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Pénale
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**International
Criminal
Court**

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Date: **15 October 2014**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekaterina Trendafilova
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

THE PROSECUTOR V. CHARLES BLÉ GOUDÉ

PUBLIC REDACTED VERSION
(of filing correcting ICC-02/11-02/11-179-Conf of 14.10.14)

with Confidential Annex A

Final Confirmation Submissions

Source: **Defence for Charles Blé Goudé**

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The Office of the Prosecutor

Fatou Bensouda

James Stewart

Eric MacDonald

Counsel for Charles Blé Goudé

Nicholas Kaufman

Legal Representatives of the Victims Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Charles Blé Goudé ("the Suspect") submits that the charges against him should not be confirmed both for the reasons set out below and for the reasons set out during the confirmation hearings which took place on 29 September 2014 through 2 October 2014.¹

THE INCIDENTS

1. The Defence reminds the learned Pre-Trial Chamber of its critique of the evidence supporting the five discrete incidents on account of which the Suspect's individual responsibility is, allegedly, engaged.

2. The attack on the demonstrators described in **Incident 1** (the RTI March) was perpetrated, principally, by FDS elements. The only youth involvement mentioned by Prosecution witnesses is attributed to FESCI activists.² The Suspect had divorced himself from FESCI many years earlier.³ Indeed, at the period relevant to the charges, he retained no influence whatsoever over FESCI or its leader/s.⁴

3. The mosque mentioned in **Incident 2** most likely caught fire not as a result of arson committed with criminal intent but, rather, mistakenly, as a result of a counter-attack prompted by a barrage of rocks thrown at the FDS elements.⁵ It is not clear whether the

¹ See ICC-02/11-02/11-T-5-CONF-ENG; ICC-02/11-02/11-T-6-CONF-ENG; ICC-02/11-02/11-T-7-CONF-ENG; ICC-02/11-02/11-T-8-CONF-ENG

² See P-106, CIV-OTP-0019-0211 at paras. 33-34 (stating that FESCI activists beat protestors, whereas BMO mercenaries fired upon them); P-435, CIV-OTP-0063-2597-R01 at 2610 ("*Mais c'était des instructions qu'il avait reçues au plan politique... Comme je l'ai dit, la FESCI meme, MIAN, tout ça...*").

³ See D-15, CIV-D25-0001-2503 at 2525 (stating that the Suspect was Secretary General of the FESCI during a single mandate, from 1998-2000); P-324, CIV-OTP-0046-1368-R01 at 1373 (stating in reference to the FESCI: "*Le leader, c'est lui qui oriente movement. Si vous êtes le Secrétaire general, là où vous orientez le mouvement, c'est là-bas que le mouvement s'en va.*").

⁴ See, e.g., CIV-OTP-0041-0241 at 0255 (as cited in para. 191 of the DCC) ("*Ça n'allait plus entre [le Secrétaire Général de la FESCI] et BLE GOUDE... Aujourd'hui quand on parle de jeunesse patriotique, on a l'impression que tout se réduit à Goude. Et quand [le Secrétaire Général de la FESCI] est venu il n'a pas voulu se laisser faire. Il a pris une position ferme. Et chaque fois il voulait combattre BLE GOUDE parce que chacun veut s'affirmer. Quand on a besoin de la FESCI, logiquement on devrait s'adresser directement au premier responsable qui est [le Secrétaire Général de la FESCI]*"); D-15, CIV-D25-0001-2503 at 2542 (citing an online call from a group of Young Patriots) ("*Excédée par cette arrogance et cette énième tentative de récupération, la FESCI t'a chassé de la RTI et tu as finalement loti ton quartier général devant l'Ambassade de France.*"); CIV-D25-0001-0965 (discussing the Suspect's boycott of FESCI activities through 2007 and 2008); D-11, CIV-D25-0001-0967 at 0977 ("*Blé Goudé ne peut pas donner des ordres à la FESCI. Ce 'est pas possible... Vous comprenez que Blé Goudé n'étant pas membre de ces différentes entités, il ne peut pas faire injonction à la FESCI de participer à une organisation*").

⁵ See DCC, para. 152 ("*Un affrontement a éclaté entre ces deux groupes au niveau du Boulevard Principal.*"); P-109, CIV-OTP-0020-0335-R01, at 0360 ("*[N]ous sommes allés massivement dans notre quartier ramasser des pierres... nous avons réussi à mobiliser la jeunesse de notre quartier pour qu'ensemble on défende le quartier.*"); P-437, CIV-OTP-0058-0488-R01 at 0504 ("*Comme je portais mon boubou pour la prière, je suis allé vite me changer à la maison et j'ai porté une tenue*").

conflagration was initiated by a grenade of an unknown variety or an incendiary device directed at the roof.⁶ The Suspect's alleged "tour" of the neighbourhood and other acts of violence described in **Incident 2**, including those which occurred at barricades, are based on pure hearsay reports.⁷ Hearsay evidence is of negligible value when it is the principal evidence supporting a charge against a suspect.⁸ Furthermore, the presence of barricades was a pre-existing phenomenon.⁹

appropriée et je suis revenu. On a alors commencé à se lancer des cailloux les uns contre les autres. Nous on a du casser le mur de la clôture devant la Mosquée pour avoir des cailloux à leur lancer...mon ami [REDACTED] est allé se positionner du côté du Commissariat pour être avec nos jeunes et riposter aux jets des pierres...Ensuite les policiers du Commissariat 16^{ème} sont venus pour ramener le calme.”).

⁶ See P-447, CIV-OTP-0058-0488-R01 at 0506 (as cited in DCC, para. 150) (“Une autre grenade a été lancée dans la Mosquée. Les tapis dans la Mosquée ont commencé à prendre feu.”); P-442, CIV-OTP-0062-0860-R01 at 0869 (as cited in DCC, para. 152) (“[J]’ai vu 2 véhicule blindés noirs de la BAE...[j]’ai vu ces chars tirer sur la mosquée.”); P-46, CIV-OTP-0014-0479-R01 at 0503 (confirming that it was gendarmes who had attacked the mosque); CIV-OTP-0053-0278 (Maguy le Tocard, then second-in-command of the UPLTCI, complicates the issue even further, stating: “Les riverains ont brûlé la mosquée parce qu’ils viennent de savoir [incompréhensible] Et les armes là.”); D-8, CIV-D25-0001-0840 at 0859 (stating that the witness had not seen this event unfold and had no first-hand information).

⁷ See generally P-369, CIV-OTP-0048-1404-R01 (containing an interview [REDACTED] consisting of assertions based exclusively on hearsay or double hearsay, and on which the Prosecution relies in its DCC, paras. 80-88, 150, 153-5, 159); See P-433, CIV-OTP-0057-1345-R01 (as cited in the DCC, paras. 150, 151, 152 153) (“Le troisième a lui fui et a rapporté les faits a [REDACTED] qui à son tour me les a rapporté.”); P-436, CIV-OTP-0058-0289-R01 at 0307 (“Mais je précise que je n’ai pas vu Charles Blé GOUDE de mes propres yeux.”); P-109, CIV-OTP-0020-0335-R01 at 0363 (stating, in reference to the violence occurring after the mosque burned, that “Nous, par exemple, avons quitté nos maisons pour aller dormir chez les voisins qui vivaient plus haut dans le quartier”); See also CIV-OTP-0046-0029 (a [REDACTED] prepared by [REDACTED] and based entirely off of hearsay evidence); cf. DCC, paras. 158-159 (citing nearly exclusively to NGO reports and/or press articles).

⁸ *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, 17 December 2010, ICC-01/04-01/07-2635 (“Although there is no prohibition on hearsay before the Court, the Chamber is conscious of the inherent risks in this type of evidence. It may therefore take such risks into consideration when attributing the appropriate probative value to items of evidence consisting mainly or exclusively of hearsay... where [media] reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned.”); *Prosecutor v. Katanga and Ngudjolo*, Trial Chamber II, 18 December 2012, ICC-01/04-02/12-3-tENG (“The Chamber also wishes to emphasise that this evidence, which is based on hearsay, must be considered with the greatest circumspection, especially as it relates to a crucial point in the Prosecution’s case”); *Prosecutor v. Mbarushimana*, Appeals Chamber, 30 May 2012, ICC-01/04-01/10-516 (OA4) (“[T]he investigation should largely be completed at the stage of the confirmation of charges hearing...the confirmation of charges hearing exists to separate those cases and charges which should go to trial from those which should not, a fact supported by the drafting history.”); *Prosecutor v. Gbagbo*, Pre-Trial Chamber I, 3 June 2013, ICC-02/11-01/11-432, paras. 27 *et seq.* (“Whenever testimonial evidence is offered, it should, to the extent possible, be based on the first-hand and personal observations of the witness... Although there is no general rule against hearsay evidence before this Court, it goes without saying that hearsay statements in the Prosecutor’s documentary evidence will usually have less probative value. Reliance upon such evidence should thus be avoided wherever possible... Heavy reliance upon anonymous hearsay, as is often the basis of information contained in reports of nongovernmental organizations (“NGO reports”) and press articles, is problematic... Such pieces of evidence cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(1)(a) of the Statute.”); *Prosecutor v. Tadić*, Case No. IT-94-01-T, *Decision on Defence Motion on Hearsay*, 5 Aug. 1996 (“[I]n deciding whether or not hearsay evidence that has been objected to will be excluded, the Trial Chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability”); *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, *Judgment*, 14 January 2000, para. 489(a) (holding that the Chamber was “unable to accept the evidence [because it] is double hearsay and lacks any features which could confirm its reliability”); *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, Case No. IT-02-60, *Judgment*, 17 January 2005, para. 300 (refusing to consider evidence that was “not . . . examined through examination-in-chief and cross-examination”); *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34, *Judgment*, 31 March 2003, para. 414 (refusal to consider testimony of a witness “overhearing” a statement regarding prison abuse); *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, *Judgment*, 26 February 2001, para. 534 (refusing to

4. The attack on the women's demonstration detailed in **Incident 3** was perpetrated by FDS military elements as was the attack on the market mentioned in **Incident 4**. The latter incident most likely resulted from the negligent pursuit of a military objective.¹⁰ There is no evidence to suggest that individuals linked to the Suspect were involved in either of these two incidents.

5. Finally, the violence described in **Incident 5** occurred almost two weeks after the Suspect had left Côte d'Ivoire.¹¹ Far from promoting a plan to remain in power at all costs, the violence constituted acts of retribution.¹² The Suspect's prior speeches at rallies in Yopougon were neither xenophobic nor inflammatory but, rather, conformed with the right to free speech and expression. It has, thus, not been shown that the rallies, particularly those in Yopougon, or individuals associated with the Suspect,¹³ were causally linked to the deaths and rapes that occurred on 11-12 April 2011.

INDIVIDUAL RESPONSIBILITY

Article 25(3)(a) – objective elements

(i) *The "common plan"*

6. The Prosecution has failed to prove the existence of a common criminal plan. The Defence respectfully asserts that there is no evidence whatsoever to suggest that the alleged

consider testimony regarding an overheard media broadcast); *Prosecutor v. Krnojelac*, Case No. IT-97-25, *Judgment*, 15 March 2002, para. 301 (refusing to consider testimony regarding statements that were overheard subsequent to the event for which the assertions are being offered as proof of the matter asserted).

⁹ See P-118, CIV-OTP-0058-0425-R01 at 0445 (calling the blockades “unexpected” and stating “*s’il y a eu systematization ou organization, ca doit etre après et ca...ceux qui ont ete les chefs, ils ont ete connus par la presse également, hein, Maguy LE TOCARD.*”); D-9, CIV-D25-0001-0865 at 0890 (“*Les jeunes aux barrages étaient hors contrôle, parce qu’il y avait un psychose de peur. Même Charles BLE GOUDE s’est fait fouillé, même moi aussi.*”); D-8, CIV-D25-0001-0840 at 0857 (“*Les jeunes de chaque quartier s’organisaient tous seuls – il mettaient les barrages pour protéger leurs quartiers et ils ont créé les groupes qu’ils appelaient les groupes d’autodéfense. C’était les jeunes du quartier même.*”); See also CIV-D25-001-0935; CIV-OTP-003-0438; CIV-D25-001-0937; CIV-D25-0001-0019.

¹⁰ See P-164, CIV-OTP-0037-0425 at 0443 (discussing potential BASA miscalculation); P-239, CIV-OTP-0038-0002 at para. 136 (stating that Brice and Pegard of the BASA made calculation errors and were responsible for the mortar fire); P-234, CIV-OTP-0041-0534 at para. 154 (stating that BASA attempted to evaluate the distance to fire the mortar).

¹¹ CIV-OTP-0028-0023 at paragraph 20. The Prosecution did not dispute the Defence assertion that the Suspect left Côte d'Ivoire on or around 29 March 2011.

¹² See CIV-OTP-0002-0631 at 642 ([T]he Yopougon neighborhood was the site of particularly intense killings of perceived pro-Ouattara groups. Many killings were in the days after Gbagbo’s arrest, as militias overly sought retribution.”); CIV-OTP-0022-0042 at 0046 (“*Le 12 avril 2011, lorsque l’ancien président Gbagbo a été arrêté les miliciens sont venu au sein de mon quartier, [REDACTED] et ont dire que toutes les femmes doivent subir la guerre parce que ce sont nos frères qui sont rebelles et que Ce sont ces derniers qui ont contribué à l’arrestation de Gbagbo.*”).

¹³ **Conf-Anx A**: tables depicting the violence of 11-12 April 2014 and to whom it was attributed by participating victims.

core members of the inner circle, namely Laurent Gbagbo, Simone Gbagbo and the Suspect, ever jointly agreed to attack a civilian population.

(ii) *The "inner circle"*

7. Even if a criminal plan was concocted by an "inner circle" comprising Laurent Gbagbo, his wife Simone and unidentified others, the Suspect was not a member of such a conspiratorial group. The Suspect was summoned to only one (valedictory) meeting in the presence of both Laurent and Simone Gbagbo together during the entire post-electoral crisis.¹⁴ At the conclusion of this meeting, the nature of which will be discussed below,¹⁵ the Suspect left Côte d'Ivoire.¹⁶

8. In the run up to the elections, the Suspect was appointed by Laurent Gbagbo to the not so prominent¹⁷ role of deputy national campaign director for the youth together with Navigué Konaté¹⁸ and was, subsequently, nominated Minister of Youth and Employment.¹⁹ By virtue of these two roles, the Suspect was obliged to attend strategy meetings with the director of the national election campaign, Issa Malick Coulibaly,²⁰ and, thereafter, cabinet meetings in the presence of other ministers of the Gbagbo government.²¹ The Suspect's presence at the Presidential Residence is not, therefore, *per se* incriminating. The same, however, cannot be said for the most prominent leader affiliated with CONARECI – Damanas Pickass²² – and the extremely notable paramilitary leader, Maho Glofiéhi,²³ whose

¹⁴ CIV-OTP-0057-0548 at 0552.

¹⁵ See below para. 19.

¹⁶ See CIV-D15-0001-0576 (confirming that a Reuters journalist covering the Ghana border on 29 March 2011 saw the Suspect crossing into Ghana); D-7, CIV-D25-0001-0658 at paras. 5, 36 (stating that the Suspect had moved to Ghana by late March 2011 because "*la ville était un véritable champ de combat*").

¹⁷ CIV-OTP-0025-0182.

¹⁸ D-4, CIV-D25-0001-0985 at para. 45.

¹⁹ As agreed by the Prosecution at ICC-02/11-02/11-5-CONF-ENG, lines 14-19.

²⁰ A Muslim of Northern Ivoirian origins whose home was nonetheless burned and pillaged prior to the elections. See CIV-D25-0001-0658 at 0675-6.

²¹ The Suspect's physical presence at the Palace when other ministers were present during certain time periods, however, does not indicate that the Suspect participated in meetings with those ministers. See, e.g., CIV-OTP-0018-1313 at 1347, 1349, 1370, 1382.

²² See CIV-OTP-0018-1313 at 1327 (entry 22 where, on 2 December 2010, he entered with two mysteriously unidentified persons) and CIV-OTP-0018-1313 at 1339 (entry 46 where, on 9 December 2010, he was the last to leave at 01:09 the following morning following a brief interlude in the presence of five pastors) and, finally, CIV-OTP-0018-1313 at 1449 (entry 9 where, on 9 April 2011, he attended the hall of the Presidential Residence).

²³ See CIV-OTP-0018-1313 at 1438 (entry 21).

independent visits to the Presidential Residence were not, on the face of it, justified by any ascertainable purpose.

9. Indeed, to suggest that the mere fact of an audience with Laurent Gbagbo can constitute circumstantial evidence of the Suspect's participation in a criminal plan is, quite frankly, absurd. For example, in its closing submission, the Prosecution sought to impute murky dealings to the Suspect by virtue of a visit paid to the Presidential Residence simultaneously with P-9 on 1 December 2010.²⁴ The Prosecution neglected to mention, however, that, on the very same day, the Suspect's visit to Laurent Gbagbo also overlapped with those of the Apostolic Nuncio,²⁵ Young Jin Choi (the former head of the ONUCI mission),²⁶ the Ambassador of France to Côte d'Ivoire,²⁷ and even Guillaume Soro himself!²⁸ Given that none of these individuals are accused of having participated in the so-called common plan, such supposed circumstantial proof derived from the mere fact of presence at the Presidential Residence bears no evidentiary weight whatsoever.²⁹

10. Finally, the evidence demonstrates that the Suspect had little to no contact with Simone Gbagbo during the relevant time period. The Prosecution has failed to prove that the Suspect participated in a single CNRD meeting in 2010 or 2011.³⁰ On the few occasions

²⁴ See CIV-OTP-0018-1313 at 1325 (entries 24 and 33).

²⁵ *Ibid* (entry 44).

²⁶ *Ibid* (entry 45).

²⁷ *Ibid* (entry 51).

²⁸ *Ibid* (entry 54) (Guillaume Soro, furthermore, visited Laurent Gbagbo in the company of Cmdts. Wattao and Morou – two of the principal pro-Ouattara militia figures – *c.f.*; entries 55 & 56).

<http://www.rfi.fr/emission/20110413-commandants-morou-ouattara-wattao-anciens-chefs-rebelles-cote-ivoire/>.

²⁹ At trial, inferences can be drawn from circumstantial evidence only when there is no other reasonable conclusion to be drawn from the presented facts. In the instant case, the Prosecutor's proposed conclusion is not even *prima facie* reasonable. See *Prosecutor v. Ngudjolo*, 18 December 2012, ICC-01/04-02/12, para. 71; *Prosecutor v. Lubanga*, 14 March 2012, -01/04-01/06-2842, para. 111 (hereinafter "Lubanga Judgment"); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 3 February 2010, ICC-02/05-01/09-73, para. 33.

³⁰ See DCC, paras. 119-120. See also D-7, CIV-D25-0001-0797 at para. 130; D-10, CIV-D25-0001-0895 at 0913; see generally CIV-OTP-0018-0810 (Simone Gbagbo's diary failing to mention the Suspect's name on the CNRD attendance lists); CIV-OTP-0018-0881 (the CNRD logbook failing to mention the Suspect's attendance); CIV-OTP-0018-0985 (CNRD attendance lists on which the Suspect never appears). Where the Suspect's name does appear on such attendance lists (which retained the same format over a number of years from 2006) – the list is not signed (whereas there does indeed exist, at least, one such signed list).

when the Suspect admittedly attended such meetings,³¹ his non-confrontational views were jokingly rejected.³² Simone Gbagbo did not, apparently, see the Suspect as an ally.³³

(iii) *Contribution*

11. Even if a common criminal plan could be said to exist, the Prosecution is required – and has failed – to demonstrate that the Suspect made a “coordinated” and “essential” contribution thereto without which the plan would have been frustrated.³⁴ The Defence notes five ways, in particular, whereby the Prosecution has argued that the Suspect contributed to the common plan: (a) by recruiting and enlisting volunteers into the FDS chain of command; (b) by galvanising the pro-Gbagbo youth in order to implement the common plan; (c) by participating in crucial policy meetings with Simone Gbagbo and Laurent Gbagbo; (d) by distributing weapons, and; (e) by recruiting and training militiamen and mercenaries. All of these alleged modes of contribution lack support in the evidence.

(a) *Recruiting and enlisting volunteers*

12. The Prosecution has spectacularly backtracked on this matter. From initially arguing that “thousands” of volunteers were recruited into the FDS,³⁵ it now admits that the said recruitment never materialised.³⁶ For its original grandiose assertion, however, the Prosecution relied, *inter alia*, on the evidence of witness P-44.³⁷ The Prosecution’s remarkable change in course has now, implicitly, accepted that this aspect of P-44’s evidence is completely untenable. Bearing this in mind, P-44’s evidence should not be

³¹ Prior to his electoral campaign nomination.

³² See D-7, CIV-D25-0001-0658 at 0694. Also D-4, CIV-D25-0001-0985 at para. 74.

³³ See CIV-OTP-0018-0810, at 0820 (“*La DNC jeunesse doit mieux fonctionner.*”), 0836 (noting Simone Gbagbo’s desire to use the support of the GPP and other self-defence groups); P-324, CIV-OTP-0046-146 at 1465 line 130 (“*Madame n’aimait pas trop l’Alliance*”), lines 139 *et seq.* (stating that Simone Gbagbo supported the CONARECI over the AJSN), 1466, lines 155 *et seq.* (“*Les reproches qu’elle faisait, c’étaient des reproches qui étaient faits notamment contre BLE GOUDE, contre Charles BLE GOUDE...Elle ne voulait pas le voir...*”).

³⁴ *Prosecutor v. Ntaganda*, Pre-Trial Chamber II, 9 June 2014, ICC-01/04-02/06-309, para. 104 (hereinafter “*Ntaganda Confirmation Decision*”); *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber II, 26 January 2012, ICC-01/09-02/11-382-Red, para. 402 (hereinafter “*Muthaura et al. Confirmation Decision*”); *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, 23 January 2012, ICC-01/09-01/11-373, para. 306 (hereinafter “*Ruto et al. Confirmation Decision*”); *Prosecutor v. Katanga and Ngudjolo*, Pre-Trial Chamber I, 30 September 2008, ICC-01/04-01/07-717, para. 525 (hereinafter “*Katanga Confirmation Decision*”).

³⁵ See ICC-02/11-02/11-60-Conf at para. 26.

³⁶ See ICC-02/11-02/11-T-6-CONF-ENG, p.29 at lines 12-15; *see also* P-9, CIV-OTP-0006-0112 at 0156.

³⁷ See ICC-02/11-02/11-60-Conf at fn.50.

"compartmentalized" (as the Prosecution suggests), and the Pre-Trial Chamber cannot simply selectively rely on such testimony.³⁸

(b) Galvanising the pro-Gbagbo youth in order to implement the common plan

13. Apart from P-44, none of the Prosecution's "insider" witnesses support the contention that the various youth organisations comprising the so-called *Galaxie Patriotique* were galvanized by the Suspect.³⁹

14. The Suspect was not the "undisputed leader" of the *Galaxie Patriotique*, nor could he be. Despite P-226's singularly erroneous belief that it was an organization in which one could formally register membership,⁴⁰ the *Galaxie Patriotique* was a creature of the media.⁴¹ Similarly, the Prosecution's reliance on television subtitling and editing in order to prove the Suspect's "presidency" of the *Galaxie Patriotique*⁴² is risible.

15. The Suspect exercised no control over any of the various armed "*autodéfense*" groups or militia headed by the likes of Moussa Touré Zeguen,⁴³ Maguy le Tocard⁴⁴ and Maho Glofiéhi.⁴⁵ The fact that many youth leaders, and even the First Lady herself,

³⁸ The Defence recalls the Prosecution's opinion expressed elsewhere that a "*compartmentalized and selective analysis of the evidence, viewing pieces of evidence in isolation, ignor[ing] critical corroborative evidence...*" should be avoided: ICC-01/04-02/12-39-Red2 at para.3.

³⁹ See, e.g., P-449, CIV-OTP-0063-1377-R01 at line 706 ("*Charles BLÉ GOUDÉ [ne] pouvait pas dire à Damana PICKAS ... À Konaté NAVIGUÉ, qui dirigeait la JFPI, de ne pas organiser un meeting...*"); P-118, CIV-OTP-0058-0448 at 0452 ("*[BLE GOUDE] preferait tourner seul sous la coupole de son organisation, COJEP. Donc il faisait meeting sur meeting...sans associer les autres souvent, qui venait, quand ils apprenaient...*"); D-10, CIV-D25-0001-0895 at 0908 ("*Ceux qui disent que BLE GOUDE contrôlait tout le monde, ont tort - il avait les adversaires féroces en interne. Il y avait une énorme adversité au sein de notre propre camp...*").

⁴⁰ See CIV-OTP-0039-0143-R02 at 0154.

⁴¹ See, *inter alia*, the Prosecution's own insider witness, P-324: "*La Galaxie Patriotique, comme le nom indique...vous savez, c'est des termes..chacun utilise souvent les choses pour faire la rhétorique, et notamment les journaux, la presse. Ils aiment pour englober..quand ils disent Galaxie Patriotique souvent, ils ont tendance à mettre même la CONARECI...l'ULPTCI...ils ont tendance à mettre tout le monde...dans la même moule*". CIV-OTP-0046-1427 at 1433.

⁴² See ICC-02/11-02/11-T-8-Conf-ENG ET 17/66 at lines 7-15.

⁴³ P-449, CIV-OTP-0063-1377 at line 770: "*Zeguen avait des personnes qui se faisaient appeler les groupes d'autodéfense. ... Ces groupes d'autodéfense là, qui avaient ... pour quelques-uns ... qui avaient des armes, possédaient des armes. Mais ceux-là ne sont pas du groupe du COJEP. Vous voyez, il faut distinguer le GPP du COJEP*".

⁴⁴ See CIV-OTP-0053-0227 at 0263 (in which Maguy Le Tocard states that he was "at war with" the Suspect and that "*l'Union des Patriotes pour la libération totale de la COTE D'IVOIRE... c'était notre organisation qui avait fait cette guerre, mais c'était toute la COTE D'IVOIRE devrait être embrasée. C'est toute la COTE D'IVOIRE qui était embrasée. Parce que c'est ... là, au moins, c'est notre structure, hein, qui est implantée sur tout le territoire qui est alimentés par les armes et qui défendent les instructions*").

⁴⁵ P-449, CIV-OTP-0063-1377 at line 200: "*Maho GLOFIEHI, dans le schéma, il n'était rien ... dans le schéma. Il n'était même pas dans l'entourage du Général Charles BLÉ GOUDÉ. Non*".

appeared at the Suspect's rallies⁴⁶ is indicative of nothing other than the Suspect's charisma and popularity. His rallies were well advertised in advance.⁴⁷ All sectors of Ivorian society were invited⁴⁸ and attended – including ecclesiastical notables.⁴⁹

16. Support for the chaotic nature of the so-called *Galaxie Patriotique*, is to be found in the background socio-political report⁵⁰ prepared by witness D-15 (who is officially included in the ICC Registry's list of experts). The unique expertise of D-15, her impartiality and the contents of her report have not been challenged by the Prosecution. Nor has the Prosecution adduced any counter-expertise. In fact, the Prosecution has failed to provide any proper analysis of the *Galaxie Patriotique* that may be of assistance to the Pre-Trial Chamber.⁵¹ In the circumstances, D-15's conclusions should be seen as persuasive evidence and relied upon when analysing the Parties' submissions.

17. Finally, the Suspect's speeches and protests formed part of his protected freedom of speech and freedom of assembly,⁵² the exercise of which cannot possibly form the basis for a crime against humanity.

(c) Participating in policy meetings

18. Not one Prosecution witness can testify that the Suspect advocated, debated or even heard discussed the illegitimate use of violence against civilians during any meeting that he had with Laurent Gbagbo. Defence witness D-3, however, corroborates the Suspect's contention that he attended the Presidential Residence only for legitimate purposes. In his

⁴⁶ *ibid* pages 17-19.

⁴⁷ See generally CIV-D25-0001-2503 at 2508.

⁴⁸ CIV-OTP-0027-0196: The invitation to all "*ivoiriens...et les chefs religieux et leurs fidèles*" to participate in the rally of 26 March 2011 published in the national media.

⁴⁹ CIV-D25-0001-2076 – accepted by the Prosecution to be 26 March 2011 (ICC-02/11-02/11-T-8-Conf at 17/66).

⁵⁰ CIV-D25-0001-2503

⁵¹ In stark contrast to the Defence which interviewed an impressive number of leaders from all branches of the so-called *Galaxie Patriotique*.

⁵² See *Case of Jersild v. Denmark*, A-298, 1994 E.C.R. 15890/89 (emphasizing the distinction between creating a dialogue with those calling for violent acts and actually propagating such ideas); *Case of Günduz v. Turkey*, 2004 E.C.R. 35071/97 (protecting the freedom of expression to discuss extremist ideas regarding issues of general interest that are widely covered in the media); *Case of Dink v. Turkey*, 2010 E.C.R. 2668/07 (the right to freedom of expression includes the right to criticize widely-held views regarding issues of general interest; states have a positive obligation to protect the lives of individuals protecting such points of view).

official capacity, D-3 was required to be present at all cabinet meetings yet maintains that no criminality was ever discussed between the Suspect and Laurent Gbagbo.⁵³

19. The evidence further demonstrates that the Suspect's last recorded visit to Laurent Gbagbo on governmental business occurred on 14 March 2011⁵⁴ whereas his last ever visit to the Presidential Residence, albeit informal, occurred on 29 March 2011.⁵⁵ According to Prosecution witness P-324 [REDACTED], it was at this final meeting that the Suspect refused to rally the youth for yet another demonstration fearing that the proliferation of weapons in the public domain could lead to things spiraling out of control.⁵⁶ For this withdrawal, out of concern for the safety of the general public, the Suspect was deemed a traitor.⁵⁷

(d) Distributing weapons

20. The Defence notes the Prosecution's clear concession that the Suspect was not personally involved in the distribution of arms.⁵⁸ Notwithstanding, even those who did not balk at resorting to violence affirmed that the Suspect did not distribute weapons.⁵⁹ It is of no great surprise that the wholly untrustworthy P-44, contrary to the Prosecution's assertion, supports such an allegation. P-44's evidence on the matter, however, is both hearsay and refuted by the very witness who P-44 claims acted as weapons supplier to the Suspect.⁶⁰ The only other piece of evidence supporting the allegation is an article by an academic of unproved expertise; similarly, hearsay and, moreover, written in 2008.⁶¹ The Pre-Trial

⁵³ See CIV-D25-0001-0630 at 0635.

⁵⁴ CIV-OTP-0053-0574 at 0737 (page demonstrating the Suspect's last visit to the Palace).

⁵⁵ CIV-OTP-0057-0548 at 0552.

⁵⁶ See CIV-OTP-0046-1461 at 1470 at line 311 *infra*. Also, CIV-OTP-0057-0772 at 0825 for the Suspect's description of this tense meeting: "*La réunion du jour portait sur l'analyse de la situation et les propositions de sortie de crise. Ce fut une réunion difficile et houleuse, tant le sujet à l'ordre du jour était délicat et sensible. Chaque participant a exposé son analyse de la situation et donné son point de vue*".

⁵⁷ *ibid*, "*Depuis l'arrestation du président Laurent Gbagbo et mon arrivée en exil, j'ai reçu et je continue de recevoir des coups de toute part... et même de ceux qui sont sensés être mes compagnons*".

⁵⁸ DCC at para. 269: "*BLE GOUDE n'avait pas besoin de distribuer lui-même les armes, les leaders de différentes milices s'en chargeaient suivant les orders de l'entourage immédiat de Laurent GBAGBO*".

⁵⁹ See CIV-OTP-0053-0227 at 0262, line 1315.

⁶⁰ ICC-02/11-02/11-T-7-Conf-ENG- ET, 01-10-14, 44/56 at line 10 *infra*.

⁶¹ *Ibid* at line 6.

Chamber will recall that weapons reportedly circulated in the latter stages of the post-electoral violence as a result of scavenging or the theft of abandoned FDS weapons.⁶²

(e) Recruiting and training militiamen and mercenaries

21. This assertion has its roots, yet again, in the hearsay evidence of P-44, which, the Defence repeats, is so unreliable that it may not form the basis for the confirmation of charges. Nowhere is the danger of relying on hearsay evidence clearer than in the present case. When first interviewed in connection with the post-election violence by the authorities in Côte d'Ivoire, P-44 claimed that the Suspect maintained 4,000 youth at his disposal.⁶³ When interviewed by the Office of the Prosecutor, however, he claimed that the Suspect had conscripted and trained 7,000 individuals in the Banco forest outside Abidjan.⁶⁴ Notwithstanding P-44's grossly untruthful exaggerations, not one of these fictional "recruits" has provided a statement to the Prosecution or materialised at any moment in time. The only other evidence adduced by the Prosecution in support of the alleged recruitment of "mercenaries" is both hearsay and demonstrably false.⁶⁵

(iv) Organised hierarchic apparatus / almost-automatic compliance

22. Indirect co-perpetration through an organization also requires that the individual accomplished the crimes through an organised and hierarchical apparatus of power, and that the execution of the crimes were secured by almost automatic compliance by the subordinates with the orders given by the leader.⁶⁶

⁶² See CIV-OTP-0053-0227 at 0266, lines 1444 *et seq.*; D-8, CIV-D25-0001-0840 at 0851-0852 and P-68, CIV-OTP-0028-0023 at 0026.

⁶³ CIV-OTP-0007-0082 at 0084.

⁶⁴ CIV-OTP-0014-0742 at 0758.

⁶⁵ P-435's assertion that the Suspect enlisted the assistance of a "Major Charles" in the 2nd Infantry Battalion in Daloa to recruit 100 Liberians from the Buduburum refugee camp in Ghana (CIV-OTP-0060-0028 at 0031) is refuted by the "*ordre de bataille*" (CIV-OTP-0048-0955). [REDACTED] claimed that he discovered documentation pertaining to Liberian mercenaries when searching the Suspect's house. The person best placed to know the truth of such an assertion (D-12) denies it (CIV-D25-0001-2048 at paragraph 29).

⁶⁶ Katanga Confirmation Decision, paras. 522 *et seq.* As in the recent *Bemba* article 70 proceedings, the Prosecution neglected to mention these elements in its presentation of the objective requirements for indirect co-perpetration. See generally ICC-02/11-02/11-T-5-CONF-ENG at p. 69 *et seq.*

23. Fulfilling this element requires that the individual had control over a highly structured organization that revolved around a centre of power.⁶⁷ The degree of control exercised must be sufficient to achieve almost automatic compliance or subjugation of the will of the actual perpetrator. In so far as the Prosecution argues that money engendered such compliance, its own evidence unequivocally reveals that the recipients of cash (allegedly from the Presidency) were affiliated with CONARECI and not with AJSN.⁶⁸

24. In light of the divisions within and between its constituent groups, the so-called *Galaxie Patriotique* cannot be classified as a hierarchical apparatus of power that commanded the almost automatic compliance of the youth.⁶⁹ To cite the words of HHJ Van den Wyngaert, even more pertinent in the instant case, the Prosecution has failed to show how the Suspect was able to "control the will"⁷⁰ of those elements of the pro-Gbagbo youth which committed the crimes comprising the five core incidents.

Article 25(3)(a) – subjective elements

(i) Knowledge of the common plan and the mutual role of the participants therein

25. As mentioned above, the Prosecution relies on the logbook of visitors to the Presidential Residence as a means of assessing the Suspect's alleged participation in conspiratorial meetings with Laurent and Simone Gbagbo. With respect to the first incident for which the Suspect's individual liability is engaged, the majority of the Pre-Trial Chamber concluded that on 14 December 2010, "*a meeting took place...at the Presidential Residence in Cocody, during which Laurent Gbagbo prohibited the demonstration, and instructed the high commanders of the FDS to take any necessary measures to prevent it*" [emphasis added].⁷¹ The Prosecution maintains that the said meeting transpired on 15 December 2010⁷² and, so the Defence agrees, is most likely correct in this respect.⁷³ The

⁶⁷ *Muthaura et al.* Confirmation Decision, paras. 191-192, 196, 201; *Ruto et al.* Confirmation Decision, para. 197.

⁶⁸ CIV-OTP-0025-0657. See also fn. 34 herein.

⁶⁹ See *infra* paras. 15-16; see also ICC-0211-0211-T-6-CONF-ENG, p. 63 *et seq.*

⁷⁰ See ICC-01/04-02/12-4 at paragraph 54.

⁷¹ *Prosecutor v. Gbagbo* Pre-Trial Chamber I, 12 June 2014, ICC-02/11-01/11-656-Red, para. 26 (hereinafter "*Gbagbo* Confirmation Decision").

⁷² See ICC-02/11-02/11-T-6-Conf-Eng-ET at page 93/99, line 3. "*My colleague is totally right, it didn't happen on the 14th ; it happened on the 15th, according to the logbooks, so that can be verified by the Chamber*". It will be noted that this comment by the learned Prosecutor confirms the accuracy of the logbooks and the Prosecution's reliance thereupon as

majority, furthermore, held that "*the evidence sufficiently demonstrates that the mission of the FDS was conceived and executed in order to achieve the goal of preventing the demonstration from taking place, by using all means, including lethal violence against civilians*" [emphasis added].⁷⁴ According to the logbook of visitors to the Presidential Residence, the Suspect did not visit the Presidential Residence on either 14 December 2010 or 15 December 2010.⁷⁵ P-9, furthermore, flatly denied that the Suspect was present at the said meeting.⁷⁶ The only conclusion which can be drawn is that the Suspect was not a party to the conception of the criminal plan to attack those civilians participating in the RTI marches and, consequently, could not have had knowledge thereof.

26. The Defence submits that the requisite knowledge and intent or "*dolus*" for indirect co-perpetration is that fixed by HHJ Trendafilova herself in the Bemba confirmation decision. In other words, the Suspect cannot "be said to have intended to commit any of the crimes charged, unless the evidence shows that he was at least aware that, in the ordinary course of events, the occurrence of such crimes was a virtually certain consequence of the implementation of the common plan" [emphasis added].⁷⁷ For example, even if the Suspect was aware of the supposedly pivotal speech which Laurent Gbagbo delivered at Divo on 27 August 2010 (which he was not), he would not have understood that it conceptualised a plan to maintain power by attacking civilians and that its subsequent implementation would, as a virtual certainty, lead to murder and rape.

27. Finally, it is worth noting that despite the Prosecution's submissions to the contrary,⁷⁸ *mens rea* for the purposes of Article 30 of the Rome Statute cannot, as a rule, be inferred from past criminal conduct (which, in the present case, is denied). As HHJ Trendafilova and her learned colleagues found, once again, in the Bemba confirmation

incontrovertible means of ascertaining the occasions on which members of the "inner circle" were physical present at one and the same time for the purposes of formulating the "common plan".

⁷³ CIV-OTP-0018-1313 at 1345 (where the visitors' logbook records at entry no.19 that both General Mangou (CMA) and General Kassaraté visited President Laurent Gbagbo between 21:52 and 22:55).

⁷⁴ Gbagbo Confirmation Decision at para. 40.

⁷⁵ See CIV-OTP-0053-0574 at 0607-0609.

⁷⁶ P-9, CIV-OTP-051-0935-R01 at 0962, lines 926-7.

⁷⁷ *Prosecutor v. Bemba*, 19 June 2009, ICC-01/05-01/08-424 at para. 369 (hereinafter "Bemba Confirmation Decision").

⁷⁸ ICC-02/11-02/11-T-6-Conf-ENG ET 31/99 at lines 3-4: "It was sufficient for Ble Goude to make reference to the actions and methods they employed in the past".

proceedings, "past conduct is not a sufficient factor to rely upon in order to infer the suspect's intent within the meaning of article 30 of the Statute ".⁷⁹

Article 25(3)(b) – objective elements

28. The Defence has demonstrated that the Suspect was not the undisputed leader of the *Galaxie Patriotique* or the "pro-Gbagbo youth". The pro-Gbagbo "youth" groups were splintered on ideological lines and did not fall into the unified and cohesive structure imagined by the Prosecution. Additionally, and by the Prosecution's own admission, the Suspect, despite being influential, "was not in a position of authority over the FDS, the militia and the mercenaries."⁸⁰ In the circumstances, therefore, the Suspect cannot be said to have exercised "*authority vis-à-vis the direct perpetrators of the crimes under question*".⁸¹ Accordingly, and in keeping with the jurisprudence of the Court,⁸² the Suspect cannot be found to have "*ordered*" the commission of the relevant crimes.

29. As for "*soliciting*" or "*inducing*", the Prosecution alleges that these residual forms of "instigation" were effected by the Suspect in the following ways: by mobilising and instructing the youth to commit acts of violence against civilians, by ordering the setting up of roadblocks, by creating a climate of fear through xenophobic rhetoric, by communicating the common plan, by endorsing the violence resulting therefrom and by funding training, weapons provision and the recruitment of mercenaries.⁸³ As argued previously,⁸⁴ none of these alleged activities have any support in the evidence.

30. More particularly, however, it has not been shown how any of the Suspect's exhortations to the general public, as evinced from his legitimate speech-making activity, comprised a "substantial contribution" or that they had a "*direct effect*" on the commission

⁷⁹ Bemba Confirmation Decision at para. 384.

⁸⁰ ICC-02/11-02/11-T-5-CONF-ENG, p. 75, lines 7-9.

⁸¹ Gbagbo Confirmation Decision at para. 244.

⁸² This Court has found that "ordering" requires that the accused holds a position of superiority. See Ntaganda Confirmation Decision at para. 147.

⁸³ ICC-02/11-02/11-T-5-CONF-ENG, p.73, lines 5-25 and p.74, lines 1-5.

⁸⁴ See ICC-02/11-02/11-T-6-CONF-ENG at pp. 53-55.

or attempted commission of the crimes forming the five charged incidents.⁸⁵ The Suspect's speeches (selectively produced by the Prosecution) were devoid of inflammatory and xenophobic content and were, as a consequence, incapable of fomenting racially or politically motivated violence.⁸⁶ The Suspect's call to enlist did not materialise, nor did his call to descend on the Golf Hotel. As for the Suspect's alleged support for roadblocks and the denunciation of "*personnes étrangères*",⁸⁷ no evidence other than hearsay and speculation has been adduced to show a causal linkage⁸⁸ between the so-called Baron Bar speech and the only "barricade violence" on account of which the Suspect's individual responsibility is engaged – namely, the specific events detailed in **Incident 2**.⁸⁹

Article 25(3)(b) – subjective elements

31. At the outset, the Defence suggests that an "instigator" may not be held liable for crimes that are committed without the scope of his intent.⁹⁰ By way of example, the Suspect's call to enlist is probative of the fact that he only ever intended that the youth comport itself within the legitimate existing framework (despite the fact that the said enlistment never took place). The unsubstantiated allegation that FDS officials might have proceeded to distribute arms to the youth in an unlawful and unregulated fashion would have fallen without the scope of the Suspect's intent.⁹¹

⁸⁵ See *Prosecutor v. Mudacumura*, 13 July 2012, ICC-01/04-01/12-1-Red, para. 63; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 Dec. 2004, para. 27); *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11A, Appeal Judgement, 28 Nov. 2007, para.480; *Prosecutor v. Kayishema and Ruzindana*, Case no. ICTR-95-1-A, Appeals Judgement, 1 June 2001, para. 198; *Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006, para.130.

⁸⁶ Where the Suspect adopted "militaristic" terminology as a bombastic rhetorical device it was either in a clearly religious context or tempered with a call to peaceful resistance. Moreover, the Suspect's repeated call to resistance "*aux main nues*" cannot be interpreted as code for violence (c.f. Krisztina Varga: ICC-02/11-02/11-T-6-Conf-ENG ET 31/99 at lines 19-20) given that the same terminology was equally adopted by the RHDP opposition CIV-OTP-0007-0231 at para. 1: "*les femmes aux mains nues*".

⁸⁷ ICC-02/11-02/11-T-7-CONF-ENG, pp. 7-9.

⁸⁸ W. Schabas, *Commentary on the Rome Statute* at p. 433 (2010) ("Case law requires proof of a causal relationship between the instigation and the crime itself, and the contribution of the accused in fact had an effect on the commission of the crime.")

⁸⁹ DCC at paras. 158-160.

⁹⁰ *ibid*, para. 798. See Wibke Kristin Timmerman, Incitement in international criminal law, 88 Int'l Rev. of the Red Cross 823, 839 (Dec. 2006).

⁹¹ In attempting to show that the Suspect's call to enlist was a façade designed to conceal his "true" intent to distribute arms to the youth, the Prosecution quoted from Simone Gbagbo's diary stating that the youth must be armed. This statement – even if probative of Simone Gbagbo's knowledge and intent - cannot be relied upon to show that the Suspect intended or was aware that the FDS would arm the youth. ICC-02/11-02/11-T-6-CONF-ENG, p. 29, lines 19-20; Presentation "Blé Goudé's orders or mots d'ordre to the pro-Gbagbo youth and his knowledge and intent": Krisztina Varga.pdf, p. 9 citing CIV-OTP-018-081 at 0833.

32. The Defence avers, in addition, that not only must the intent of the instigator be directed at causing his agent to commit a crime, but he must, also, foresee that the person(s) he has influenced will carry out the crime envisaged with the requisite state of mind.⁹² As an accessorial mode of liability for which the objective elements are satisfied with less rigorous requirements, the risk that even the most trivial form of conduct be deemed "instigation" is suitably counterbalanced by the need to satisfy more stringent subjective requirements.

33. At this juncture, the Defence feels it appropriate to pay particular heed to the criminal knowledge and intent imputed to the Suspect on the basis of a cast-away comment made to a journalist to the effect that "*dans une révolution, il y a toujours des effets collatéraux*".⁹³ Firstly, there is nothing to suggest that the Suspect was specifically countenancing the deaths of civilians as opposed to insurgent rebels killed in the conduct of a legitimate military operation. Secondly, the death of civilians in a "revolution", as regrettable as it may be, is a trite statement of a matter of public record. Thirdly, the comment is misrepresented; the journalist was not putting the Suspect on notice that people affiliated with him were marauding about Côte d'Ivoire causing acts of violence but, rather, that the situation was an unfortunate one of generalised chaos caused by both parties to the civil unrest. The Suspect's true reaction to the countrywide pandemonium, as presented to him by the journalist, was evoked in the very same interview in an exchange which immediately preceded the "*effets collatéraux*" comment.

"JOURNALIST: Yeah. CHARLES, does it worry you? That there are so many people who are mobilised and who are active and who are on the verge of violence, what's going to happen in this country if you can't calm the situation down?"

Charles BLÉ GOUDÉ [CBG]: This is what I ... c'est ce que je vous ai dit, je vous ai dit que ... en tant que leader, nous avons le devoir de désamorcer cette bombe. Vous comprenez ? L'objectif d'un leader n'est pas seulement de vaincre, ce que nous devons gagner ici, la véritable victoire, c'est la victoire de la paix. Parce que ceux qui crient ainsi, qui nous acclament, ce qu'ils attendent de nous.

⁹² A. Eser, Individual Criminal Responsibility, in *The Rome Statute of the International Criminal Court: A Commentary* 797 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

⁹³ CIV-OTP-0019-0128 at 0129.

*c'est qu'ils vivent en paix. Et que chacun puisse avoir un travail décent qui puisse lui permettre de vivre dans un environnement de paix. C'est à ça que nous nous attelons".*⁹⁴

The Suspect's "knowledge and intent", therefore, were and are clearly articulated - albeit ignored by the Prosecution. The Suspect firmly believed that his role was to promote peace in spite of the ongoing violence.

Article 25(3)(c)

34. The Defence submits that the principles governing liability pursuant to Article 25(3)(c) of the Rome Statute are broadly similar to those governing Article 25(3)(b) and thus repeats them while stressing some important distinctions. Firstly, the objective conduct envisaged under Article 25(3)(c) would most likely cover any form of accessorial behaviour not encompassed by Article 25(3)(b). For this reason, the Defence suggests that while a minimal level of participation may, arguably, trigger liability under Article 25(3)(c), the effect of such participation on the commission of the crime must be both “direct” and “substantial”⁹⁵. Secondly, the use of the phrase “*for the purpose of facilitating...introduces a subjective threshold which goes beyond the ordinary mens rea requirement within the meaning of article 30*”.⁹⁶ Accordingly, the Defence suggests that the *mens rea* required for Article 25(3)(c) liability entails specific intent to facilitate a specific crime, coupled with the knowledge that such facilitation will **as a certainty lead to the commission** of the charged offence.

Article 25(3)(d) – objective elements

35. This Chamber has found that the Article 25(3)(a) “*concept of a ‘common plan’ is functionally identical to the statutory requirement of article 25(3)(d) of the Statute that there*

⁹⁴ *ibid.*

⁹⁵ Lubanga Judgment at para. 997; *Prosecutor v. Mbarushimana*, 16 December 2011, ICC-01/04-01/10-465-Red, at para.281 (hereinafter “Mbarushimana Confirmation Decision”).

⁹⁶ K. Ambos, Article 25, Individual Criminal Responsibility in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, 757 (Otto Triffterer ed., 2d ed. 2008); see also A. Eser, Individual Criminal Responsibility, in *The Rome Statute of the International Criminal Court: A Commentary*, 801 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

be a 'group of persons acting with a common purpose.'"⁹⁷ The Defence therefore refers to its submissions on indirect co-perpetration in this regard.

36. The jurisprudence of the Pre-Trial Chambers to date suggests that a "contribution" for the purposes of Article 25(3)(d) must be "significant"⁹⁸ yet not, necessarily, "substantial".⁹⁹ Indeed, "[w]ithout some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability".¹⁰⁰ The Prosecution has not stated the nature of the Suspect's alleged contribution to the criminal "common purpose" yet there is no evidence to suggest that he performed any of the "contributory" acts that were held to have fixed Laurent Gbagbo's liability under Article 25(3)(d).¹⁰¹ Additionally, and as mentioned previously, the Suspect's more overt and legitimate acts of support for the Gbagbo regime have not been shown to engender criminal offences or the means whereby such criminal offences could be committed.¹⁰²

37. Finally, even if it be determined that the Suspect figured prominently in the Gbagbo election campaign and government, such purported "high-level membership" of a "group" *per se* cannot be said to constitute the requisite contribution for the purpose of Article 25(3)(d).

Article 25(3)(d) – subjective elements

38. In order to confirm the charges against the Suspect pursuant to this mode of liability, the Pre-Trial Chamber, so it is submitted, must be satisfied, at the very least, that substantial grounds exist to believe that the Suspect was aware that he was rendering "significant"

⁹⁷ Mbarushimana Confirmation Decision, at para. 271.

⁹⁸ *ibid.* at paras. 276, 285. (The Chamber "consider[ed] that it would be inappropriate for such liability to be incurred through any contribution to a group crime..." and held that "in order to be criminally responsible under article 25(3)(d) of the Statute, a person must make a significant contribution to the crimes committed or attempted.")

⁹⁹ Ruto, Kosgey & Sang; ICC-01/09-01/11-373 at paragraph 354.

¹⁰⁰ ICC-01/04-01/10-465-Red at para. 277.

¹⁰¹ ICC-02/11-01/11-656-Red at para. 254.

¹⁰² See ICC-02/11-02/11-T-6-CONF-ENG, p.27, lines 19-20 ("Despite the repeated threats to attack the Golf Hotel, Blé Goudé did not give a mot d'ordre to do so."1); p.29, lines 12-15 (conceding that "the official integration of the youth into the army did not materialize").

material assistance to identifiable criminal activity and that his assistance would have a causal effect on the commission thereof.¹⁰³

39. Just as the Suspect was not privy to or aware of a common criminal plan, he was, similarly, unaware of a criminal “common purpose”. Consequently, the Suspect could not have intended to (i) “*engage in the relevant conduct that allegedly contribute[d] to the crime and (ii) be at least aware that his [...] conduct contribute[d] to the activities of the group of persons for whose crimes he [...] is alleged to bear responsibility.*”¹⁰⁴

RELIEF SOUGHT

40. In light of all the aforementioned, the learned Pre-Trial Chamber should **DECLINE** to confirm the charges.

41. Given the passage of three years since the opening of an investigation in the Côte d'Ivoire situation and given the all-encompassing nature of the document containing the charges, there exist no grounds for the Pre-Trial Chamber to exercise its powers under Article 61(7)(c) of the Rome Statute.



Nicholas Kaufman
Counsel for Charles Blé Goudé

Jerusalem, Israel
15 October 2014

¹⁰³ ICC-01/04-01/10-465-Red at para. 288: “The definition of “intent” is given in article 30 of the Statute, and the Chamber deems it appropriate to use this definition when determining what is an “intentional contribution” for 25(3)(d) liability. Intentional conduct is defined in article 30(2)(a) of the Statute such that a person must “mean[] to engage in the conduct.” The Chamber, however, notes that the application of this requirement alone may lead to the imposition of criminal liability on persons whose intentional actions have an unintended, significant effect on a group that is acting with a common purpose. The Chamber is thus of the view that the “intentionality” of the contribution must include an additional element, linking the contribution with the crimes alleged”.

¹⁰⁴ *ibid.*