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Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER I

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

**SITUATION IN CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

Request for the dismissal of the "Prosecution Reply to Defence Response to Joinder Request" (ICC-02/11-01/11-781) and

Application for leave to respond to:

- the "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-02/11-01/11-780); and
- the "Prosecution Reply to Defence Response to Joinder Request (ICC-02/11-01/11-781)", if it is not dismissed *in limine*

Source: Defence team for Laurent Gbagbo

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

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I. Procedural history

1. On 16 December 2014, the Prosecution lodged a “request to join the cases” with the Chamber hearing the *Gbagbo* case.¹
2. On 18 December 2014, the record of the *Blé Goudé* case was transmitted to the Presidency.²
3. On 19 December 2014, the Defence for Laurent Gbagbo filed a “*Requête afin que la Chambre de première instance I se déclare incompétente pour statuer sur la demande de jonction des affaires Gbagbo et Blé Goudé présentée par le Procureur*”³ and, should the Chamber declare itself competent, it filed a request “*portant sur la détermination de la date à partir de laquelle courent les délais fixés pour que la Défense puisse déposer une éventuelle réponse à la demande de jonction du Procureur*”.⁴
4. On Saturday, 20 December 2014, the Presidency referred the *Blé Goudé* case to Trial Chamber I.⁵
5. On 22 December 2014, the Prosecution lodged its joinder request of 16 December 2014 anew with Trial Chamber I, which had since been seized with the *Blé Goudé* case.⁶
6. On 6 January 2015, the Single Judge declared the Trial Chamber competent to rule on the Prosecution’s joinder request. It granted the Defence’s second request and ordered “the filing of any response to the Joinder Request within 21 days of notification of the French translation of this request and of the *Blé Goudé* Confirmation Decision”.⁷

¹ ICC-02/11-01/11-738.

² ICC-02/11-02/11-191.

³ ICC-02/11-01/11-742.

⁴ ICC-02/11-01/11-742.

⁵ ICC-02/11-02/11-193-Corr.

⁶ ICC-02/11-02/11-194.

⁷ ICC-02/11-01/11-744.

7. On 12 February 2015, having received the French translation of the documents listed in its request, the Defence filed a response to the “Prosecution’s Request to join the cases of ‘The Prosecutor v. Laurent Gbagbo’ and ‘The Prosecutor v. Charles Blé Goudé’”.⁸

8. On 17 February 2015, the Prosecution applied for leave to reply to the Defence response.⁹

9. On 19 February 2015, the Defence lodged an objection to the Prosecution’s application for leave to reply.¹⁰ The Legal Representative of Victims registered her support for the application and also requested leave to reply.¹¹

10. On 20 February 2015, the Single Judge of the Trial Chamber granted the applications of the Prosecution and the Legal Representative of Victims.¹²

11. On 23 February 2015, the Prosecution¹³ and the Legal Representative of Victims¹⁴ filed their respective replies to the Defence response to the joinder request.

II. Discussion

1. The dismissal *in limine* of the Prosecution reply

12. The Prosecution stated in its application for leave to reply that it wished to “reply to the Defence’s restrictive interpretation and application of the relevant law on the joinder of cases (article 64(5) of the Statute and rule 136 of the Rules) as set out in Part 2 and applied in Part 3 of the Response.”¹⁵ It further specified that, “[i]f

⁸ ICC-02/11-01/11-765-tENG.

⁹ ICC-02/11-01/11-771.

¹⁰ ICC-02/11-01/11-773.

¹¹ ICC-02/11-01/11-772.

¹² ICC-02/11-01/11-775, e-mail of the Single Judge dated 19 February 2015.

¹³ ICC-02/11-01/11-781.

¹⁴ ICC-02/11-01/11-780.

¹⁵ ICC-02/11-01/11-771, para. 4.

leave to reply is granted, the Prosecution undertakes to address this discrete issue concisely and without repeating the arguments presented in its Joinder Request.”¹⁶

13. In his decision granting the Prosecution and the Legal Representative of Victims leave to reply, the Single Judge specified, on the basis of the Prosecution’s application, the issue to be addressed by the reply: “namely that portion addressing the interpretation and application of Article 64(5) of the Statute and Rule 136 of the Rules”.¹⁷ The Single Judge set precise parameters from which the Prosecution and the Legal Representative of Victims should not depart. In other words, he granted leave to reply concisely on that discrete issue alone.

14. When the Prosecution’s reply is examined, (1) it can be seen that it strays far from the parameters circumscribed by the Single Judge, going well beyond the “issue” he defined; and (2) it proves in fact to be a means of further elaborating and supporting its initial submissions by extending them to new areas and discussing new points.

1.1. The Prosecution’s reply strays from the parameters of the “issue” as defined by the Single Judge

15. The Prosecution’s reply broaches issues discussed in section 4 of the Defence response (the section on the joinder of cases), even though it was authorised solely to reply to the considerations set out in sections 2 and 3 of the Defence response (the sections on the applicable law for the joinder procedure and the joinder of charges).

16. The Prosecution observes, for example, that, “the Defence’s position fails to properly consider the impact of having separate trials on the fairness and efficiency of the proceedings, the protection and well-being of victims and witnesses, the duplication of evidence, as well as on the rights of the accused.”¹⁸ That point was made by the Defence in section 4 of its response, which should not have been

¹⁶ ICC-02/11-01/11-771, para. 6.

¹⁷ ICC-02/11-01/11-775, para. 4.

¹⁸ ICC-02/11-01/11-781, para. 12.

discussed in the reply as the Single Judge did not include that section in his leave to reply. (Furthermore, the Prosecution's allegation is not correct as the Defence provided an analysis of that very point.)

17. A further example is the Prosecution's claim that, "[i]n addition, since the Prosecution intends to adduce almost the same evidence in both cases, it has demonstrated the positive impact that a joinder of the two cases would have on the fair and efficient administration of justice, the protection and well-being of victims and witnesses, the avoidance of duplication of evidence, and the rights of Mr Gbagbo and Mr Blé Goudé."¹⁹ That question was also discussed by the Defence in section 4 of its response, in reply to the arguments put forward by the Prosecution in its request.

18. For these reasons, the Defence would, if given leave to respond, request that the Chamber dismiss the Prosecution reply. A dismissal would be all the more warranted as the Prosecution reply merely restates, albeit in greater detail, the arguments made in its original request and in reality constitutes nothing but an attempt to remedy that request's inadequacies.

1.2. The Prosecution reply proves in fact to be a means of further developing and supporting its initial submissions

19. Far from responding to new points supposedly raised by the Defence response, the Prosecution reply proves to be simply a lengthier and more detailed version of its original request. However, in its application for leave to reply, the Prosecution undertook not to repeat its initial arguments.²⁰

20. For instance, paragraph 13 of the Prosecution reply, which examines the applicable law and specifically the existence of a presumption of joinder of cases, merely repeats what the Prosecution said in its initial request.²¹ By way of further

¹⁹ ICC-02/11-01/11-781, para. 21.

²⁰ ICC-02/11-01/11-771, para. 6.

²¹ ICC-02/11-01/11-738, para. 7.

example, the analysis in paragraphs 16 and 17 seeks only to bolster the argumentation in the Prosecution's initial request with regard to the "same transaction" test.²²

1.3. The Prosecution fails to reply to the arguments put forward by the Defence response

21. Concerning the application of the law to the facts, at no stage does the Prosecution directly counter the Defence's line of reasoning. Rather than engaging in a reasoned discussion of the Defence's position, the Prosecution simply recalls its original contentions, referring to paragraphs 15 and 20 of its joinder request. This is illustrated by the language used in its reply: "in its Joinder Request the Prosecution amply demonstrated..."²³ "In particular, the Prosecutor pointed to..."²⁴ and "The Prosecution also submitted..."²⁵

22. Finally, the Prosecution reply shows that the Prosecution merely restates its initial arguments. This provides ample proof that the Defence response contained no novel submissions and simply set out an analysis based directly on the arguments advanced by the Prosecution in its initial request. The Prosecution has hence used the leave to reply for a purpose other than the one envisaged and specified in the decision rendered by the Single Judge. It should not have used its reply merely to voice disagreement with the stance taken by the Defence.

²² ICC-02/11-01/11-738, para. 15.

²³ ICC-02/11-01/11-781, para. 20.

²⁴ *Idem.*

²⁵ *Idem.*

2. Application for leave to respond to the Prosecution reply and the reply of the Legal Representative of Victims

Introduction

23. Regulation 24 of the Regulations of the Court provides that, except for responses to a document, any response to a response or a reply may be submitted only with the leave of the Chamber, unless otherwise provided in the Regulations.

24. In *Lubanga*, the Prosecution sought in the alternative leave to reply to a Defence reply. In the words of the Appeals Chamber decision: “the Appeals Chamber **does not consider it necessary**, at this juncture, to have further submissions on this point or to strike any part of Mr Lubanga’s Reply. **If deemed necessary**, the Appeals Chamber will invite further submissions at a later stage in the proceedings.”²⁶ The test applied was therefore usefulness/necessity. In this case, it is therefore a matter of assessing whether it would be useful/necessary to grant the Defence leave to respond to the Prosecution reply and the reply of the Legal Representative of Victims, and whether it would inform the discussion on the issue of a joinder.

25. In addressing this matter, it should be noted that:

- The reasoning submitted by the Prosecution in its reply seeks less to respond to the Defence than to develop the initial submissions set out in the joinder request. The reply contains nothing that could not have been included in the joinder request if the Prosecution had made that request sufficiently detailed. If such had been the case, the Defence could have responded. The brevity of the Prosecution joinder request denied the Defence the opportunity to respond to all of the submissions now presented by the Prosecution in its reply. This application seeks first and foremost to allow the Defence to respond.

²⁶ ICC-01/04-01/06-3002, para. 8.

- The Prosecution has strayed from the parameters circumscribed by the Bench for its reply and has submitted new arguments in support of its reasoning; these arguments require a response if the Chamber is to have a complete picture.
- The Legal Representative of Victims has endorsed the Prosecution position, adding her interpretation of the Statute and setting out a very particular analysis of the Prosecution joinder request, which necessitates an additional response from the Defence on those points.
- As far as the reply of the Legal Representative of Victims is concerned, the Defence is not convinced that she is expressing the views and concerns of the victims within the meaning of the Statute, or that she demonstrates that the personal interests of the victims whom she represents would be affected should a joinder not take place. The Representative merely argues the merits with a view to supporting the Prosecution's stance and so acts as a second prosecutor, which is proscribed by the Statute and jurisprudence.²⁷ This double attack impairs the fairness of the proceedings. The remedy may consist of either dismissing the reply of the Legal Representative of Victims or granting the Defence leave to respond to it.
- The Defence observes that the Legal Representative of Victims considered the Prosecution's initial joinder request to be sufficiently complete as to warrant only four paragraphs of her response.²⁸ She completely endorsed the Prosecution's arguments: "The Common Legal Representative shares the arguments put forward by the Prosecution in its Request".²⁹ In that case, why did the Legal Representative of Victims feel it necessary to provide 18 pages of support for the Prosecution's arguments?

²⁷ Article 68(3); ICC-01/05-01/08-1023, para.17; ICC-01/04-556, para. 55.

²⁸ ICC-02/11-01/11-743, paras. 15-18.

²⁹ ICC-02/11-01/11-743, para. 16.

- Further with regard to the issue of fairness, it should be noted that the Prosecution will have argued for joinder in a request and a reply, supported by the Legal Representative of Victims, who will have argued in the same vein in a response and a reply, while, should this application fail, the Defence will have had the opportunity to put its arguments in its initial response alone.
- In the light of the importance of the discussion and the serious ramifications that a joinder would have for the parties concerned, it appears all the more necessary to grant the Defence the right to respond given that the replies of the Prosecution and Legal Representative of Victims call for comment of a legal nature. If the Defence is not permitted to make that comment, it would be tantamount to not allowing the Defence to express its point of view fully and to have the last word in respect of the Prosecution motions.
- The crucial and novel nature of the issue of a joinder at trial stage means that it is particularly appropriate for the Defence to be allowed to respond. It was furthermore in the view of the Single Judge the novelty and importance of the issue that justified allowing the Prosecution and the Legal Representative of Victims to reply: "The Single Judge has already acknowledged 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'. [...] The Single Judge further notes Prosecution and LRV submissions concerning the novel nature of the Issue at the Court."³⁰
- If the Defence were not permitted to respond, this would equate to giving the Prosecution the last word in respect of Prosecution motions, which would most certainly not meet the requirements of a fair trial. The Court has on many occasions and in various circumstances recognised the right of the Defence to the last word.³¹ It is vital on this issue of such importance to the Accused that

³⁰ ICC-02/11-01/11-775, para. 7.

³¹ ICC-01/04-01/06-T-29-FR, p. 23; ICC-02/11-01/11-T-14-FRA, p. 29, lines 16-20; ICC-01/04-01/06-2722, para. 2.

the Defence be able to exercise its right to reply and be afforded the opportunity to submit all its arguments in response to those presented by the Prosecution and the Legal Representative of Victims.

26. If leave to respond were granted, the Defence would expound on the following points:

2.1. The “interpretation” of article 64(5)

27. Both the Prosecution and the Legal Representative seek to sidestep the explicit language of the Statute. Under the guise of proffering an “interpretation” of the Statute, the Prosecution and the Representative attempt to circumvent the letter of the Statute, which expressly mentions the “joinder of charges”. By so doing, they misconstrue the concept of “charge” within the meaning of the Statute.

28. For example, the Prosecution asserts that, “nothing in the ordinary meaning of the terms in article 64(5) of the Statute, in particular the term ‘charges,’ indicates that a Chamber’s discretionary power to join charges is limited to situations where the legal characterisation of the charges are identical, as argued by the Defence.”³² However, the Prosecution refrains from proving that assertion and even avoids clarifying what it understands the concept of “charges” to encompass and what, in its view, a “joinder of charges” would entail. Had the Prosecution duly discussed the Defence’s position and had it, as a result, analysed the concept of “charge”, it would not have used the phrase “legal characterisation of the charges” because a “charge” *includes* the legal characterisation of the facts and hence the term “legal characterisation of the charges” is devoid of legal meaning. A charge is a combination of (1) the facts; (2) a legal characterisation of the facts; and (3) a mode of liability. By refusing to debate the provisions of the Statute and their consequences for a decision on joinder, the Prosecution and the Legal Representative of Victims are unable to explain exactly how the different charges could be joined without that leading *ipso facto* to a modification of the charges faced by each of the two Accused.

³² ICC-02/11-01/11-781, para. 9.

29. Ultimately, in their replies the Prosecution and the Legal Representative of Victims rely on their opinion of what the Statute should be. Their rebuttal of the Defence's analysis and its conclusions rests solely on the idea that to concur with the Defence would restrict the number of joinders.³³ This does not prove their point, let alone constitute a legal argument. Any reasoning submitted to the Chamber must be based on what the Statute says, and not what the parties would like it to say. Whether the application of the Statute would entail many or few joinders must not lead to acceptance of a reasoning that seeks to cast doubt on the letter of the Statute. The parties, participants and bench must apply the Statute, the whole Statute and nothing but the Statute.

2.2. Use of "drafting history"

30. Both the Prosecution and the Legal Representative of Victims refer to the drafting history of the Rome Statute to contest the Defence's construction of the applicable law. However, in so doing they misapply the preparatory work.

31. First, under Article 32 of the Vienna Convention, the preparatory work is only a supplementary means of interpretation of a text and serves solely to confirm or invalidate the interpretation of a treaty provision which was first undertaken in compliance with the principal rules of interpretation set out at Article 31 of the Vienna Convention. As stated above, the Prosecution and the Legal Representative of Victims did not attempt to interpret the Statute, which could have justified their subsequent use of the drafting history as a supplementary means. At no stage did they inquire into the scope of the concept of the "joinder of charges"; nor did they even inquire into the scope of the concept of "charges". They did not at any point discuss the interpretation of article 64(5), but merely stated how they would have liked it to have been worded. In this context, referring to the drafting history is not appropriate and adds nothing whatsoever to their reasoning.

³³ ICC-02/11-01/11-781, para. 11; ICC-02/11-01/11-780, paras. 35 and 41.

32. Second, it should be noted that use of the drafting history is particularly problematic. The draft Statute of the International Criminal Court produced in 1994 cannot be considered technically to fall within the concept of “drafting history”. The draft was produced by the United Nations International Law Commission and not by the States’ representatives. It therefore sheds no light on the actual intentions of those representatives when they drew up the provisions of the Statute. What may be used to interpret the Statute is the preparatory work in the strict sense that took place during the discussions that led directly to the drafting of the Statute in July 1998 and the work that took place under the aegis of PrepCom from 1998 to 2002. The 1994 draft was followed by four years of inter-State negotiations that produced radical changes to it. The Statute adopted in Rome in 1998 does not resemble that text in any shape or form. Although the 1994 draft is of historical interest, by no means may it be used to make the Statute say what it does not.

33. So much is evident in the present debate: although the jurisprudence and practice of the ad hoc tribunals regarding joinder may have been examined by the authors of the 1994 draft, any reference to that jurisprudence or practice was subsequently removed by the drafters of the Statute. Article 64(5) does not refer to them either in letter or spirit. The Prosecution and the Legal Representative of Victims are therefore wrong to impute to the drafters of the Statute a contrary intention. The Prosecution and the Representative do not explain why, if the negotiators of the State Parties to the Rome Statute attached such importance to the “same transaction” criterion, they did not explicitly include it in the Statute.

2.3. The “presumption” of joinder

34. In its reply the Prosecution merely reiterates its stance on the “presumption of joinder” based on its reading of article 64(5) and [the English version of] rule 136: “Together they establish a presumption that ‘[p]ersons accused jointly shall be tried together’”.³⁴ As in its initial request, the Prosecution avoids explaining what “persons

³⁴ ICC-02/11-01/11-781, para. 13.

accused jointly” means and from what text the “joint accusation” criterion is drawn. That phrase, and *a fortiori* that criterion, are missing from article 64(5) and [the French version of] rule 136.

35. [The French version of] rule 136 is, however, wholly unambiguous: it provides that “[TRANSLATION] Accused persons *in respect of whom the charges have been joined* shall be tried together”, which therefore entails that before it rules in favour of a joinder of “trials” (explicit in the [French] title of rule 136), the Chamber must first rule on a joinder of “charges”, in accordance with article 64(5).

36. In this regard, the reference made by the Legal Representative of Victims to the negotiation process culminating in the phrasing of rule 136 is not relevant. The Legal Representative of Victims suggests that the drafters drew on the rules on joinder of the International Criminal Tribunal for the former Yugoslavia (ICTY).³⁵ However, rule 136 does not reflect the practice or jurisprudence, and still less the language, employed at the ICTY. Above all, the Representative’s opinion does not take into account an essential difference distinguishing the ICC from the ICTY: the ICTY Statute does not have a provision equivalent to article 64(5). Ultimately, the wording of [the French version of] rule 136 is clear and does not leave room for misunderstanding, and hence the rule should simply be applied.

37. Of note is that, while the Prosecution criticises the Defence for an analysis that restricts the Chamber’s discretion³⁶ – an analysis based on a reading of the Statute’s clear provisions – it tries at the same time to remove the Bench’s entire discretion on the issue of joinder by basing its analysis on a supposed presumption of joinder of charges, which has no legal foundation.³⁷

³⁵ ICC-02/11-01/11-780, para. 20.

³⁶ ICC-02/11-01/11-781, para. 7.

³⁷ ICC-02/11-01/11-765-tENG, paras. 33-39.

2.4. The relevance of *Katanga* and *Chui* jurisprudence

38. Like the Legal Representative of Victims, the Prosecution refers on several occasions to the decision of the Pre-Trial Chamber, confirmed on appeal, allowing the joinder of the *Katanga* and *Chui* cases **before** any decision on the confirmation of charges. In its response, the Defence will discuss the relevance of this jurisprudence.

39. As regards applicable law, that decision does not provide a relevant precedent for the instant case as, at the time when the decision was taken, no decision on the confirmation of charges had yet been handed down in either of the cases. Technically speaking, this could not therefore have been a decision to join the charges on the basis of article 64(5) as such a joinder would have supposed the existence of charges, and hence of a decision on the confirmation of charges. The Pre-Trial Chamber sought to streamline the pre-trial consideration of the charges, and not to rule ahead of time on a joinder of the charges (which by definition post-dates the confirmation decision) and *a fortiori* on a joinder of cases. The wording of article 64(5) provides further confirmation that the drafters of the Statute believed that a joinder should be founded not on the Prosecution's accusations but on charges confirmed by the Bench.

40. The Pre-Trial Chamber and the Appeals Chamber did not seek to inquire as to the application of article 64(5) and rule 136 during the trial phase, but to streamline the process during the confirmation of charges stage.

41. Furthermore, if the facts are examined, the Defence observes that in *Katanga* and *Chui* the charges confirmed were identical: the same facts, the same legal characterisation and the same mode of liability. In the instant case, however, the charges are not the same. The Prosecution itself remarks that the Pre-Trial Chamber noted the precise correspondence of the charges in the joinder decision.³⁸ How could it fail to draw the logical conclusions for the present situation?

³⁸ ICC-02/11-01/11-781, para. 19.

2.5. The application of the law to the facts

42. In their replies the Prosecution and the Legal Representative of Victims substitute their own understanding of the two cases for the Bench's – as far as it can be discerned from the decisions on the confirmations of charges. To an extent, especially as regards the Prosecution, it is as if they have failed to move beyond the accusations formulated at the very beginning of the case and to take account of factors that emerged during the confirmation of charges stage, the considerations of the Bench in the decisions on the confirmation of charges, and the fact that the charges against the two Accused are different.

43. Hence, the Prosecution pays no regard to the clear comparison drawn by the Defence between the charges faced by both Accused in the belief that “[w]hat matters is that Mr Gbagbo and Mr Blé Goudé are both charged for their alleged co-responsibility for the same crimes committed by pro-Gbagbo forces in Abidjan against perceived Ouattara supporters between 16 December 2010 and 12 April 2011.”³⁹ This statement does not reflect the content of the decision on the confirmation of charges against Charles Blé Goudé in the slightest. In fact, the Pre-Trial Chamber *did not confirm* the responsibility of Charles Blé Goudé as indirect co-perpetrator on the basis of article 25(3)(a) for three of the four events underlying the charges against Laurent Gbagbo (the demonstrations at the RTI building, the shelling of Abobo and the women's march). It is therefore utterly incorrect to say that joinder is warranted by the fact that the mode of liability is the same.

44. Further, the Prosecution's interpretation of charges that it claims are similar – despite the fact that they are based on responsibility that differs greatly between the Accused, even though reference is made to the same facts – confirms the fears expressed by the Defence in its response: the Prosecution does indeed intend to use a joint trial to focus the discussion on charges that have not been confirmed against Mr Blé Goudé, in flagrant violation of his rights.

³⁹ ICC-02/11-01/11-781, para. 15.

45. Similarly, in an attempt to show from another angle that the charges are the same, the Legal Representative of Victims tries to salvage the reference made by the Prosecution to a “common plan” in its request for joinder. She “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.”⁴⁰ However, that reasoning does not stand up to scrutiny, as the Defence will show in its response.

46. First, as the Prosecution has not seen fit to clarify in its reply the reference in its initial request to a common plan, it seems difficult for the Legal Representative of Victims to put herself in its place and explain what it could have said.

47. Above all, the Legal Representative of Victims errs in her analysis of the Defence response. The Defence response does not “concede” anything. The Defence underscores that the only basis for a judicial assessment of shared responsibility of the two Accused is the concept of co-perpetration enshrined in article 25(3)(a) of the Statute. The Prosecution’s use of the concept of a “common plan”, which is just one element of responsibility under article 25(3)(a), on which to found all the allegations against Charles Blé Goudé – when, with regard to article 25(3)(a), the Bench found that Charles Blé Goudé was not responsible for three of the four events – is an attempt to subvert the Bench’s decisions on the confirmation of charges and to find a basis on which to level common accusations against the two Accused. To so proceed violates their rights.

48. In the same vein, the Legal Representative of Victims contests the Defence’s submission that the modes of liability must be identical for a joinder to take place.⁴¹ The Legal Representative of Victims relies in particular on ICTY jurisprudence,

⁴⁰ ICC-02/11-01/11-780, para. 33.

⁴¹ ICC-02/11-01/11-780, para. 40.

which, according to her, demonstrates that “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”.⁴² The footnote⁴³ refers to *Milutinović*. In that case, all the accused were charged both as principals (in particular as participants in a joint criminal enterprise) and accessories.⁴⁴ This similarity of modes of liability is also found in major joined cases such as *Prlić*⁴⁵ and *Popović*.⁴⁶ Thus, the jurisprudence cited by the Legal Representative of Victims does not back up her assertion. The Defence wishes to expound on its analysis of ICTY jurisprudence in its response.

2.6. Participation by the Legal Representative of Victims in the joinder discussion

49. The Defence firstly notes that the application of the Legal Representative of Victims for leave to reply was filed on 19 February 2015 and that it was granted by the Single Judge by e-mail two and a half hours later on the same day. The Defence did not therefore physically have time to reply. However, it is apparent from the Representative’s reply that, far from putting forward the views and concerns of the victims whom she represents, she is playing the role of a second prosecutor. In these circumstances the Defence should be allowed to respond to the Legal Representative of Victims.

50. Of note is that the Representative’s reasoning in favour of a joinder rests partly on the idea that a joinder would make it easier to discover the truth of the facts.⁴⁷ However, legal proceedings seek to uncover the “legal truth” applying to the responsibility of an individual. A trial does not aim to reconstruct the historical truth in its entirety. More simply, it entails understanding an individual’s role and share of responsibility in the course of events that have been verified as real. In

⁴² ICC-02/11-01/11-780, para. 40.

⁴³ ICC-02/11-01/11-780, footnote 62.

⁴⁴ ICTY, Case No. IT-05-87-PT, (Redacted) Third Amended Joinder Indictment, 21 September 2006.

⁴⁵ ICTY, Case No. IT-04-74-T, Second Amended Indictment, 26 May 2011.

⁴⁶ ICTY, Case No. IT-05-88-T, Indictment, 26 October 2006.

⁴⁷ ICC-02/11-01/11-780, para. 42.

other words, it involves understanding those events through what is said, in the course of the judicial process, about an individual's conduct. In this context, legal truth may only be seen in relation to an individual as it alone may cast doubt on the presumption of innocence. The reasoning behind a decision on joinder should not therefore be premised on a purely hypothetical exhaustive and complete reconstruction of the facts but rather on respect for the rights of the defence. The question is: which procedure – joinder or non-joinder – would best respect the rights of the individual and hence ensure proper administration of justice. The argument of the Legal Representative of Victims in this respect is irrelevant.

3. Conclusion

51. Rather than engaging in debate and examining how to interpret the wording of the Statute on joinder correctly, and specifically how to interpret the question of the joinder of “charges” under article 64(5), the Prosecution, followed by the Legal Representative of Victims, has sought merely to develop its initial arguments. Nowhere does it examine what the joinder of different charges would actually signify for each of the Accused. The Defence has shown that a joinder of different charges would force Laurent Gbagbo and Charles Blé Goudé to defend themselves against charges that have not been confirmed against them. In order to avoid a discussion of the merits and consequences of a joinder, the Prosecution and Legal Representative of Victims have situated the matter within the conceptual framework of the ICTY, a tribunal where there is no confirmation of charges stage and whose Statute does not provide for joinder.

52. Given the importance of the issue, in particular as regards the rights of the Accused, fairness demands that the Defence be granted leave to respond with a view to reframing discussion.

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

In limine,

- **Dismiss** the reply of the Prosecution (ICC-02/11-01/11-781);

If the reply of the Prosecution is not dismissed,

- **Grant** the Defence leave to respond to the reply of the Prosecution (ICC-02/11-01/11-781);

In all events,

- **Grant** the Defence leave to respond to the reply of the Legal Representative of Victims (ICC-02/11-01/11-780).

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 2 March 2015

At The Hague, The Netherlands