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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

Public

Prosecution's Response to "Defence request to amend the document containing the charges for lack of specificity"

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. On 22 August 2014, the Prosecution filed its Document containing the charges¹ (“DCC”) and List of Evidence.²
2. On 25 August 2014, the Defence filed the “Defence request to amend the document containing the charges for lack of specificity” (“Defence request”) alleging that “[t]he ‘facts and circumstances’ underpinning all forms of liability apart from Article 25(3)(a) liability are lacking from the present DCC.”³
3. The Prosecution submits that it has fully respected the requirements of Regulation 52 of the Regulations of Court and the Chamber’s directions with respect to Regulation 52. For the reasons specified below the Defence request should be rejected.

Submissions

4. Notice of the legal characterisation of the facts is provided in the DCC. At paragraph 172, the Prosecution states: “*Bien que l’Accusation ait structuré la présentation des faits selon les éléments constitutifs de l’article 25-3-a, ces faits s’appliquent, pour autant que pertinent, aux autres motifs de responsabilité pénale retenus, tel que détaillé dans l’Exposé des Charges.*”⁴ The Prosecution could have repeated all the same facts with respect to each mode of liability charged, however, this would have led to an overly voluminous and repetitive DCC without providing any additional specificity for the benefit of the Defence.
5. Moreover, the Prosecution alleges that the facts charged at paragraphs 173 to 321 of the DCC, and in particular those included in Part 9 of the DCC, titled “EXPOSÉ DES CHARGES”, at paragraphs 322 to 334, establish the elements of all

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-02/11-02/11-126, para. 5.

⁴ DCC, para. 172.

modes of liability under Article 25(3)(a) (indirect co-perpetration); 25(3)(b) (ordering, soliciting and inducing); 25(3)(c) (aiding, abetting or otherwise assisting) and 25(3)(d).

6. As a matter of law, there is significant overlap between the different modes of liability under the Statute and especially those under Article 25. In addition, and more importantly, in this particular case, the same set of facts can be used to establish the elements of the different modes of liability. This scenario is not uncommon and it was even foreseen by the drafters of the Regulations of the Court, when providing at Regulation 55 that a Chamber may modify the legal characterisation of the charged facts to accord with a form of participation under Articles 25 and 28, other than that charged in the DCC.
7. Additionally, in making reference to “*facts and circumstances* underpinning [...] forms of liability”⁵, the Defence appears to misunderstand the scope of a charging document. According to Regulation 52, the necessary ingredients of a document containing the charges are (a) information identifying the suspect; (b) a statement of facts; and (c) a legal characterisation of the facts. The latter merely requires the Prosecution to identify to which of the crimes under Articles 6, 7 or 8 the alleged facts relate and which form or forms of participation under Articles 25 apply.
8. In addition to Regulation 52, the Prosecution had the benefit of the guidance of the Chamber when it stated that: “[w]ith respect to the legal characterisation of the facts as subsumed within a form of individual criminal responsibility under article 25(3) or 28 of the Statute, the Prosecutor shall identify the form or forms of individual criminal responsibility which would accord to the set of material facts alleged”.⁶ This is precisely what the Prosecution has done and consequently the DCC complies fully with Regulation 52 and the Chamber’s directions regarding the presentation of the DCC.

⁵ Defence request, para. 5.

⁶ ICC-02/11-01/11-325, para. 29; see also: ICC-02/11-02/11-57, para. 11.

9. Furthermore, it is notable that the Amended DCC in the GBAGBO case⁷ provided the Defence in that case with the same form of notice, and after being challenged,⁸ for reasons similar to those set out in the Defence request, was found by the Chamber, in its “Decision on Defence requests related to the continuation of the confirmation proceedings” (“Decision 619”),⁹ to be in compliance with the requirements of Regulation 52.¹⁰
10. The Prosecution observes that the Defence is aware of Decision 619 from the GBAGBO case, as it is mentioned in the Defence request.¹¹ Unfortunately, the Defence request does not address the portions of this decision that are directly on point and contrary to the position being advanced by the Defence.
11. Instead, the Defence relies upon a passage from the “Separate Opinion of Judge Christine Van den Wyngaert” (“Separate Opinion”).¹² When read in full it is clear that the Separate Opinion is clearly, and only, opining as to the legal issue of the basis upon which the Prosecution can add “new incidents” and charges under Articles 25(3)(b) and 28 following the postponement of the confirmation of the charges hearing.¹³ Nowhere does the Separate Opinion address the issue of specificity or the requirements of Regulation 52. Consequently, the Defence misrepresents the quoted passage of the Separate Opinion by suggesting it is “pertinent and apposite” to the actual issues raised in the Defence request.
12. The Defence also argues that the Prosecution has not “stipulated which of the two sub-sections of Article 25(3)(d)” it is relying on.¹⁴ The Prosecution submits there is no requirement that it choose between Article 25(3)(d)(i) and 25(3)(d)(ii).

⁷ ICC-02/11-01/11-592-Conf-Anx2-Corr2 and ICC-02/11-01/11-592-Conf-Anx2-Corr2-Red.

⁸ ICC-02/11-01/11-598-Conf-Corr and ICC-02/11-01/11-598-Conf-Corr-Red.

⁹ ICC-02/11-01/11-619.

¹⁰ ICC-02/11-01/11-619, paras. 13-14; see also Decision on the confirmation of charges in the *Lubanga* case, ICC-01/04-01/06-803-tEN, para. 151.

¹¹ Defence request, para.3, footnote 3.

¹² ICC-02/11-01/11-619-Anx; Referred to in Defence request, para. 4.

¹³ ICC-02/11-01/11-619-Anx, para. 1.

¹⁴ Defence request, para. 7.

Both apply as alternatives to each other, and both should be available. Moreover, when deciding on the applicability of Article 25(3)(d) both provisions (i) and (ii) should be considered by the Chamber.¹⁵ The Prosecution therefore confirms that it relies on both 25(3)(d)(i) and 25(3)(d)(ii) for the purposes of the confirmation of charges hearing.

Relief Requested

13. For the reasons set out above, the Prosecution submits that the Defence request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 28th day of August 2014

At The Hague, The Netherlands

¹⁵ See Final Trial Judgment in the *Katanga* case: ICC-01/04-01/07-3436, para.1638.