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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 the Defence request to amend the document containing the charges for violation of the rule of speciality

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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Introduction

1. The Office of the Prosecutor ("Prosecution") submits that there has been no infringement of the rule of speciality necessitating the intervention of the Pre-Trial Chamber I ("Chamber") to either strike out the February incident[1] listed in the Document Containing the Charges ("DCC")[2] or to seek waiver from the Côte d'Ivoire authorities pursuant to Article 101 of the Rome Statute ("Statute"). The Chamber should proceed to consider the merits of the allegations submitted in the DCC, which uniformly constitute part of the course of conduct which forms the basis of the crimes for which the suspect has been surrendered.

2. In particular, the conduct described in the February incident is set out in the arrest warrant and its sources. Since the February incident has a clear connection to the arrest warrant, the Defence request to amend the DCC for violation of the rule of speciality (the "Application")[3] should be rejected.

3. The Prosecution furthermore submits that the inclusion of the February incident in the DCC comports with the previous judicial interpretation of the term "conduct" as well as the object and purpose of the term "course of conduct". The object and purpose of Article 101 is to avoid proceedings on factual bases that bear no connection to the arrest warrant executed by the surrendering State. The February incident is constitutive of the same crimes, occurring in the context of the same attack against the civilian population, and during the same temporal scope and geographic area.[4]

[1] The Prosecution had previously referred to the Yopougon attack of 25-28 February 2011 as the "fifth incident". As of its filing of the DCC on 22 August 2014, the Prosecution referred to the incident as the "second incident" which is where it falls temporally within the alleged crimes. For the sake of clarity going forward, the Prosecution will refer to this incident as the February incident.
[2] ICC-02/11-02/11-124-Conf-Anx2-Corr.
[5] ICC-02/11-32-Conf-Exp and ICC-02/11-33-Conf-Exp.
[5] ICC-02/11-32-Conf-Exp and ICC-02/11-33-Conf-Exp.

Confidentiality

4. The Prosecution files this submission as Confidential since it refers to the content of the interview notes of a witness and which are confidential. The Prosecution has no objection to this submission being reclassified as public if the Chamber deems it appropriate.

Procedural History

5. On 9 December 2011, the Prosecution filed the "Prosecutor's Application Pursuant to Article 58 as to Charles Blé Goudé" ("Prosecution's Application").[5]

6. On 21 December 2011, Pre-Trial Chamber III issued the "Warrant of Arrest for Charles Blé Goudé".[6]

7. On 6 January 2012, Pre-Trial Chamber III also issued the Decision on the Prosecution's Application.[7]

8. On 22 August 2014, the Prosecution filed its footnoted DCC and List of Evidence.

9. On 25 August 2014, the Defence filed the Application. [8]

Submissions

A. <u>The February incident falls within the factual parameters of the arrest warrant</u>

10. The Defence is incorrect in asserting that the conduct related to the February incident was not mentioned in the Prosecution's Application.[9]

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[5] ICC-02/11-32-Conf-Exp and ICC-02/11-33-Conf-Exp.
[6] ICC-02/11-02/11-1.
[7] ICC-02/11-02/11-3.
[8] ICC-02/11-02/11-127.
[9] ICC-02/11-02/11-127, para.37.

11. The February incident relates to the crimes that took place in Yopougon between 25 and 28 February 2011. On the morning of 25 February, Blé Goudé held a meeting at the Bar Le Baron in Yopougon, where he called on the youth to protect their neighbourhoods and to denounce foreigners in their neighbourhoods.[10] Following this call, pro-Gbagbo youth and militia supported by members of the FDS, attacked the predominantly "Dioula" neighbourhoods of Yopougon and burned the Lem mosque. In executing the *"mot d'ordre"* of Blé Goudé, pro-Gbagbo youth also erected a large number of roadblocks where they targeted civilians of northern Ivorian ethnic origin, including the "Dioula" and West-African nationals, sometimes killing or burning them to death after accusing them of being rebels.[11] As a result, between 25 and 28 February 2011, at least 24 people were killed or burned to death and at least seven others were injured in Yopougon. Blé Goudé's course of conduct, which resulted in the commission of the crimes that took place during the February incident, was specifically referenced at paragraph 27 of the Prosecutor's Application:[12] *"According to one witness (…) Blé Goudé instructed youth militia to set up roadblocks, to control foreigners and to "chase" people from the North"*. The source used to support this statement was the summary statement of a witness,[13] the relevant part of which states:

> *119. Les jeunes devaient 1) faire des barrages dans la rue ; 2) contrôler les étrangers; 3) chasser les gens qui portaient gris-gris, ceux qui venait du Nord... Ils étaient considérés comme des rebelles. Ils étaient considéraient responsables d'avoir attaqué la Cote d'Ivoire et pourtant il fallait les tuer, les bruler...*
> *120. C'est Blé GOUDÉ qui a donné aux leaders patriotes sur la liste les instructions que je viens de mentionner et les gens sur la liste passaient ces instructions à leurs fideles. Blé GOUDÉ a donné ces instructions aux jeunes parce que pour lui GBAGBO avait gagné les élections et il fallait le garder au pouvoir.*

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[10] ICC-02/11-02/11-124-Conf-Anx2-Corr, para.150. The French quote reads as follows: *"vérifier les entrées et les sorties de [leurs] quartiers et dénoncer toute personne étrangère qui vient dans [leur] quartier"*.
[11] ICC-02/11-02/11-124-Conf-Anx2-Corr, para.156.
[12] ICC-02/11-32-Conf-Exp, para.27.
[13] See ICC-02/11-32-Conf-Exp, para.27, footnote 66, CIV-OTP-0006-0002, paras.119-120.

12. Moreover, the same paragraph of the Prosecution's Application further stated that Blé Goudé *"called on the youth (…) to identify foreigners in Abidjan and throughout the country, following which attacks were reported against West African nationals"*. Two of the three sources supporting this statement refer specifically to Blé Goudé's speech of 25 February 2011, which was followed by crimes now constituting part of the February incident as charged by the Prosecution in its DCC. The first source is a UN Security Council Report dated 30 March 2011,[14] which states:

> 47. After Mr. Blé Goudé called on the Young Patriots in February to identify "foreigners" in Abidjan and throughout the country, a number of attacks targeting nationals of West African countries were reported, with some abducted or burned alive, and foreign-owned businesses in Abidjan vandalized and looted (…)

13. The second source is a Human Rights Watch article,[15] which also makes explicit reference to the February incident:

> On Feb. 25, Gbagbo's youth minister and close confidant, Charles Blé Goudé, called on "real" Ivoirians to protect their neighbourhoods and chase out foreigners, a scarcely veiled threat against northern Ivoirian ethnic groups that tend to support Ouattara and immigrants from neighbouring countries, as well as the U.N.-authorized peacekeepers and French troops. Blé Goudé's militia supporters have heeded the call. Some victims have been burned alive or beaten to death, while attackers have looted other victims' shops, destroyed their homes, and told them to leave their neighbourhoods -- where many have lived for decades — or be killed. Since late February, some 700,000 Abidjan residents have been displaced from their homes due to fighting and reprisals.[16]

14. In the *Mbarushimana* case,[17] a differently constituted Pre-Trial Chamber I held: "in principle, the description of facts and their related legal characterisations, as contained in any request for a warrant of arrest and in the decision issuing such order, are provisional. There should be no requirement that the formulation of

[14] See ICC-02/11-32-Conf-Exp, para.27, footnote 70, which contains a reference to: UNSC "Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire", 30 March 2011, CIV-OTP-0002-0010 at 0020, para.47.
[15] See ICC-02/11-32-Conf-Exp, para.27, footnote 70, which also contains a reference to: HRW, "The case for Intervention in Ivory Coast", 25 March 2011, CIV-OTP-0002-0845.
[16] HRW, "The case for Intervention in Ivory Coast", 25 March 2011, CIV-OTP-0002-0845 at 0846.
[17] ICC-01/04-01/10-465-Red, para.88.

charges in the DCC strictly follow the factual and legal foundations of the warrant of arrest, especially in view of the fact that, in accordance with article 61(4) of the Statute and as the Appeals Chamber has held, the Prosecution can continue his investigations and amend or withdraw charges without the permission of the Pre-Trial Chamber prior to the confirmation hearing."[18]

15. Since the February incident is set out in the arrest warrant and its sources, the Application should be rejected.

B. <u>The incident falls within the same 'conduct' and/or 'course of conduct'</u>

16. In the event that the Chamber finds that the February incident does not fall within the factual parameters of the arrest warrant, the Prosecution submits that the_inclusion of the February incident in the DCC comports with the previous judicial interpretation of the term "conduct" as well as the object and purpose of the term "course of conduct" as it is constitutive of the same crimes, occurring in the context of the same attack against the civilian population, and during the same temporal scope and geographic area.[19]

Legal Interpretation

17. In the *Mbarushimana* decision cited above (paragraph 14), Pre-Trial Chamber I recalled that whereas a DCC must contain a detailed description of the charges, the Prosecution's application for a warrant of arrest requires only a "specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed", together with a "concise statement of facts which are alleged to constitute those crimes." Accordingly, the Chamber held that "the rule of speciality is not, in principle, violated by the inclusion in the DCC of one or more crimes, which were not explicitly described or legally characterised in the

[18] ICC-01/04-01/10-465-Red, para.88.
[20] ICC-01/04-01/10-465-Red, para.91.

warrant of arrest, but are otherwise implicit in the description of the course of conduct underlying the crimes in relation to which a "concise statement of the facts", in accordance with article 58(2)(c) of the Statute, has been provided by the Prosecution".[20]

18. In this context, guidance with respect to the interpretation of the terms "conduct" and "course of conduct" can be gleaned from their application in other provisions of the Statute. In particular, various chambers of this Court have provided considerable attention to the definition of the term "conduct" in admissibility proceedings. While the Prosecution acknowledges the different contexts within which the term is used in Article 17 and Article 101, it nonetheless recalls the significant inter-linkages between Parts 2 and 9 of the Statute. In particular, the identification of the "conduct" which forms the basis of the proceedings before the Court also appears in Part 9, in the context of surrender proceedings, in connection with prior determinations on the admissibility of the case.[21] Moreover, both Articles 17 and 101 are closely related to the principle of *ne bis in idem*, for whose application the specification of the conduct in question plays a central role.[22] Given this close interrelationship, the term "conduct" for the purpose of surrender proceedings in Part 9, including Article 101, should not be wider or narrower than that applied within the context of admissibility in Part 2. Otherwise the entire framework would unravel.

[20] ICC-01/04-01/10-465-Red, para.91.

[21] See e.g. Article 89(2), which refers to domestic challenges based on the principle of *ne bis in idem* in Article 20; and Article 90(1), which refers to the competing requests for surrender and extradition with respect to "the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender", which is linked in Article 90(2)-(5) to the question of whether there has been a prior determination on the admissibility of the case at hand (*i.e.* in relation to "the same person for the same conduct" as defined in para.1). See also Article 95 and Article 99(4).

[22] See Article 17(1)(c) and Article 20(3); P Wilkitzki, Article 101, in O Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court (2008), p.1638. The Prosecution has previously submitted in other proceedings that guidance as to the interpretation of "substantially the same conduct" may be taken from national and regional decisions related to the application of the *ne bis in idem* principle, stating that a case will be "substantially the same" if any differences in the underlying facts and circumstances are minor, such that the facts and circumstances may be described as essentially the same because they are inextricably linked together in time, space and by their subject-matter. See ICC-01/11-01/11-384, paras.54-64; Case C-436/04 Van Esbroeck [2006] ECR I-2333 "Judgment"; Case C-105/05 Van Straaten [2006] ECR I-9327 "Judgment"; Case C-367/05 Kraaijenbrink [2007] ECR I-6619 "Judgment"; Sergei Zolotukhin v Russia, Appl.no.1493/03 "Grand Chamber Judgment", 10 February 2009.

19. With respect to the term "conduct" in the context of Article 17, a case before the Court will be inadmissible where, subject to an assessment of genuineness, there are or have been domestic proceedings concerning the same case. As the Appeals Chamber has held, "the defining elements of a concrete case before the Court are the individual and the alleged conduct".[23] It also upheld the correctness of the Pre-Trial Chamber's application of the "same person/same conduct" test when comparing the person and conduct that form the subject of the proceedings in question (before the ICC and at the national level).[24] The Appeals Chamber explained that the "same conduct" component will be satisfied if national proceedings cover "the same individual and substantially the same conduct as alleged in the proceedings before the Court".[25]

20. In a subsequent decision, the Appeals Chamber explained the meaning of "substantially the same conduct" as requiring a case-by-case assessment as to the degree of overlap or similarity between the conduct alleged before the national courts compared to that before the ICC.[26] In particular, it held that there need not be absolute symmetry between the incidents charged at the national level and those before the Court, stating: "[t]he real issue is … the degree of overlap required as between the incidents being investigated by the Prosecutor and those being investigated by a State - with the focus being upon whether the conduct is *substantially* the same."[27]

21. It follows that if "conduct" for the purpose of Article 17, does not require absolute symmetry in underlying incidents, but can permit an assessment of

[23] ICC-01/09-01/11-307, para.40; ICC-01/09-02/11-274, para.39. See also ICC-01/11-01/11-547, para.61.
[24] ICC-01/09-01/11-307, para.47: "the Appeals Chamber finds that given the specific stage that the proceedings had reached, the 'same person/same conduct' test applied by the Pre-Trial Chamber was the correct test. The Pre-Trial Chamber thus made no error of law."
[25] ICC-01/09-01/11-307, para.40; ICC-01/09-02/11-274, para.39.
[26] ICC-01/11-01/11-547, para.72.
[27] ICC-01/11-01/11-547, para.72. The Appeals Chamber further observed that in carrying out an assessment as to whether the national case sufficiently mirrors the one that the Prosecutor is investigating, "it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents"; ICC-01/11-01/11-547, para.73.

substantial symmetry, the same must apply to the notion of "conduct" in Article 101, given the similar function the rule of speciality plays in defining the scope of the case before the Court.[28] Accordingly, the term conduct in Parts 2 and 9 of the Statute should have a consistent application.

22. The term "course of conduct" is necessarily broader than the term "conduct." In a similar vein, when the term appears in the context of Article 7(2)(a) as part of the *chapeau* definition of an "attack against a civilian population," it denotes that the intention of the drafters was to avoid single or isolated acts and instead to focus on a multiplicity of acts which form part of a broader attack.[29]

23. Extradition treaties and accompanying national laws typically define the subject-matter of a request by reference to the "offence" or "crime" in question, linked as this is with other extradition law principles related to, *inter alia*, double criminality.[30] As the Defence points out, the choice of the more generic term "conduct or course of conduct" was chosen to denote that the rule was linked to the underlying facts in question, not to the legal qualification of the offender's deed.[31] Nonetheless, the specific term "*course of* conduct" finds no equivalent in extradition practice, which necessarily seeks to limit any scope for variation, suggesting that the drafters of the Statute intended the Court to have greater latitude on questions of speciality.

[28] The Prosecution recalls that the term of "conduct" under Article 17 must be consistent, by virtue of the inter-linkage made between Article 17(1)(c) and Article 20(3), with the application of the term "conduct" under the principle of *ne bis in idem*.
[29] See D. Robinson, "Defining "Crimes Against Humanity" at the Rome Conference", 93 *AJIL* No. 1 (1999), p.48; the author also cites *Prosecutor v. Tadic*, Form of the Indictment, No. IT-94-1-T, para. 11 (Nov, 14, 1995): "'directed against any civilian population' ensures that what is to be alleged will not be one particular act but, instead, a course of conduct".
[30] See e.g. article 14, European Convention on Extradition (Council of Europe, 1957); article 14, Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters (2002).
[31] ICC-02/11-02/11-127, para.27, citing Wilkitzki (n.36 above) at p.1638. The Prosecution nonetheless notes that the Defence submission is somewhat misleading since the commentary is not uniquely focussed on the term "course of conduct" as the Defence appears to suggest. The passage in question correctly reads: "the final version of the Statute deliberately chose the more generic term 'conduct or course of conduct'. This avoids the misunderstanding that the speciality principle was linked to the *legal qualification* of the offender's deed rather than the underlying *facts*, a misunderstanding frequently causing problems…in the context of the '*ne bis in idem*' principle…" (emphasis in the original).

24. When joining the Statute, States Parties accept the Court's exercise of its highly specific and limited subject-matter jurisdiction. At the same time, traditional concerns as to the possible abuse of a foreign legal process (with respect to both the rights of the extraditing State and those of the defendant) do not arise with respect to the surrender of suspects to the ICC.[32] Nonetheless, the rule of speciality is still relevant in the ICC context in that it defines the understood scope of an ICC case by the surrendering State – not because the requested State may refuse surrender by objecting to certain charges over other charges, but because the State retains the right to challenge the admissibility of the case under Articles 17 and 19, to seek conditions on the sequencing of cases concerning the same person for different conduct pursuant to Article 89(4) and Rule 183, and to consider competing requests for extradition in relation to the same or other conduct pursuant to Article 90. The requested State thus has an interest in knowing the subject-matter of the case against the suspect who it is surrendering.[33]

25. Thus, in the context of the Statute, the object and purpose of the provision is to avoid surprising a surrendering State, by including within the scope of the charges sought after surrender, allegations which bear no connection with the underlying facts for which the person was surrendered. If the conduct later alleged by the Prosecution is substantially the same as that which formed the basis of the crimes in the arrest warrant, or if the course of conduct alleged by the Prosecution encompasses similar underlying acts occurring within the context of

[32] Notably, a number of States during the negotiations argued that there was no need for a rule of speciality in the Statute at all, at least in relation to States Parties, given their obligation to cooperate fully with the Court under Part 9 and their prior acceptance of the Court's exercise of jurisdiction with respect to a carefully defined subject-matter jurisdiction; see Wilkitzki (n.36 above) at p.1637; B Swart, "Arrest and Surrender" in Cassese et al (eds), *The Rome Statute of the International Criminal Court* (2002), p.1700.
[33] Although the rule of speciality is a right that may only be invoked by States, the suspect also has an obvious interest in knowing the scope of the case against him or her in the light of, *inter alia*, the right to bring a domestic challenge prior to surrender based on the principle of *ne bis in idem*, pursuant to Article 89(2), and may be heard in concomitant processes by virtue of Rules 196 and 197.

the same pattern of violence described in the arrest warrant, the rule of speciality is not infringed.

Application to the Second Incident

26. As is clear from the chronology of events, the acts constituting the February incident occurred between the incidents of the RTI demonstration of December 2010 and the women's march of 3 March 2011, as originally sought in the Prosecution's Application. It forms part of the course of conduct related to the implementation of the common plan, which the Chamber identifies in its Article 58 Decision as follows: "Mr. Gbagbo and his inner circle adopted a policy to launch violent attacks against Mr. Gbagbo's political opponent, Mr. Ouattara, members of the latter's political group and civilians believed to support him, in order to retain power by all means".[34]

27. The Prosecution submits that the facts described in the arrest warrant set out the course of conduct which forms the basis of the crimes for which the suspect was surrendered.[35] Specifically, as recalled in the arrest warrant, this course of conduct is identified in the Prosecution's Application in relation to the suspect's "individual criminal responsibility as regards the crimes against humanity of murder, rape and other forms of sexual violence, persecution and other inhumane acts committed during the post-election crisis from 28 November 2010 onwards by the Ivorian Defence and Security Forces ("FDS"), which were reinforced by youth militias and mercenaries loyal to President Gbagbo ("pro-

[34] ICC-02/11-02/11-3-US-Exp, para.21, which refers to the conclusions of the Chamber in its Decision on the Application against Laurent Gbagbo at ICC-02/11-01/11-9-Red, para.42.
[35] In the *Saif al-Islam Gaddafi* case, Pre-Trial Chamber I held that "the events expressly mentioned in the Article 58 Decision do not represent unique manifestations of the form of criminality alleged against Mr Gaddafi in the proceedings before the Court. They constitute rather samples of a *course of conduct* of the Security Forces, under Mr Gaddafi's control, that allegedly carried out an attack committed across Libya from 15 February 2011 onwards against the civilians who were dissidents or perceived dissidents to Gaddafi's regime, which resulted in an unspecified number of killings and acts of persecution" (emphasis added); ICC-01/11-01/11-344, para.82.

Gbagbo forces"), in Abidjan, including around the Golf Hotel and elsewhere in the country".[36]

28. The Chamber found "reasonable grounds to believe that these attacks by pro-Gbagbo forces during the post-electoral violence were committed pursuant to an organisational policy. Furthermore, they were widespread and systematic, as demonstrated, *inter alia*, by the extended time period during which crimes were committed (between 28 November 2010 and May 2011), their geographic spread (many of the neighbourhoods of Abidjan and the west of Côte d'Ivoire), the high number of reported victims and the general pattern of the way in which the offences were committed."[37]

29. Accordingly, the Chamber issued the warrant of arrest for the suspect's "alleged criminal responsibility within the meaning of Article 25(3)(a) of the Statute for the crimes against humanity of (1) murder under Article 7(l)(a); (2) rape and other forms of sexual violence under Article 7(l)(g); (3) other inhumane acts under Article 7(l)(k); and (4) persecution under Article 7(l)(h) of the Statute committed in the territory of Côte d'Ivoire during the period between 16 December 2010 and 12 April 2011".[38] This represents the course of conduct for which the suspect was surrendered.

30. The specific conduct alleged in the Prosecution's Application related to four incidents, selected as representative of the broader course of conduct described above, which were presented in support of the charges.[39] In its Article 58 Decision, the Chamber relied on the evidence presented in support of these four incidents for its decision on the charges set out in the arrest warrant, without

[36] ICC-02/11-02/11-1-US-Exp, para.2.
[37] ICC-02/11-02/11-1-US-Exp, para.6.
[38] At ICC-02/11-02/11-1-US-Exp, para.16, the Chamber noted the provisional nature of this mode of liability.
[39] ICC-02/11-02/11-3-US-Exp, para.16; ICC-02/11-01/11-9-Red, para.55.

those incidents exhausting the scope of the charges.[40] The February incident listed in the DCC is not a new course of conduct, but the itemisation of further violent conduct attributable to the suspect which occurrred within the same course of conduct described in the arrest warrant: i.e. constitutive of the same crimes, occurring in the context of the same attack against the civilian population, and during the same temporal scope and geographic area, as those set out in the arrest warrant.[41]

Relief Requested

31. For the reasons set out above, the Prosecution requests the Chamber to dismiss the Defence Application.

Fatou Bensouda, Prosecutor

Dated this 29th day of August 2014

At The Hague, The Netherlands

[40] ICC-02/11-01/11-9-Red, para.69. At ICC-02/11-02/11-3-US-Exp, para. 17, the Chamber incorporates its conclusions in its Decision on the Application against Laurent Gbagbo, ICC-02/11-01/11-9-Red.

[41] In addition, the incidents that took place on 25 and 28 February 2011 were also mentioned in the *"Exposé des faits en cause au regard des elements du chapeau de l'article 7"* section of the Document containing the charges against Laurent GBAGBO, see ICC-02/11-01/11-592-Anx1, paras.66 and 68.