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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

PUBLIC

With Confidential Annex A

Public redacted version of Prosecution's submission on the provisional agenda for the 21 April status conference, 14 April 2015, ICC-02/11-01/15-35-Conf

Source: Office of the Prosecutor

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

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Other

1. The Office of the Prosecutor (“Prosecution” or “OTP”) submits its observations on the provisional agenda for the status conference pursuant to Trial Chamber I’s order of 11 March 2015 (“Agenda”).¹

Confidentiality

2. The Prosecution files its submission as Confidential since it contains information related to witnesses and the status of the investigation which cannot be shared with the public at this stage. A public redacted version will be filed as soon as practicable.

Submission

- a. Timing, volume and modalities of disclosure pursuant to rule 76*

Article 55(2) interviews (insider witnesses)

3. The Prosecution has disclosed on a rolling basis to both Defence teams the statements and interview transcripts of the witnesses it intends to rely on at trial.² On 6 February 2015, the Prosecution filed on a confidential basis in the then *Gbagbo case*, its provisional List of Witnesses (“LoW”) and List of Evidence.³ While the Defence team of Mr Blé Goudé may not currently have access to LoW, the Prosecution’s intent to rely on a given witness (or expert) at trial is made clear when it discloses statements or interview transcripts or expert reports under the category of incriminating evidence for the purposes of their release and upload in E-court. Currently, the Prosecution has disclosed as incriminating evidence the statements, interview transcripts, experts reports and investigator’s reports in

¹ ICC-02/11-01/15-1, and its AnxA.

² To date the Prosecution has disclosed over 4128 documents as incriminating evidence. This number is not limited to rule 76 materials but the entirety of the materials disclosed as incriminating evidence for the purposes of E-Court.

³ ICC-02/11-01/11-759.

relation to 112 persons it intends to call as witnesses. The Prosecution informs the Chamber that in relation to one witness, [REDACTED].⁴

4. The Prosecution submits in confidential Annex A its updated LoW in order to provide timely notice to the Defence. [REDACTED].⁵
5. The Prosecution is finalising the quality control of the transcripts of interviews of insider Witness P-0559, in order to proceed to their disclosure in the week of 20 April. The Prosecution is also awaiting the completion of the transcription of the second interview of insider Witnesses P-0047 and P-0011⁶ and interviews of insider Witnesses P-0483 and P-0560. The Prosecution expects to be in a position to disclose the transcripts of the interview of P-0047 in the week of 20 or 28 April, at the latest and of the interview of P-0011, P-0483 and P-0560 in the second half of May 2015. The Prosecution notes that the timeline anticipated for the completion of the transcripts of P-0483 also includes their translation from Liberian Kreyol/English into French.

Crime base witnesses

6. The Prosecution has completed the interview of three crime base witnesses and their statements will be disclosed by the end of next week.⁷

Expert witnesses

7. The Prosecution intends to call expert witnesses at trial. One of these witnesses, P-0410 is a medical expert who examined some of the Prosecution witnesses. His testimony will focus on the reports that were drafted as a result of these medical examinations.

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ These are the statements of crime base Witnesses P-551, P-567 and P-568.

8. Witness P-0411 is an expert in ballistics who will be testifying about his report on the alleged shelling sites in Abidjan,⁸ related to the 17 March 2011 incident.
9. The Prosecution expert on the phenomenon of youth groups in Côte d'Ivoire has almost completed his report which should be disclosed by the end April.
10. The Prosecution was recently informed by the *Nederlands Forensisch Instituut* ("NFI") that it was able to identify by DNA three of the victims of the 3 March incident. The reports detailing the exhumation of the bodies, the collection of the bio-samples from the victims' bodies and of their relatives, the chain of custody of these samples and their positive analysis by the NFI should be disclosed by the end of April. The Prosecution currently foresees that at least two experts will be called to testify to present these results.⁹ With the identity of three victims now confirmed, the Prosecution will conduct autopsies of the victims. The Prosecution expects to be able to disclose the autopsy reports by mid-May 2015. A pathologist should be added to the Prosecution's LoW.
11. As indicated in its submission of 6 February 2015,¹⁰ expert Witness P-0564 did a further examination of Witness P-0131. The report of the expert was disclosed to both Defence teams on 6 and 10 of March 2015.¹¹ Expert P-0564 will also be called to testify in relation to the external examinations of the bodies of the victims of the 17 March 2011 incident.¹²
12. In its 6 February 2015 submission,¹³ the Prosecution indicated that it was also waiting for the DNA results of samples collected during the exhumation of alleged victims of the 17 March incident. The Prosecution has been informed that

⁸ CIV-OTP-0049-0048.

⁹ One expert will be [REDACTED] and the other an expert from the NFI.

¹⁰ ICC-02/11-01/11-760-Red2, para. 20.

¹¹ See CIV-OTP-0076-1483, see also Communications of Evidence disclosed to the Defence: ICC-02/11-01/11-805 and ICC-02/11-02/11-221.

¹² See for instance CIV-OTP-0073-1071 to CIV-OTP-0073-1122 that were disclosed on 27 February and 2 March 2015. See Communications of Evidence disclosed to the Defence: ICC-02/11-01/11-793 and ICC-02/11-02/11-219.

¹³ ICC-02/11-01/11-760-Conf-Red, para. 32.

the DNA results should be available by the end of April. Once the results will be received, all information relevant to the 17 March forensic mission will be disclosed to the Defence. However, from the preliminary information currently available, it is unlikely that any of the samples collected match the victims exhumed. Consequently, the information collected is likely to be disclosed pursuant to rule 77 of the Rules of Procedure and Evidence (“Rules”).

13. The Prosecution recalls that it was able to collect and disclose the original HD version of the video of the 3 March incident as allegedly filmed by Witness P-0114.¹⁴ The Prosecution has sought the expertise of a Spanish video enhancement expert to enhance the video. The Prosecution believes that such an enhanced version will demonstrate that smoke can be seen coming out of the canon of the armoured vehicle when the first shot is heard on the video (at around time stamp 00:03:39:10). Additionally, with an enhanced version, the injuries to the victims, the exact location of their bodies as well as further details as to the make-up of the FDS convoy should be clearer and therefore more useful when questioning witnesses and for the Chamber’s truth seeking mission. This enhanced version of the video and the expert report are expected to be available for disclosure by 30 April.

14. With the location of the victims enhanced, the Prosecution will be in a position to conduct a proper crime scene examination. Family members will also now be in a position to confirm the identity of the victims. The Prosecution foresees that by the second half of May it should be able to disclose the results of the further investigative steps, including forensic activities.

15. The Prosecution disclosed on 13 April, the crime scene report of the Lem mosque conducted by the Prosecution’s Scientific Response Unit (“SRU”).¹⁵ The SRU team

¹⁴ See video at CIV-OTP-0077-0411 and document CIV-OTP-0077-0193 that were disclosed on 23 March 2015. On 13 April 2015, the same video was provided again on separate DVDs to Defence since the video is uploaded in Ringtail it lost some of its original image quality. See Communications of Evidence disclosed to the Defence: ICC-02/11-01/15-12; ICC-02/11-01/15-31.

¹⁵ CIV-OTP-0076-1952.

collected a number of samples and items which were sent for analysis to the French *Institut de recherche criminelle de la gendarmerie nationale* (“IRCGN”). The Prosecution has received a report which it will disclose shortly in relation to that crime scene analysis.

16. The Prosecution recently obtained another report from the IRCGN¹⁶ in reference to the forensic examinations of two metallic fragments recovered from the bodies of two alleged victims of the 17 March incident.¹⁷ This report will also be disclosed shortly. The conclusions of the report tend to indicate, *inter alia*, that both fragments have an identical elemental composition and an identical microstructure. Further scientific examinations will be conducted to determine whether these metallic samples are similar to seven other metallic fragments recovered in relation to the 17 March incident¹⁸ and whether all of these metallic fragments may originate from mortar shells, and if so of which type, model, and calibre. These further expert reports should be available by the end of May and middle of June 2015.

17. Finally, the Prosecution has been actively looking into the possibility of calling an expert on hate speech. Unfortunately to date, the experts the Prosecution has contacted that have experience on the subject matter and worked in Côte d’Ivoire have declined to cooperate. They decline either for security reasons or indicate that this will impede their ability to continue their research activities in the field. The Prosecution has identified a possible expert who may be willing to draft a report on the subject matter but a final decision has not yet been taken by the Prosecution. Further details will be provided during the 21 April status conference.

¹⁶ CIV-OTP-0076-1913.

¹⁷ See footnote 12 above.

¹⁸ Report on the Alleged Shelling Sites in Abidjan, Ivory Coast – 8-12 July 2013, CIV-OTP-0049-0048, at pp. 0065-0066, and 0070-0071.

b. Whether the Prosecution anticipates issues concerning the protection of witnesses and other persons

18. The Prosecution does not currently anticipate any issues. [REDACTED],¹⁹ [REDACTED].

c. Material already disclosed and intended to be disclosed by the Prosecution pursuant to article 67(2) of the Statute and rule 77 of the Rules

19. The Prosecution has disclosed to the Defence on a rolling basis article 67(2) and rule 77 materials in its possession.²⁰

20. The Prosecution will continue its on-going review of newly collected evidence and of evidence already in its possession for article 67(2) and rule 77 material to ensure timely disclosure. The Prosecution continues to regularly review its evidence collection during the course of the pre-trial and trial phases in order to identify information that may become relevant as the case and as the lines of the Defence evolve or become known. Evidence review and disclosure are therefore not static, but a continuous process.

21. Consequently, any material falling under this category is being disclosed as soon as practicable.

d. Languages to be used in the proceedings

22. Based on the languages used during their interview, the majority of Prosecution witnesses will testify in French, with others testifying in Dioula or English. As noted in paragraph 5 above, Witness P-0483 will testify in Liberian Kreyol - a vernacular form of Liberian English. The interpretation of the witnesses' testimony will therefore be necessary.

¹⁹ ICC-02/11-02/11-212-Conf, para. 25

²⁰ 3875 documents were disclosed as rule 77 to both Defence teams. This number does not include documents that were disclosed as rule 77 and re-disclosed as incriminating evidence. Additionally, there are 202 documents that were disclosed pursuant to article 67(2). This number also does not include documents re-disclosed as incriminating evidence.

e. Agreements as to evidence

23. The Prosecution intends to send a proposal to both Defence teams for that purpose as soon as its disclosure is completed and the submission of any auxiliary document in relation to the charges is agreed upon. While the Prosecution will do its utmost to secure agreements that go beyond facts of mere common sense or of judicial notice, it recalls that such agreements will have to be reached with two Accused, represented by two Defence teams who may have different strategies.

f. Conduct of the proceedings

24. The Prosecution recently filed in the *Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba et al*²¹ and the *Ntaganda*²² cases proposals on the conduct of the proceedings which incorporate the best practices and lessons learned of past cases. Upon further instructions of the Chamber, the Prosecution remains available to submit a similar proposal.

g. Filing of auxiliary documents in relation to the charges

25. The Pre-Trial proceedings in the cases against Laurent Gbagbo and Charles Blé Goudé introduced a number of procedural innovations which resulted in clarity as to the facts and circumstances that are confirmed by the Pre-Trial Chamber and that are the basis of the trial proceedings. The procedural background in these cases informs the Prosecution's proposals concerning the presentation of its updated Document Containing the Charges ("DCC").

²¹ Public redacted version of "Prosecution's Observations on the Agenda of the First Status Conference" ICC-01/05-01/13-859-AnxD.

²² Prosecution submissions on the conduct of proceedings and the modalities of victim participation at trial, ICC-01/04-02/06-547, paras. 9-61.

26. Moreover, as the Prosecution has previously submitted,²³ the procedures followed in the *Gbagbo* and *Blé Goudé* cases so far have provided the Accused with extensive notice of the nature, cause and content of the charges pursuant to their right under article 67(1)(a). The Prosecution has provided the Defence with detailed and comprehensive DCCs, which precisely identified and hyperlinked to E-Court all items of evidence that the Prosecution relied on to establish each of the factual allegations contained in the DCC.²⁴ The Prosecution has further submitted with every disclosure of incriminating material (and continues to do so), an Element Based Chart (“EBC”). A short time before the confirmation of charges hearing, it provided a consolidated EBC with hyperlinks.
27. Relying also on a joint DCC at the trial would not only continue to ensure that the Accused’s rights under article 67(1)(a) are fully protected, but it would also provide for consistency in the proceedings and make effective use of the time and resources that the Prosecution has already invested in this case.
28. In sum, the Prosecution intends to present a common and updated DCC that a) accurately reflects the charges as confirmed by the Pre-Trial Chamber; and (b) largely follows the structure and format of the DCCs that the Prosecution presented during the confirmation of charges proceedings.
29. Accordingly, the proposed DCC will consist of two main parts: First, it will include an extensive part that describes the evidence that the Prosecution intends to present during trial, as well as its latest analysis of that evidence, with a view to establishing the elements of the crimes charged, as well as the applicable modes of liability. The Second part of the proposed DCC will articulate the facts and circumstances as confirmed by the Pre-Trial Chamber, as well as their legal characterisation.

²³ ICC-02/11-01/11-T-25-Red-ENG CT, p. 46, ln.12 to p.52, ln.21.

²⁴ See Footnoted DCC in the *Gbagbo* case (ICC-02/11-01/11-592-Conf-Anx2-Corr2-tENG) and Footnoted DCC in the *Blé Goudé* case (ICC-02/11-02/11-124-Anx2-Corr-Red).

30. In addition, the Prosecution proposes to present a List of Evidence that will present all the evidence that the Prosecution wishes to introduce during the trial in a table format. If requested to do so, the Prosecution can provide the Defence with an EBC, which lists each item of incriminating evidence disclosed to the Defence in relation to the elements of the crimes and/or the modes of liability to which it goes to proof. The EBC would consist of a document that consolidates the EBCs that accompanied each disclosure of incriminating evidence.²⁵

31. Finally, although the Pre-Trial Chamber declined to confirm charges for Laurent Gbagbo on the basis of article 28, the Prosecution will shortly file a request for notice to be given of a possible re-characterisation pursuant to regulation 55(2) of the Regulations of the Court ("RoC") in this respect. The Prosecution proposes to include in the Joint DCC references to Mr Gbagbo's criminal liability under article 28, which will be subject to the Trial Chamber's notice.

Background

32. In both pre-trial proceedings, the Pre-Trial Chamber instructed the Prosecution to "clearly and comprehensively identif[y] and distinguish [...] [the material facts underlying the charges] from those facts of a mere subsidiary nature".²⁶ The Pre-Trial Chamber stated that "subsidiary facts may be analysed by the Pre-Trial Chamber insofar as relevant to determine the existence of material facts, but are not themselves part of the charges and are not subject to confirmation by the Pre-Trial Chamber under article 61(7) of the Statute."²⁷

33. The Prosecution presented its case subject to these instructions. Sections 1 to 8 of the respective DCCs²⁸ contained subsidiary facts, in which the Prosecution described the evidence upon which it relied for the purposes of the confirmation

²⁵ See ICC-02/11-01/11-592-Conf-Anx3-Corr; ICC-02/11-01/11-592-Conf-Anx4-Corr; ICC-02/11-02/11-130-Conf-Anx1.

²⁶ ICC-02/11-01/11-325, paras.27-28; ICC-02/11-02/11-57, paras.11-12.

²⁷ ICC-02/11-01/11-325, para.27; ICC-02/11-02/11-57, paras.11-12.

²⁸ ICC-02/11-01/11-592-Anx1; ICC-02/11-01/11-592-Conf-Anx2-Corr2-tENG (Amended DCC in the case against Laurent Gbagbo); ICC-02/11-02/11-124-Anx1-Corr; ICC-02/11-02/11-124-Conf-Anx2-Corr, see also ICC-02/11-02/11-124-Anx2-Corr-Red, ICC-02/11-02/11-124-Conf-Anx2-Corr-tENG (DCC in the case against Charles Blé Goudé).

of charges hearing and explained how this evidence establishes the material facts of the charges to the requisite evidentiary threshold. These subsidiary facts also served the purpose of providing the Defence with additional notice pursuant to article 67(1)(a), together with the List of Evidence and the Footnoted DCC that the Prosecution filed simultaneously. Section 9 of the DCC in both cases included the actual charges. Pursuant to regulation 52 of the RoC, it was divided into two parts. The first part included the (material) facts and circumstances of the charges. These facts support each of the elements of the crimes charged as well as the modes of liability. The second part contained the legal characterisation of the charges. It identified the relevant crimes, as well as the modes of liability.

34. The decisions on the confirmation of charges against Laurent Gbagbo and Charles Blé Goudé followed the same approach.²⁹ Section 2 of the respective decisions consists of an analysis of the evidence and Section 3 includes the Pre-Trial Chamber's factual findings. On the basis of this analysis and factual findings, Section 4 sets out the "factual circumstances and the legal characterisation confirmed by the Chamber". As a result, the charges that have been confirmed by the Pre-Trial Chamber and upon which the trial will be conducted are included in Section 4 of the respective confirmation decisions. The facts and circumstances of the confirmed charges are included in paragraphs 267-277 of the confirmation decision against Laurent Gbagbo and paragraphs 183-193 of the confirmation decision against Charles Blé Goudé. Moreover, the applicable legal characterisation is included in paragraphs 278 and 194 of the respective decisions.

The Proposed Joint DCC

35. Following the Trial Chamber's decision to join the charges against Laurent Gbagbo and Charles Blé Goudé,³⁰ the Prosecution proposes to present the charges against both Accused in one consolidated document.

²⁹ See ICC-02/11-01/11-656 (Decision on the confirmation of charges against Laurent Gbagbo); ICC-02/11-02/11-186 (Decision on the confirmation of charges against Charles Blé Goudé).

³⁰ ICC-02/11-01/15-1.

36. As noted above, and consistent with the confirmation of charges proceedings, the proposed Joint DCC will have a first part in which the Prosecution will describe how it intends to use its evidence to establish the facts and circumstances described in the charges. This part may be referred to as the “Auxiliary Part of the DCC” and serves the purpose of a Pre-Trial Brief that the Prosecution filed in other cases. The second part of the proposed DCC will include actual “Charges” consisting of the facts and circumstances, as well as their legal characterisation, as confirmed by the Pre-Trial Chamber. For ease of reference, the below analysis will first deal with the “Charges”.

(i) The Charges

37. Consistent with regulation 52 of the RoC and with the respective confirmation of charges decisions, this part of the DCC will consist of two sections, namely the facts and circumstances as confirmed by the Pre-Trial Chamber, and their legal characterisation.

38. The first section will reflect the facts and circumstances as confirmed by the Pre-Trial Chamber in Section 4 of the respective confirmation decisions. Although the relevant facts for each Accused largely overlap, they include some details that are specific to one or the other Accused. This applies in particular to the facts that describe the criminal conduct and the *mens rea* of each Accused. In addition, one incident,³¹ although relevant to each Accused, serves a different purpose in the charges against Laurent Gbagbo and Charles Blé Goudé. For that reason, the Prosecution will clearly identify which facts are common to both Accused, and which facts are specific to each of the two Accused.

39. The second section of the charges will consist of the legal characterisation of the facts. This part will not include additional facts, but it will demonstrate how the facts and circumstances included in the previous part relate to the crimes charged

³¹ The “February 2011 Incident”.

as well as to each of the relevant modes of liability. Finally, this part will also identify each of the Counts of which the two Accused stand charged.

(ii) The Auxiliary Part of the DCC

40. The Auxiliary Part of the proposed DCC is intended to provide additional notice to the Accused pursuant to article 67(1)(a) of the Statute. It will explain how the Prosecution intends to use its evidence to establish the crimes charged, as well as the relevant modes of liability at trial.
41. The Auxiliary Part of the DCC will largely follow the structure and format of parts 1 to 8 of the Footnoted DCC, which precisely identified and hyperlinked the items of evidence that the Prosecution relied on to establish each of the factual allegations contained in the DCC.³² The Auxiliary Part of the DCC will (a) merge the two previous Footnoted DCCs into one document; and (b) reflect the additional evidence that the Prosecution intends to rely on for the purposes of the trial, as well as the Prosecution's latest analysis of its evidence.
42. In preparing the Auxiliary Part of the DCC, the Prosecution may rely on its previous analysis of the evidence and on subsidiary facts as included in the Footnoted DCC that the Prosecution filed during the confirmation proceedings. It may also rely on the Pre-Trial Chamber's analysis of the evidence and the factual finding included in Sections 2 and 3 of the respective confirmation decisions. However, the analysis of the evidence and factual findings of the Pre-Trial Chamber in its confirmation of charges decision cannot bind the Prosecution or the Trial Chamber. As stated by the Pre-Trial Chamber, the analysis of the evidence and the subsidiary facts included in the DCC "are not themselves part of the charges and are not subject to confirmation by the Pre-Trial Chamber under article 61(7) of the Statute."³³ Moreover, while maintaining the consistency of its case, the Prosecution may, in light of the additional evidence obtained since the

³² See, ICC-02/11-01/11-592-Conf-Anx2-Corr2-tENG; ICC-02/11-02/11-124-Anx2-Corr-Red.

³³ ICC-02/11-01/11-325, para.27; ICC-02/11-02/11-57, paras.11-12.

confirmation of charges hearing, slightly depart from the analysis of individual items of evidence in view of the totality of evidence that it will present during the trial.

h. Any other matter related to the applicability of decisions and orders previously rendered by the Chamber

43. The Prosecution would like to recall that the Prosecution and Defence evidence uploaded in E-court in the previous two cases now also has to be uploaded in E-court under the new case code. Therefore, the confidentiality level will have to be reviewed before the Registry can upload and make available the evidence. [REDACTED].

i. Commencement of the trial

44. The Prosecution submits that in light of the last investigative activities being finalised, the expected completion of some interview transcripts, and the additional forensic evidence and reports to be disclosed in the second part of May and early June 2015, a realistic date to start the trial would be in October 2015. It notes, however, that the first round of the Ivorian Presidential election is currently scheduled to take place in late October 2015, as constitutionally foreseen and as confirmed by President Ouattara again last March.³⁴ Any second round, if necessary, would take place 15 days after the proclamation of the first round results.³⁵ The Prosecution is mindful of the impact that an October commencement date may have on the general security situation in Côte d'Ivoire, and will present its views on that impact by way of oral submissions at the upcoming status conference.

³⁴ See "Côte d'Ivoire: Ouattara confirme organisation de la présidentielle en octobre 2015", 24 March 2015. Available at: <http://www.connectionivoirienne.net/108678/cote-divoire-ouattara-confirme-lorganisation-de-la-presidentielle-en-octobre-2015> [Last accessed 14 April 2015].

³⁵ Article 36, Constitution de la République de Côte d'Ivoire.

Conclusion

45. The Prosecution respectfully provides this submission and will supplement orally its response where necessary during the status conference of 21 April 2015.



Fatou Bensouda, Prosecutor

Dated this 15th day of April 2015

At The Hague, The Netherlands