

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-02/11
Date: **1 September 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

IN THE CASE OF THE PROSECUTOR v. CHARLES BLÉ GOUDÉ

Confidential

**Prosecution's Response to "Defence request to amend the document containing
the charges to exclude prejudicial facts"**

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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**Victims Participation and Reparations
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Other

Introduction

1. On 22 August 2014, the Prosecution filed its footnoted Document containing the charges¹ ("DCC") and List of Evidence.² On the same date, the Prosecution filed a public version of the DCC without footnotes.³
2. On 27 August 2014, the Defence filed the "Defence request to amend the document containing the charges to exclude prejudicial facts" ("Defence Request").⁴ The Defence Request alleges that paragraphs 15 to 58 of the DCC, which constitute the entire Part 3 of the DCC, ("Part 3") are prejudicial. Additionally, the Defence requests that the Prosecution be required to state in the DCC the date when the common plan was conceived and when Charles BLÉ GOUDÉ ("BLÉ GOUDÉ") started participating in the common plan.⁵
3. The Prosecution submits that Part 3 is not unfairly prejudicial to BLÉ GOUDÉ. Part 3, and the DCC as a whole, complies with Regulation 52 of the Regulations of the Court since it provides notice to the Defence regarding the facts and circumstances relevant to the charges. Additionally, the DCC gives sufficient information as to the date by which the common plan had begun, and does specify how the common plan evolved to include a State or organisational policy. There is no further legal requirement that the Prosecution provide particulars as to a precise date on which the common plan would have started, or the exact date on which BLÉ GOUDÉ commenced his participation therein. For the reasons specified below the Defence Request should be rejected.

¹ ICC-02/11-02/11-124-Conf-Anx2. ICC-02/11-02/11-124-Conf-Anx2-Corr was filed on 27 August 2014.

² ICC-02/11-02/11-124-Conf-Anx3. ICC-02/11-02/11-124-Conf-Anx3-Corr was filed on 27 August 2014.

³ ICC-02/11-02/11-124-Anx1. ICC-02/11-02/11-124-Anx1-Corr was filed on 27 August 2014.

⁴ ICC-02/11-02/11-128-Conf.

⁵ Defence Request, paras. 9-11.

Confidentiality

4. The Prosecution files this submission as confidential because it responds to a Defence submission of the same classification. Since the DCC was already made public,⁶ the Prosecution has no objection to the reclassification of this response as public if the Chamber deems it appropriate.

Submissions

Part 3 of the DCC is not unfairly prejudicial

5. The Prosecution submits that Part 3 is important since it provides notice to the Defence of the following factual allegations which include, but are not limited to:
 - a. The context⁷ – which is provided to assist the Defence and the Chamber to understand the historical and political background that led to the rise of BLÉ GOUDÉ, his role within GBAGBO's inner circle, and the post-electoral violence. The context also assists the Defence to understand events that then occurred during the post-electoral violence itself, including the crimes charged;
 - b. The presentation of probative facts and evidence, including of prior conduct that is material and probative to prove the knowledge⁸ and intent of BLÉ GOUDÉ, evidence that corroborates other admissible evidence, and also, in some instances, as pattern of conduct evidence.⁹

⁶ ICC-02/11-02/11-124-Anx1-Corr.

⁷ For the importance of the context in understanding crimes that occur during a multi-year conflict see the Article 74 judgement in the *Katanga* case, ICC-01/04-01/07-3436, paras.426-520; Also regarding temporal scope see Pre-trial Chamber II's "Decision on Admissibility of Evidence and Other Procedural Matters", ICC-01/04-02/06-308, para.30.

⁸ For the importance of past conduct and events as evidence relevant to knowledge of an accused see the Article 74 judgement in the *Katanga* case, ICC-01/04-01/07-3436, paras.1685-1991.

⁹ Jurisprudence of the *ad hoc* tribunals confirms that evidence of prior conduct may be relevant and probative to establish facts such as the *mens rea* of the Accused. See e.g. *Prosecutor v. Strugar*, IT-01-42-T, Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence, 22 January 2004, pp.2, 4 (holding that evidence of events outside the indictment was admissible to show the *mens rea* of the Accused, based upon prior conduct in similar circumstances); *Prosecutor v. Kunarac et al*, IT-96-23-T & IT-96-

6. Furthermore, it is important to note that the post-electoral violence that occurred in Côte d'Ivoire from 28 November 2010 to 30 April 2011 did not occur spontaneously or as a result of a sole triggering event. Rather it occurred as part of the culmination of a decade-long conflict. The post-electoral violence and surrounding events would be difficult, if not impossible, to understand without the contextual information provided in Part 3.
7. The Defence Request alleges that the "decision making process" of the Chamber, will be unfairly influenced by the DCC's reference to examples of BLÉ GOUDÉ's alleged prior involvement in criminal activity prior to the time period of the charges.¹⁰ This assertion is unfounded, especially as it is presented in sweeping general terms, without a single reference to an impugned portion of the DCC or an element of evidence. In the absence of sufficient details, it is not possible for the Chamber or the Prosecution to know what precise "alleged criminal activity"

23/1-T, Judgement, 22 February 2001, paras.589, 591 (considering evidence of uncharged rapes as an important indicator of the state of mind of the Accused at the relevant time, even though they were not taken into account for the purpose of conviction or sentencing). Such evidence may also be admitted in the practice of the *ad hoc* tribunals as 'pattern of conduct' evidence: see e.g. ICTY, Rules of Procedure and Evidence, IT/32/Rev.49, 22 May 2013, Rule 93(A) ("Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice"); ICTR, Rules of Procedure and Evidence, 10 April 2013, Rule 93(A); SCSL, Rules of Procedure and Evidence, 31 May 2012, Rule 93(A); *Prosecutor v. Popovic et al*, IT-05-88-AR73.5, Decision on Vujadin Popovic's Interlocutory Appeal against the Decision on the Prosecution's Motion to Reopen its Case-in-Chief, 24 September 2008, para.24 (finding no error in the context of the Trial Chamber's decision to admit evidence of uncharged crimes in accordance with ICTY Rule 93 as "relevant and probative of the Appellant's knowledge, intent and consistent pattern of conduct" regarding charged crimes); *Prosecutor v. Seselj*, IT-03-67-AR73.7, Decision on Appeal against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008, paras.23-24 (describing as being "in line with the jurisprudence of the International Tribunal" for evidence of uncharged events to be "admissible in order to corroborate facts that are included in the [...] Indictment and to help establish the existence of a consistent pattern of conduct pursuant to Rule 93 of the Rules, provided sufficient notice is given"; in such circumstances, although the Accused cannot be convicted of the uncharged events, the evidence can "go towards proving 'the purpose and methods of the joint criminal enterprise [...] the degree of coordination and cooperation of individuals and institutions that are allegedly party of the joint criminal enterprise, [...] the involvement [...] of the Accused, knowledge of the Accused [...] and the general elements of the persecution campaign'"); *Prosecutor v. Kupreskic et al*, IT-95-16-A, Judgement, 23 October 2001, paras.321-326, 361 (with reference to ICTY Rule 93, considering in principle that evidence of an incident outside the scope of the indictment may corroborate evidence showing the involvement of an accused in a charged incident, although ultimately overturning the relevant conviction due to a notice error). See also *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para.37 ("'Pattern of conduct' has generally not been used to introduce evidence of crimes not alleged in the indictment, but has rather been used as the basis for inferences of intent from actions which are alleged in the Indictment"); *Prosecutor v. Kvočka et al*, IT-98-30/1-T, Judgement, 2 November 2001, paras.105, 547, 554, 556 (accepting testimony of two victims of sexual assault as relevant to a consistent pattern of conduct under Rule 93).

¹⁰ Defence Request, para. 3.

the Defence is referring to. Consequently, it is not possible to present detailed arguments about the impugned portions of the DCC or elements of evidence. Nor will it be possible for the Chamber to ascertain any alleged potential prejudice.

8. Furthermore, the Defence Request fails to explain how the impugned information or evidence would “unfairly influence the decision making process” of the Chamber. The Chamber is not composed of a jury that could be swayed by factual allegations of prior criminal activity or bad character, but by a panel of professional judges that are aware of the potential dangers of such evidence. Therefore, the Defence’s submissions should be disregarded.
9. Similarly, the presentation of evidence of “good or bad conduct”, as alleged by the Defence,¹¹ is not one of the purposes of Part 3. Again, the Defence fails to specify which element of evidence is being impugned. In order to deliver its decision on the confirmation of the charges against BLÉ GOUDÉ, the Chamber will evaluate the totality of the evidence on the record, and will be able to exclude or give no consideration to evidence that is irrelevant or considered to be unfairly prejudicial.

The DCC complies with Regulation 52 of the Regulations of the Court

10. The Defence Request complains that the DCC does not specify the date that the common plan was conceived and when BLÉ GOUDÉ’s participation in the common plan started, and asks for these particulars.¹² However, the DCC complies with Regulation 52 since it provides the date by which the common

¹¹ Defence Request, para. 4.

¹² Defence request, paras. 3, 11.

plan had emerged¹³, and details of how the common plan evolved to include a State or organisational policy:

Dès son accession à la Présidence de la République de Côte d'Ivoire, en octobre 2000, GBAGBO a eu pour objectif de se maintenir au pouvoir, y compris en réprimant ou en attaquant violemment ceux qui contestaient son autorité. Dans les années suivantes, sachant une élection présidentielle inévitable, BLÉ GOUDÉ, GBAGBO et l'entourage immédiat de ce dernier ont, conjointement, conçu et mis en œuvre un Plan commun en vue de le maintenir à la Présidence par tous les moyens, y compris en commettant les crimes poursuivis. Au plus tard le 27 novembre 2010, la mise en œuvre du Plan commun a évolué pour inclure une Politique d'État ou organisationnelle qui avait pour but une attaque généralisée et systématique contre les civils considérés comme soutenant OUATTARA (« la Politique »).¹⁴

11. Details of the common plan were similarly presented in the Amended DCC in the GBAGBO case,¹⁵ and in its “Decision on the confirmation of charges against Laurent Gbagbo”, the Chamber confirmed the existence and evolution of the common plan as follows: “In advance of the presidential election of 2010, Laurent Gbagbo and his inner circle jointly designed and implemented a common plan to maintain him as President by all necessary means, including by committing the

¹³ In the practice of the ICTY and ICTR, where the Prosecution alleged liability pursuant to a common purpose, it must plead as a material fact, among others, “the period over which the enterprise is said to have existed”: see e.g. *Prosecutor v. Sainovic et al*, IT-05-87-A, Judgement, 23 January 2014 (“Sainovic AJ”), para.214; *Prosecutor v. Simic*, IT-95-9-A, Judgement, 28 November 2006, para.22; *Prosecutor v. Ntagerura et al*, ICTR-99-46-A, Judgement, 7 July 2006, para.24; *Prosecutor v. Kvočka et al*, IT-98-30/1-A, Judgement, 28 February 2005, para.28. The precise date on which the common purpose crystallised, however, need not be established or plead: see e.g. *Sainovic AJ*, paras.607, 609 (“while the existence of a common purpose at the time of the crimes is one of the elements of JCE liability, the date of its formation is not”). See also e.g. *Prosecutor v. Prlic et al*, IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, 22 July 2005, paras.20-21 (“The Prosecution is not expected to give the exact dates of the beginning of a plan which need not be prearranged to exist but to inform, including approximately if accuracy is not possible, the Defence of what it believes is the temporal time-frame of the JCE based on the elements of the case. The determination of the exact dates, if possible, at which the JCE commenced and ended is a matter for resolution at trial”, emphasis added).

¹⁴ ICC-02/11-02/11-124-Anx1, para. 323, (footnotes from the DCC omitted). The same information is provided at paras. 2 and 173.

¹⁵ ICC-02/11-01/11-592-Anx1, para. 212.

crimes charged. By 27 November 2010, the implementation of the common plan had evolved to include a State or organisational policy to launch a widespread and systematic attack against civilians perceived to support Alassane Ouattara.”¹⁶

12. Furthermore, the Prosecution retains the discretion to include the facts and circumstances that it intends to rely on at a confirmation of charges hearing. When addressing an analogous issue regarding the facts required to establish an attack, the Appeals Chamber stated that: “it is for the Prosecutor to plead the facts relevant to establishing the legal elements and for the Pre-Trial Chamber to determine whether those facts, if proven to the requisite threshold, establish the legal elements of the attack.”¹⁷ Similarly, in dealing with an analogous issue in the *Lubanga* trial, the Appeals Chamber stated: “To give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute.”¹⁸

The Defence is not prejudiced

13. As mentioned above, the information provided in Part 3, as an integral part of the DCC, provides notice to the Defence and therefore contributes in a positive way to the fairness of the proceedings.
14. Additionally, at the confirmation of charges hearing, the Defence will be able to challenge the admissibility and probative value of the Prosecution evidence relating to Part 3 of the DCC, including on the evolution of the common plan, and present its own evidence.

¹⁶ ICC-02/11-01/11-656-Red, para. 268.

¹⁷ ICC-02/11-01/11-572 OA5, para. 47.

¹⁸ ICC-01/04-01/06-2205 OA15 OA16, para. 94.

Relief Requested

15. For the reasons set out above, the Prosecution submits that the Defence Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 1st day of September 2014

At The Hague, The Netherlands