



Original: **English**

No.: **ICC-02/11-02/11**

Date: **25/08/2014**

PRE-TRIAL CHAMBER I

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

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
*THE PROSECUTOR V. CHARLES BLÉ GOUDÉ***

Public Document

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

Source: The Defence for Charles Blé Goudé

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

The Office of the Prosecutor
 Fatou Bensouda, Prosecutor
 James Stewart, Deputy-Prosecutor
 Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence
 Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicant/s

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
 Esteban Peralta Losilla

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section Other**

1. The Defence for Charles Blé Goudé (the “Suspect”) hereby requests that Pre-Trial Chamber I of the International Criminal Court strike out certain aspects of the Document Containing the Charges (“DCC”)¹ for violation of the rule of speciality.

Procedural History

2. On 9 December 2011, the Prosecutor filed an application for a warrant of arrest against the Suspect.² In this application, the Prosecutor stated that “the general case theory of the GBAGBO Application equally applies to this Application and that it “incorporates by reference” the “relevant portions of the GBAGBO Application, as well as the underlying supporting material.”³ In so doing, the Prosecutor provided footnote references thereby incorporating “*in particular*” paragraphs 5-73, 76-92, 94-131, and 149-150 of the Gbagbo document.⁴

3. On 21 December 2011, Pre-Trial Chamber III issued the “Warrant Of Arrest for Charles Blé Goudé” (the “Arrest Warrant”).⁵

4. On 6 January 2012, Pre-Trial Chamber III issued its reasoned decision on the Prosecutor’s application pursuant to Article 58, supplying its justification for the Arrest Warrant noting, in the process, a “considerable degree of overlap between the Gbagbo Application and the present Application”, specifically as regards “the relevant portions of the Gbagbo Application (viz. paragraphs 5-73, 76-92, 94-131 and 149-150, together with the underlying/supporting material).”⁶

¹ ICC_02/11-02/11-124-Conf.

² ICC-02/11-02/11-60-Conf.

³ *Ibid*, at para. 7.

⁴ *Ibid*, at n. 5.

⁵ ICC-02/11-02/11-1.

⁶ ICC-02/11-02/11-3, para. 6.

5. In this decision, Pre-Trial Chamber III specifically stated that it had “address[ed] the issue of the underlying acts... during the incidents referred to by the Prosecutor in support of the charges”.⁷ Pre-Trial Chamber III also noted “that the Prosecutor relies on the same four incidents that supported the charges against Laurent Gbagbo.”⁸

6. The Prosecutor’s application for an arrest warrant against Laurent Gbagbo of 25 October 2011 had alleged four incidents in support of the charges, claiming that the Suspect was a part of Mr. Gbagbo’s “inner circle” while citing the Suspect’s name no less than 29 times.⁹ In issuing the Arrest Warrant, Pre-Trial Chamber III reiterated those four incidents, namely;

“(i) The attacks relating to the RTI demonstrations between 16 and 19 December 2010.

(ii) The attack on the women's march in Abobo on 3 March 2011.

(iii) The Abobo market shelling on 17 March 2011.

(iv) The Yopougon massacre on 12 April 2011.”¹⁰

7. On 19 January 2012, Pre-Trial Chamber III issued a request for arrest and surrender to Ghana attaching thereto a copy of the Arrest Warrant.¹¹ Similarly, on 3 December 2012, the Chamber issued a request for arrest and surrender directly to Côte d'Ivoire, once again attaching the Arrest Warrant which, as mentioned above, referenced the Pre-Trial Chamber’s full decision granting the Prosecutor’s request for an arrest warrant pursuant to Article 58 of the Statute.¹²

⁷ *Ibid.* at para. 23.

⁸ *Ibid.* at para. 16.

⁹ ICC-02/11-24-Conf-Exp.

¹⁰ ICC-02/11-01/11-9-Con, para. 55 (footnotes omitted).

¹¹ ICC-02/11-02/11-4-Conf.

¹² ICC-02/11-02/11-19, p.3.

8. On or about 18 January 2013, the Suspect was snatched from his place of residence in Accra, without being shown a warrant and without being granted access to a lawyer. He was subsequently transferred to Côte d'Ivoire.

9. On 13 January 2014, Côte d'Ivoire provided observations rejecting the Court's request for surrender "*pendant la durée nécessaire à l'accomplissement de l'enquête et les procédures internes*".¹³

10. On 21 March 2014, however, the Suspect was brought before the Chambre d'Accusation of the Cour d'Appel d'Abidjan in accordance with relevant domestic legal provisions and Article 59(2) of the Rome Statute. The Chambre d'Accusation authorized the surrender of the Suspect to the ICC, citing the ICC Prosecutor's request for an arrest warrant of "*le 12 décembre 2011*"¹⁴, the arrest warrant issued by Pre-Trial Chamber III of 21 December 2011, and the arrest and the surrender request of 3 December 2012.¹⁵

11. The Suspect was ultimately surrendered to the Court by Côte d'Ivoire on 22 March 2014 "*in execution*"¹⁶ of the Request for Surrender.

12. On 24 June 2014, the Prosecutor petitioned the Single Judge for an extension of the time limit for filing her DCC arguing as follows:

"The Prosecution informs the Chamber and Defence that in the course of its further investigation it collected evidence "involving the multiple commission of acts" that will form the basis of a fifth charged incident as part of the charges against BLÉ GOUDÉ which will be described in the DCC to be filed on 18 July 2014".¹⁷

¹³ ICC-02/11-02/11-37-Conf, para. 18.

¹⁴ This document actually dates of 9 December 2011.

¹⁵ ICC-02/11-02/11-50-Conf-Anx5, pp. 21-22.

¹⁶ ICC-02/11-02/11-50-Conf-Anx5, p. 22.

¹⁷ ICC-02/11-02/11-90-Conf, para. 9.

13. On 4 July 2014, the Prosecutor purported to “provide the Chamber and the Defence with some further information about ‘the fifth charged incident’” in light of the Defence’s indication that it would “argue that this fifth incident ‘offends the rule of speciality’”.¹⁸ Particularly, the Prosecutor stated that “[t]he fifth charged incident will refer to the same crimes as currently charged and falls within the same course of conduct involving the multiple commission of acts in Abidjan between 25 February and early March 2011”.¹⁹

14. On Friday 22 August 2014, ten minutes before the stroke of midnight, the Prosecutor provided the Defence with its most truly “courteous” copy of a non-footnoted and non-hyperlinked DCC. The footnoted, hyperlinked version of the DCC was available to the Defence by 10h35 on Saturday, 23 August 2014.

Legal Basis for the Request

15. In order to determine a violation of the rule of speciality, the Pre-Trial Chamber must analyse the factual “course of conduct” underlying the accused crimes as they were understood by Côte d’Ivoire. This subjective understanding must then be compared to the factual “course of conduct” alleged in the DCC. Any “course of conduct” alleged in the DCC exceeding that which served as the basis for the requested State’s surrender must be struck from the DCC.

Specificity of the DCC

16. The Prosecutor has been requested to ensure completeness and accuracy in her DCC.²⁰ Indeed, the Single Judge has stated that she “expects the

¹⁸ ICC-02/11-02/11-100-Conf, paras. 24-25.

¹⁹ *Ibid.* at para. 26.

²⁰ ICC-02/11-02/11-57, para. 13 (“The Single Judge also emphasises the importance of comprehensive and accurate submissions of the Prosecutor as to what evidence is relied upon to substantiate the particular factual allegations that support the charges being brought against Mr Blé Goudé”).

Prosecutor to follow the same approach in the present case” with respect to the DCC as she adopted in the *Gbagbo* case.²¹

17. The purpose of a DCC, according to the Court’s founding documents, is to “inform[] promptly and in detail of the nature, cause, and content of the charge”²² being brought against the Suspect in a document constituting a “detailed description of the charges”²³ and containing “a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial”.²⁴

18. This Pre-Trial Chamber has further observed “that one of the core purposes of confirmation of charges is to fix and delimit the factual scope of trial. In this regard, article 74 of the Statute states that ‘the decision at trial shall not exceed the facts and circumstances described in the charges and any amendment to the charges’.”²⁵ It is no doubt for this reason that the Single Judge has further specified that “it is of paramount importance that, in the DCC, the material facts underlying the charges on which the Prosecutor seeks to bring the person to trial be clearly and comprehensively identified and distinguished from those facts of a mere subsidiary nature.”²⁶

19. For the purposes of this request, the Defence will assume, for the sake of argument, that the Prosecutor has complied with the obligations listed above. This Request should therefore be read without prejudice to the *Defence request to amend the document containing the charges for lack of specificity*”.²⁷

²¹ *Ibid.* at para. 12.

²² Article 67(1)(a), Rome Statute.

²³ Rule 121(3), Rules of Procedure and Evidence.

²⁴ Regulation 52(b) of the Regulations of the Court.

²⁵ Decision on the date of the confirmation of charges hearing and proceedings leading thereto”, 14 December 2012, ICC-02/11-01/11-325, para. 27.

²⁶ *Ibid.* at para. 28.

²⁷ ICC-02/11-02/11-126.

Requirements of the Arrest Warrant

20. Pursuant to Article 58 of the Statute, the Prosecutor's application for an arrest warrant must contain "a specific reference to the crimes within the jurisdiction of the Court" and "a concise statement of the facts which are alleged to constitute those crimes".²⁸ The arrest warrant, itself, must include the same features.²⁹

Rule of Speciality

i) The rule of speciality under international law

21. The rule of speciality under international law dictates that a person who has been extradited shall not be detained, proceeded against, sentenced, or punished for any **offence** committed prior to his surrender other than that for which the requested State has consented to his extradition.³⁰

22. The basis for this rule rests on five principles: (1) the requested State may have refused surrender if it had known that the requesting State intended to proceed against the individual for alternate or additional offenses, (2) the requesting State legally acquires *in personam* jurisdiction over the individual for specific offenses, (3) the requesting State obtains the physical presence of the individual instead of requiring an *in absentia* trial, (4) the requesting State can rely on the requested state's legality of process and procedures for surrender for due process considerations, and (5) the requested State can rely upon the factual representations made by the requesting State in the surrender process.³¹

23. In essence, the rule of speciality protects a requested State's sovereignty after it has surrendered its own national to a requesting State, as well as the

²⁸ Article 58(2).

²⁹ Article 58(3).

³⁰ See B. Richardson, *The Principle of Speciality in Extradition*, 62 Int'l. Rev. Pen. L. 85; B. Swart, *The Rome Statute of the International Criminal Court: A Commentary* 1639,1698 (Antonio Cassese et al., eds., 2002); Council of Europe, *Extradition European standards: Explanatory notes on the Council of Europe convention and protocols* (2006), available at <http://www.coe.int/t/dghl/standardsetting/pc-oc/978-92-8716076-8.pdf>, p.32.

³¹ B. Richardson, *The Principle of Speciality in Extradition*, 62 Int'l. Rev. Pen. L. 85, 86.

national's own interest in due process and fundamental fairness. Indeed, there exists an increasingly recognised international consensus that the rule of speciality provides a protection of the surrendered person's individual subjective rights in the face of potentially unfair or "unexpected prosecution".³² The drafters of the Rome Statute explicitly stated that "some provision concerning specialty was required in order to safeguard the rights of the accused"³³ and that exceptions to aspects of the rule must "be based on the consent or waiver of the accused".³⁴

24. The Statute's legislators clearly sought to protect the transferred national's rights in addition to those of the State. The earlier drafts of the Rome Statute, indeed, sought to protect the transferee's rights through a parallel rule restricting the use of evidence "unless necessary to preserve a right of the accused" and allowing waivers to the rule of speciality only when "based on the waiver or consent of the accused".³⁵ Scholars have, similarly, held that the rule of speciality is "closely interconnected with other principles such as double criminality and reciprocity, the compliance with which it aims to ensure."³⁶ The ability of individuals to exercise their rights pursuant to the rule of speciality should therefore be regarded as a rule of customary international law.³⁷

³² *Ibid.* at 86; P. Wilkitzki, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes* 1634, 1638 (Otto Triffterer ed., 2d ed., 2008) ("Without doubt, the rights and interests of persons surrendered have to be taken into consideration by the Statute as well.") (emphasis in original); see also, e.g., *Cipriani v Italy*, 22142 Eur. Ct. H. R. 07 (2009); *Woolley v United Kingdom*, 28019 Eur. Ct. H. R. 10 (2012); *United States v. Levy*, 905 F.2d 326, 328 n.1 (10th Cir. 1990) (Defendant had "standing to raise [a doctrine of specialty challenge]"); *United States v. Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994) ("An extradited person may raise whatever objections the extraditing country is entitled to raise.").

³³ *Ad Hoc* Committee on the Establishment of an International Criminal Court, *Report*, A/50/22 (1995), para. 219.

³⁴ Preparatory Committee on the Establishment of an International Criminal Court, *Report Volume I*, A/51/22 (1996), para. 346.

³⁵ Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Informal Group on Judicial Cooperation and Enforcement*, A/AC. 249/CRP.17 (1996), p. 35.

³⁶ See P. Wilkitzki, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes* 1634, 1635 (Otto Triffterer ed., 2d ed., 2008)

³⁷ *Ibid.* at 1636 (citing M. Bassiouni, *Draft Statute International Tribunal*, 10 *Nouvelles études pénales* 95 (1993)).

ii) The rule of speciality under ICC law

25. Article 101(1) of the Rome Statute provides as follows:

“A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered”.

26. As is clear from the plain wording of the Statute, Article 101(1) differs from the general rule of speciality under international law in its specific prohibition of subsequent proceedings for crimes based on a “course of conduct” other than that “which forms the basis of the crimes for which the person has been surrendered”.

27. Indeed, the final version of the Statute “deliberately chose the generic term ‘course of conduct’” (as distinct from “crime” or “offence”) thereby avoiding “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”.³⁸ The Statute’s final formulation of the rule of speciality makes explicit reference to the addition of factual content to the charged offences, and their legal qualification, consequently, has no bearing.³⁹ This analysis has recently been confirmed by HHJ Cuno Tarfusser sitting as the Single Judge in Pre-Trial Chamber II.⁴⁰

28. In light of the above, the Defence hereby dissents from a previous ICC Pre-Trial Chamber decision on the issue of speciality which is distinguishable

³⁸ P. Wilkitzki, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes* 1634, 1638 (Otto Triffterer ed., 2d ed., 2008) (emphasis in original).

³⁹ See *ibid.*

⁴⁰ “Decision on ‘Narcisse Aiido's Request for an Order Rejecting the Prosecution's Document Containing the Charges (ICC-01/05-01/13-526-AnxB1) and for an Order to the Prosecution to File an Amended and Corrected Document Containing the Charges’”, 15 July 2014, ICC-01/05-01/13-567, p.5 (“CONSIDERING...that wording of article 101 of the Statute... was deliberately chosen by the drafters of the Statute to be more generic, and as such, the usage of this term restricts the scope of application of the rule of speciality before the Court in the sense that its operation is linked to the underlying facts rather than the legal qualification of the suspect's behavior.”).

in so far as it focused on whether a **crime** described in the DCC but not in the arrest warrant should be barred on account of the rule of speciality.⁴¹ In the present instance, the Pre-Trial Chamber should not consider which counts or crimes are charged in the DCC but did not appear in the Arrest Warrant. The Pre-Trial Chamber should, rather, determine what "course of conduct" constituted the basis of the crimes for which the requested State surrendered the suspect.

29. It is to be noted that the test for establishing a “course of conduct” does not correlate necessarily to the “concise statement of facts” normally included in an arrest warrant. The Court must apply a subjective test in deciding on the basis of what course of conduct the requested State ordered the surrender. Indeed, the “focus of the inquiry” must instead be “the facts attributed to the suspect rather than the legal qualification.”⁴²

30. Finally, Pre-Trial Chamber II has emphasized that the rule of speciality “is limited to the scenarios in which the person is arrested and is surrendered as a result of a request submitted by the Court to the State”.⁴³

Ability of the Chamber to Order an Amended DCC

31. The Pre-Trial Chamber has the power to strike out certain provisions of the DCC that do not comply with the Defence’s rights or other aspects of a fair trial as required by ICC rules and/or jurisprudence.⁴⁴

⁴¹ See “Decision on the confirmation of charges”, 16 December 2011, ICC-01/4-01/10-465-Red, para. 91 (“Therefore, in the view of the Chamber, 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 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”) (emphasis added).

⁴² W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 1056.

⁴³ “Decision on the ‘Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE’ and the ‘Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19* August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute’”, 12 September 2011, ICC-01/09-02/11-315, para. 16.

32. In addition, all dispositions of the Rome Statute are to be interpreted *in dubio pro reo* and in strict compliance with the human rights of the Suspect pursuant to Articles 21(3) and 22(2) of the Rome Statute. The Suspect therefore has the right to an effective remedy against a breach of his individual rights pursuant to the rule of speciality.

Submission

33. As is abundantly clear from the record of both ICC and national proceedings, Côte d'Ivoire has jealously guarded its sovereignty and prerogative to exercise its own jurisdiction throughout this affair. Côte d'Ivoire has relied strictly upon certain aspects of the Prosecutor's documents and those of the Pre-Trial Chamber in surrendering the Suspect. Any subsequent changes to the "course of conduct" underlying the crimes charged would violate the rights of both Côte d'Ivoire and the Suspect under the rule of speciality as delineated in Article 101(1) of the Rome Statute.

Basis for the Suspect's Surrender from Côte d'Ivoire

34. As a result of the Article 59 proceedings before the Chambre d'Accusation of the Cour d'Appel of Abidjan, it was decided to authorize the Suspect's transfer on the basis, *inter alia*, of (i) the Prosecutor's Article 58 application for an arrest warrant, (ii) the arrest warrant issued by Pre-Trial Chamber III, and (iii) the request for surrender of 3 December 2012.

The Fifth Incident

35. The DCC against the Suspect lists the so-called "fifth incident" as one of the "*cinq incidents pour lesquels la responsabilité pénale de BLÉ GOUDÉ est*

⁴⁴ See, e.g., "Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document", 25 June 2008, ICC-01/04-01/07-648 (ordering the Prosecutor to withdraw the DCC and file an amended DCC due to the vagueness of certain provisions).

engagée".⁴⁵ It is, principally but not exclusively, an attack on the Sicogi-Lem Mosque of 25 February 2011, during which 13 people were allegedly killed.⁴⁶

36. With respect to this incident, the Prosecutor describes the Suspect's "course of conduct" as follows: (a) providing a "*mot d'ordre*" at or about 09:00 at the Baron Bar on 25 February 2011, (b) causing the immediate and spontaneous erection of barricades manned by armed youth arising out of this "*mot d'ordre*",⁴⁷ (c) causing the words "*Général, Général*" to be called out near the police department of the 16th arrondissement,⁴⁸ (d) provoking the burning of the Lem Mosque and the Qur'an books housed therein (e) causing the death of 13 persons and (f) somehow generating subsequent acts of violence between 25-28 February 2011 in the Doukouré neighbourhood.⁴⁹

37. None of the above-cited specifics which comprise a clearly defined "course of conduct" are mentioned in either the Suspect's arrest warrant or that of Laurent Gbagbo. Nor is this "course of conduct" mentioned in either of the Prosecutor's applications pursuant to Article 58, despite the details provided with respect to the other charged "incidents".⁵⁰

38. As also discussed above, the Prosecutor herself informed the Chamber that the so-called "fifth incident" was brand new, claiming that it had only recently come to her attention pursuant to her "further investigation".⁵¹

⁴⁵ DCC, para. 77.

⁴⁶ DCC, para. 155.

⁴⁷ DCC, para. 156.

⁴⁸ DCC, para. 157.

⁴⁹ DCC, para. 158-160.

⁵⁰ See generally ICC-02/11-02/11-60-Conf; (specifying dates, locations, associated persons for all charged incidents as well as many if not all of the subsidiary incidents without making any mention of the course of conduct relating to the "fifth incident").

⁵¹ ICC-02/11-02/11-09-Conf, para. 9.

The Suspect's Transfer

39. The Chambre d'Accusation of the Cour d'Appel in Abidjan itself stated that the Suspect would be transferred on the basis of the Prosecutor's Article 58 application which, as will be remembered, incorporated the substance of the the *Gbagbo* arrest documentation.

40. It is, furthermore, clear that Côte d'Ivoire sought to preserve its sovereignty in this affair as demonstrated by its decision not to surrender the Suspect to the ICC for at least 14 months following his rendition from Ghana.

41. The Suspect's transfer to the ICC Detention Facility was, in the circumstances, predicated upon specific and detailed facts that constituted the "course of conduct" on which the accused crimes were based.

Exclusion of the Fifth Incident from the DCC

42. The Prosecutor is obligated to provide a DCC that appropriately identifies all material facts with a view to fixing the factual scope of a future trial.

43. The DCC describes and specifies an entirely new factual "course of conduct" which was not included in the Prosecutor's various applications under Article 58 of the Rome Statute. Such underlying "course of conduct" was not included in the documentation provided to Côte d'Ivoire at the time of the Suspect's surrender.

44. The relevant authorities of Côte d'Ivoire, in fact, relied upon the "course of conduct" detailed in the documentation with which they were provided by the ICC.

45. The rule of speciality, as presented in the Rome Statute and interpreted by its drafters, was designed to protect individuals from “unexpected prosecution” and to preserve the requested State’s sovereignty when surrendering one of its nationals to the Court.

46. This rule of speciality has thus been breached in the present instance because the Prosecutor has implemented a new “course of conduct” which was not subjectively considered by Côte d'Ivoire when surrendering its own national.

Relief Sought

47. In light of the aforementioned, the Defence requests that the Pre-Trial Chamber amend the DCC by striking out all reference to the so-called “fifth incident” relating to the alleged attacks in Yopougon/ Doukouré between 25-28 February 2011.

48. The Prosecutor should be ordered to submit an amended DCC in compliance with Article 101(1) as soon as possible.



Nicholas Kaufman
Counsel for Charles Blé Goudé

Jerusalem, Israel
Monday, August 25, 2014