility as indirect co-perpetrator of three of the four major incidents for which Laurent Gbagbo is alleged to be responsible.⁴⁶ Consequently, it should be noted that by continuing to focus on the common plan, even after the decision of the Judges, the Prosecution is, in fact, trying to use Charles Blé Goudé as link to tie President Gbagbo to certain acts allegedly committed by members of the so-called pro-Gbagbo youth movements. However, that link is artificial. The sole *raison d'être* for the possible presence of Charles Blé Goudé in a joint trial is to serve Prosecution interests by giving the impression that the mere presence of the accused attests to the existence of such a link, even though this is contrary to the letter of the Judges' decision. In this regard, it is interesting to note that any acts committed by youth group members are only accessory to the charges brought by the Prosecutor against Laurent Gbagbo and seem to have been included in the record merely for the purposes of the case.

73. The situation here is far from the perfect similarity of charges which led to the joinder of the *Katanga* and *Chui* cases. In those two cases, the accused were prosecuted as indirect co-perpetrators for exactly the same clearly-defined facts, namely the attack of one village.⁴⁷ As soon as the risk became evident that the modes of liability may no longer be identical, the cases were severed.⁴⁸ In like manner, the Pre-Trial Chamber recently severed the case of Dominic Ongwen from the cases of his co-accused in the Ugandan situation for the main reason that the charges brought

⁴⁵ ICC-02/11-02/11-186, paras. 96-102.

⁴⁶ ICC-02/11-02/11-186, paras. 147-148.

⁴⁷ ICC-01/04-01/07-307, p.6.

⁴⁸ ICC-01/04-01/07-3319.

against this suspect are lesser than those brought against the other suspects.⁴⁹ One may well assume that what justifies severance in one case logically justifies a non-joinder in another.

74. Lastly, it is clear that a joinder of both cases will lead to modification of the charges confirmed against Laurent Gbagbo. In fact, these charges do not relate to the incidents which allegedly occurred in Yopougon in February 2011.⁵⁰ The incidents in Yopougon rather underpin the charges brought against Charles Blé Goudé, who is being prosecuted mainly for allegedly playing a role in these incidents⁵¹ as indirect co-perpetrator, under an alleged common plan with Laurent Gbagbo. Now, since charges were not brought against Laurent Gbagbo for the Yopougon incidents of February 2011, he did not have the opportunity to defend himself during the pre-trial phase and engage in an adversarial debate on the existence, *per se*, or presentation of these incidents and his alleged role in them. Above all, in the event of a joinder, Laurent Gbagbo would be forced to defend himself for a charge which was not confirmed against him but which, however, implicates him as co-perpetrator, and that would constitute a *de facto* modification of the charges.

3.3.2 Other modes of liability.

75. The charges against both Laurent Gbagbo and Charles Blé Goudé were confirmed under different modes of liability. Laurent Gbagbo was committed to trial under article 25(3)(b) and 25(3)(d) for four incidents,⁵² while Charles Blé Goudé was committed to trial under article 25(3)(c) and 25(3)(d) for five incidents, and 25(3)(b) for the march on RTI and the incidents which allegedly occurred in Yopougon in February and April 2011.⁵³

⁴⁹ ICC-02/04-01/05-424, para. 8.

⁵⁰ They were only mentioned as supportive evidence of the existence of the contextual element of crimes against humanity. ICC-02/11-01/11-656-Conf, para.77.

⁵¹ ICC-02/11-02/11-186, paras. 141-158.

⁵² ICC-02/11-01/11-656-Conf, para. 266.

⁵³ ICC-02/11-02/11-186, paras. 182-194.

76. A comparison of both confirmation of charges decisions reveals that the charges confirmed against Laurent Gbagbo and Charles Blé Goudé are as follows: Laurent Gbagbo is liable for the march on RTI, in the main, under article 25(3)(a) and, alternatively, under articles 25(3)(b) or 25(3)(d); for the women's march, in the main, under article 25(3)(a) and, alternatively, under articles 25(3)(b) or 25(3)(d); for bombardment of Abobo market, in the main, under article 25(3)(a) and, alternatively, under articles 25(3)(b) or 25(3)(d); for the Yopougon incidents of April 2011, in the main, under 25(3)(a) and alternatively, under articles 25(3)(b) or 25(3)(d). Charles Blé Goudé is liable for the march on RTI alternatively under articles 25(3)(b), 25(3)(c), or 25(3)(d); for the women's march alternatively under articles 25(3)(c), or 25(3)(d); for the Yopougon incidents of February 2011, in the main, under article 25(3)(a) and alternatively under article 25(3)(b); for bombardment of Abobo market, alternatively under articles 25(3)(c), or 25(3)(d); for the Yopougon events of April 2011, in the main, under article 25(3)(a) and alternatively under article 25(3)(b).

77. It follows therefore that the principal modes of liability confirmed for both accused are not the same, while the alternative modes of liability do not cover the same conduct.

78. The fact that the same modes of liability are mentioned in both cases for the same incident does not tantamount, *ipso facto*, to a similarity of charges. Indeed, a charge is not an abstract concept; it is based on precise accusations. First of all, it is founded on a precise narrative about specific incidents. Secondly, it is founded on the alleged conduct of the accused. Lastly, it is founded on the accepted legal characterisation of the accused's liability. In other words, each mode of liability has its narrative. Abstract mention of the same "incident" and reference to the same mode of liability do not automatically mean that there is a similarity of charges. Proof of such similarity has to be based on the reality as established during the confirmation of charges phase. Similarly, just as there are facts underpinning the

charges, there are also facts which underpin the modes of liability. There can be no joinder of cases if these facts are not similar for the two accused.

79. Under the alternative modes of liability mentioned in the decisions – in other words, putting aside the alleged common plan – it is apparent, from the decisions, that the conduct for which each accused is allegedly responsible is different, thus giving rise to only one possible conclusion: the charges brought against them under the same mode of liability are dissimilar.

80. For example, regarding the mode of liability under article 25(3)(b), the crimes ascribed to Charles Blé Goudé mainly relate to his alleged influence over pro-Gbagbo youth and militia members⁵⁴ and focus on instructions allegedly given for the march on RTI,⁵⁵ allegations which do not feature in the confirmation of charges decision in the *Gbagbo* case.

81. Regarding article 25(3)(d), the Judges focused on the alleged role of Charles Blé Goudé in ensuring cooperation between the various pro-Gbagbo forces⁵⁶ and on the instructions which he allegedly gave for the march on RTI⁵⁷, allegations which do not also feature in the confirmation of charges decision in the *Gbagbo* case.

82. It is evident, therefore, that beyond using the same mode of alternative liability, the content of the charges differs for each accused person since the facts underpinning the charges are not the same. Consequently, it is impossible to consider that the charges are sufficiently similar to warrant a joinder of cases.

83. The Defence wishes to emphasize that such a discussion arises only because the Pre-Trial Chamber decided in both cases that it was possible to confirm the

⁵⁴ ICC-02/11-02/11-186, para. 160.

⁵⁵ ICC-02/11-02/11-186, para. 161.

⁵⁶ ICC-02/11-02/11-186, para. 179.

⁵⁷ ICC-02/11-02/11-186, para. 178.

charges under several modes of alternative liability. This marks a major departure from existing jurisprudence because hitherto, the Chambers of the Court had considered it impossible to hold the same person responsible for various conducts which are mutually exclusive.⁵⁸ Accordingly, it was recognised that a person cannot be prosecuted concurrently as a principal and an accessory to the same crime.⁵⁹ The Pre-Trial Chamber departed from existing jurisprudence and considered that it was possible to prosecute a person concurrently as principal and an accessory to the same crime. It refused to grant the Defence leave to appeal on this essential point, thus generating a form of judicial insecurity which must be mitigated as the proceedings unfold.⁶⁰

84. If past jurisprudence had been applied, the charges against Laurent Gbagbo would have been confirmed under article 25(3)(a), thereby excluding the possibility of confirming them under other modes of liability. There would therefore not have been any need to discuss other modes of liability.

85. In light of the above, a joinder of charges would be risky. Joining charges which are, in fact, different and which, regarding one particular incident, are based on a certain mode of liability in the main for one of the accused, and on another mode of liability in the main (meaning, on another narrative based on other facts) for the other accused, would ultimately obscure the proceedings and actually prevent any real discussion and determination of liability. Furthermore, since the Pre-Trial Chamber did not make a distinction between the various modes of liability and excluded none of them, a joinder of the cases under these various modes of liability could lead to a situation where one accused is considered responsible under one mode of liability and the other responsible under another mode, both modes being mutually exclusive.

⁵⁸ ICC-01/04-01/07-717, para. 471.

⁵⁹ ICC-01/09-01/11-1, para. 36.

⁶⁰ ICC-02/11-01/11-680.

86. Any joinder of charges is predicated on the idea that there supposedly exists a sufficiently strong link between the accused persons which justifies their having engaged in similar conduct under similar circumstances. In this case, indirect co-perpetration would suggest the possible existence of such a link. Consequently, it is the sole basis on which the Prosecutor can request for a joinder. This explains why the Prosecutor is so insistent on the notion of “common plan”. However, the fact is that Charles Blé Goudé was not committed to trial on the basis of indirect co-perpetration of three out of five incidents underpinning the charges brought against him.⁶¹ It is clearly evident that a joinder is impossible since the charges, as confirmed by the Judges, are, in fact, different and a ruling in favour of a joinder under these circumstances would tantamount to a modification of the charges brought against each of the accused.

87. Moreover, the Pre-Trial Chamber’s approach of adopting all the modes of alternative responsibility, which are mutually exclusive, has not yet been validated by the Appeals Chamber. The Appeals Chamber may challenge such an approach.⁶² Under these circumstances, there is no need to take the risk of initiating a joinder which would ultimately modify the charges confirmed by the Judges by “homogenising” them. This would result in a misrepresentation of the confirmation of charges decisions and a torrent of appeals which could further obscure the proceedings. A joinder would prevent the conduct of clear logical proceedings.

88. Lastly, a joinder of charges under such circumstances would utterly invalidate the very notion of a joinder: a joinder is possible only when the content of the charges is the same. In the instant case, however, any ruling in favour of a joinder would be founded on the appearance and wording of the charges, and not on their content. In fact, such a ruling would be predicated solely on the fact that reference is made in both cases to the same modes of alternative liability. However, since the facts

⁶¹ ICC-02/11-02/11-186, para. 194.

⁶² ICC-02/11-01/11-676-Conf, paras. 135-148.

underpinning the charges are different, the practical implementation of the joinder would be extremely difficult. Moreover, the joinder could lead to real cacophony since the narratives on the two accused are, in fact, very dissimilar and even conflicting. Consequently, the joinder would only serve as a cosmetic façade to cover up the Prosecutor's inability to establish a link between the two accused persons.

3.4 Conclusion on the joinder of charges.

89. The foregoing arguments show that, upon analysis, only one charge is apparently the same for the two accused persons: the charge related to the Yopougon events of April 2011. In fact, this charge relates to the same incident, the same legal characterisation and the same mode of liability under article 25(3)(a), and hinges on the idea of an alleged common plan between the two accused persons. The other charges brought against the two accused are dissimilar.

90. A joinder of charges under these circumstances tantamounts to forcing the two accused persons to defend themselves against charges not confirmed against them. That would be a violation of their rights and would call to question the relevance of the confirmation of charges phase during which judges are supposed to lay the foundation of the trial.

91. In other words, dissimilar charges should give rise to two different trials.

92. Consequently, the Defence invites the Chamber to find that the cases are, in fact, different and to assess the negative consequences that a joinder could have on the rights of the defence and the proper administration of justice. The fact that the Prosecution bases its arguments on its subjective view of the case (common plan) and not on one or several legal and other criteria is evidence that it views the joinder as justified only because it would, *a priori*, give the impression that a link does exist.

However, the Chamber cannot rely on such reasoning because that would place the accused in a position of weakness by raising the existence – albeit unproven by definition at this stage – of a common plan, and would force them to defend themselves against charges not brought against them. Above all, this would place the accused in a situation where they have to defend themselves for crimes for which their responsibility – the necessary link between an accused and the alleged crime – is not at issue.

93. Since it is clear that there can be no joinder of all the charges because that would mean forcing the accused to defend themselves against unconfirmed charges and could lead to much confusion during the proceedings, the Chamber should, if it decides to join the cases in spite of everything, order the Prosecution to specify the charges it wishes to be covered by the joinder. Without such clarification, it would be difficult for the Chamber to assess the risk that the accused would face in defending themselves against unconfirmed charges.

4. Relevance of the joinder

94. Should the Trial Chamber rule that the charges are sufficiently similar to justify a joinder, it would then be appropriate to reflect on the relevance of such a joinder.

95. In this regard, while Rule 136 prescribes a joinder of cases as the logical consequence, certain conditions set out under this same rule must, nonetheless, be fulfilled before a ruling is made in favour of a joinder. These include, avoiding serious prejudice to the accused and protecting the interests of justice. On these points, however, the Prosecutor fails to provide any convincing arguments in support of his request.

96. As to the timeframe, the Prosecutor considers that any delay resulting from a joinder of cases would not be prejudicial to the Defence and to the accused's right to be tried without undue delay since the Defence had indicated that it would be ready to start the trial in November or December 2015.⁶³ This Prosecution argument is a misinterpretation of the Defence position and is based on confusion regarding the notion of timeframe.

97. The Defence requested to be given the time needed to prepare cross-examinations efficiently, considering the complexity of the case, the difficulties of field missions to be conducted, the huge volume of documents exchanged by the parties and especially the very large number of witnesses to be called by the Prosecutor (one hundred and one witnesses⁶⁴). That was the Defence position absent a joinder of cases.⁶⁵ The possibility of a joinder gives rise to a completely different situation and would generate an increased workload which would, *de facto*, postpone the commencement date of the trial since the Defence for Laurent Gbagbo would then have to study the entire case record of *Blé Goudé* and conduct the necessary investigations. A joinder would postpone the effective commencement of the trial to 2016.

98. Furthermore, it is important to recall that the time needed to prepare the defence of Laurent Gbagbo is not a "time limit". The simple point at issue here is the effective implementation of a fundamental right enshrined in the Statute and in international human rights law.⁶⁶ The accused's exercise of a right cannot be used against him as the Prosecutor is trying to do in this case.

99. Consequently, there are time limits needed for the effective preparation of a case and "delays" which may result in a violation of the rights of the accused, due to

⁶³ ICC-02/11-01/11-738, para. 20.

⁶⁴ ICC-02/11-01/11-T-25-CONF-FRA, p.10, ll. 9-13 and ICC-02/11-01/11-759-Conf-AnxA.; ICC-02/11-01/11-T-25-CONF-FRA, pp.66-70, ll. 21-11.

⁶⁵ ICC-02/11-01/11-T-25-CONF-FRA, p. 45, ll. 7-9.

⁶⁶ Article 67(1)(b).

the manner in which the Prosecution builds its case. Requesting for a joinder now, at this late stage, will perforce impact on the work of the Defence and likely result in undue delay.

100. In any event, there can be no joinder of cases without a concomitant decision to postpone the effective commencement date of the trial. Such a date must, however, be discussed with all parties including the Defence for Charles Blé Goudé. Consequently, the Defence for Laurent Gbagbo is of the view that, should the Chamber rule in favour of a joinder, a status conference should be convened to decide on a new realistic date for the commencement of the trial.

101. As to the evidence and the substance of the proceedings, the Prosecutor asserts that “a joint trial would ensure consistency with respect to the admissibility of evidence, procedural and legal findings and the ultimate verdicts”,⁶⁷ while recognising, paradoxically, a few pages later that “[i]n 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”.⁶⁸ Through these statements, the Prosecution is, indeed, acknowledging that a joinder could generate a certain amount of confusion and adversely affect the administration of justice. It is interesting to note that the Defence for each of the accused would find it extremely difficult to conduct coherent cross-examinations if witness statements are perceived and used differently against each of the two accused persons.

102. As to the witnesses, prosecution and defence witnesses will not be necessarily the same persons in both cases. Regarding prosecution witnesses, it is clear from the Prosecution’s statements that it has mainly built a *Gbagbo* case and that, for now, it views the *Blé Goudé* case as only an aspect of the *Gbagbo* case. It follows therefore that if the Prosecution were to call witnesses in the *Blé Goudé* alone, only such witnesses

⁶⁷ ICC-02/11-01/11-738, para. 19.

⁶⁸ ICC-02/11-01/11-738, para. 22.

would probably be different, for the most part, from the witnesses called in the *Gbagbo* case. Regarding defence witnesses, since the charges are different, the defence teams for the two accused persons will be different and the witnesses they call will be different.

103. Similarly, the Prosecution cannot declare today that it will adduce the same evidence against both accused persons,⁶⁹ for one simple reason: the charges are different.

104. Furthermore, it is too early to know the evidence that the Prosecution intends to disclose in the *Blé Goudé* case since, by its own admission, it is still carrying on investigations.⁷⁰ Only a careful comparison of the evidence to be disclosed by the Prosecution in both cases will make it possible to determine whether the Prosecution intends to use the same evidence in both cases.

105. As to the general issue of prejudice to the accused, the Prosecution pays scant attention to potential violations of the rights of the accused which could arise from a joinder. It merely recalls that under Rule 136(2) the joinder affords each of the persons charged with the same rights as if they were tried separately.⁷¹ However, merely recalling the existence of a right does not guarantee that such right will not be violated. It is proper to ensure that the rights of the accused are protected all through the trial. In this regard, the Defence notes that the Prosecution founds its reasoning on the jurisprudence of the *ad hoc* Tribunals. First of all, the Prosecution fails to demonstrate the relevance of relying on these decisions. Secondly, the ICC Statute is different in that it explicitly requires judges to make its interpretation consistent with internationally recognised human rights.⁷²

⁶⁹ ICC-02/11-01/11-738, paras. 17 and 18.

⁷⁰ ICC-02/11-01/11-761, para. 12 and ICC-02/11-02/11-212-Red, para. 33.

⁷¹ ICC-02/11-01/11-738, para. 21.

⁷² Article 21(3).

106. As to the sought “consistency”, the Prosecutor asserts that a joint trial would ensure greater consistency of the two proceedings, which would prevent conflicting rulings and judgments and ensure that judgements will not be overturned on appeal.⁷³ However, as the Prosecution itself acknowledges, “[t]he trial is being held before professional judges”⁷⁴ who are less likely to issue conflicting rulings and judgments. Besides, the Prosecution fails to explain why there would be fewer appeals in a joint case than in two separate cases, which is indeed a flawed argument when analysed in light the experience of the *ad hoc* Tribunals.⁷⁵

107. The Prosecution also asserts that failure to join the cases would lead to exposure of only “half of the picture” and undermine the interests of justice.⁷⁶ It has been demonstrated that serving the interests of justice entails conducting clear proceedings and that confusion resulting from a possible joinder should be avoided. As to the charges, it has been demonstrated that they are different for each accused person and consequently that there are two different pictures. The Prosecution has never actually indicated which “half of the picture” would be missing if there were no joinder. By declaring that each of the two cases represents only “half of the picture”, is the Prosecution stating that it does not have sufficient evidence to successfully prosecute each case separately, and that without a joinder it may not be able to satisfy the evidentiary requirements needed to achieve its purposes? To put it plainly, is it not saying that it will have no “case” against Laurent Gbagbo if there is no joinder with the Charles Blé Goudé case? Yet, the Prosecution is supposed to build a complete case – and not a half case – against each accused. If the Prosecution wanted a full picture of the post-election crisis, why does it not prosecute the rebel leaders suspected by major human rights organisations of committing mass crimes?

⁷³ ICC-02/11-01/11-738, para. 19.

⁷⁴ ICC-02/11-01/11-738, para. 22.

⁷⁵ Recent examples are, ICTY, *Prosecutor v. Gotovina and Markac*, Judgement, Appeals Chamber, 16 November 2012 or ICTY, *Mugenzi and Mugiraneza v. The Prosecutor*, Judgement, Appeals Chamber, 4 February 2013.

⁷⁶ ICC-02/11-01/11-738, para. 19.

108. Conclusion on the joinder of cases: The Prosecution's explanations as to the relevance of a possible joinder are utterly lacking in detail and premature, regarding evidence for instance. Consequently, should there be a ruling in favour of a joinder, it would be necessary for the Prosecution to state in detail what it expects the joinder to cover: Which evidence does it intend to adduce in a joint trial? How does it intend to avoid bringing unconfirmed charges against either one of the accused persons? What will be the format of the preliminary brief which it intends to draft? When does it hope to complete its investigations? Will it make a distinction between the witnesses in *Gbagbo* and those in *Blé Goudé*? etc.

109. It is only after such crucial explanations that the Defence will be able to give its views on the actual content of the request for a joinder and that the Chamber will be able to take a decision.

5. Conclusion.

110. The Prosecution failed to analyse the applicable law in its request. On the contrary, it subverted the spirit of that law by focusing on the alleged common plan without ever conducting the indispensable comparison of charges and without considering the actual consequences of a possible joinder. Consequently, it failed to provide the material necessary for a substantive debate and a relevant decision.

111. Rather, it is quite obvious that a joinder of charges would afford the Prosecutor an opportunity to accuse these individuals of crimes covered by charges not confirmed in the pre-trial phase, a situation that is totally inconsistent with the letter and spirit of the Statute and violates the rights of the two accused persons.

112. Worse still, a joinder of cases will enable the Prosecution to cover up its flawed reasoning in the narratives it presented on each of the accused, by replacing

such narratives with a broader and vaguer narrative which is no longer quite consistent with accusations made against each of the accused persons.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I TO:

Noting article 64(5) of the Statute, rule 136 of the RPE,

In limine,

- **Deny** *in limine* the Prosecutor's request for lack of reasoning;

In the main,

- **Reject** the request for a joinder of charges for lack of similarity in the charges brought against each of the accused;

In the alternative,

- **Order** the Prosecutor to explain in detail the charges to be covered by the potential joinder, stating the facts underpinning each charge, their legal characterisation and the relevant mode of liability, such that an effective discussion can be held on the joinder of charges;

In the further alternative, should the Chamber elect to rule on the joinder of charges,

- **Deny** the request for a joinder;

In the very remote alternative,

- **Order** the Prosecutor to provide the necessary clarifications which would enable the parties and the Chamber to express views on the relevance of any joinder;

And,

- **Organise** a status conference to determine new dates as a result of the joinder.

[Signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 12 February 2015, at The Hague, The Netherlands.