

1 International Criminal Court
2 Pre-Trial Chamber I - Courtroom 1
3 Situation: Republic of Côte d'Ivoire
4 In the case of The Prosecutor v. Laurent Gbagbo - ICC-02/11-01/11
5 Presiding Judge Silvia Fernández de Gurmendi,
6 Judge Hans-Peter Kaul and Judge Christine Van den Wyngaert
7 Confirmation of Charges Hearing
8 Wednesday, 27 February 2013
9 (The hearing starts in open session at 2.17 p.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Good
14 afternoon. Court officer, would you please call the case.
15 THE COURT OFFICER: Thank you, Madam President. Situation in the Republic of
16 Côte d'Ivoire, in the case of The Prosecutor versus Laurent Gbagbo, ICC-02/11-01/11.
17 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.
18 We were able to come up with a solution that would allow you to have your
19 additional minutes, so you have the time that you need now and then 15 minutes
20 after the last session of this afternoon. And we will comply strictly with those
21 instructions because, if we do step out of those limits, then the Judges will not be able
22 to perform properly.
23 MR ALTIT: (Interpretation) Thank you, your Honour.
24 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: You now have the floor.
25 MR ALTIT: (Interpretation) Thank you, Madam President. Maître Ivanovic will

1 continue her presentation on responsibility.

2 MS FAUVEAU IVANOVIC: (Interpretation) Madam President, your Honours,
3 yesterday we established that President Gbagbo, because of the deep division within
4 the FDS, had no control over those forces unless or over the militia and the
5 mercenaries.

6 Now, regarding control over militia, the Prosecutor alleges that they were under the
7 control of Blé Goudé, who was under President Gbagbo's control. Blé Goudé had
8 some authority over the youth but it might be more appropriate to say that the youth
9 respected him. They admired him, they respected him, but they were not under his
10 control.

11 By the way, since the Prosecutor has failed to establish who the militia were, it is only
12 logical that he cannot demonstrate who had control over them. Furthermore, the
13 Prosecutor alleges that President Gbagbo allegedly had control over militia and
14 mercenaries by using the FDS command chain. Should that be the case -- should
15 that have been the case, President Gbagbo would have had to work with the Minister
16 of Defence, yet the Minister of Defence found out about the existence of militia and
17 mercenaries through the media. He never saw them. And further still, he argues
18 that the FDS never used any militia or mercenaries; document 1273, page 1293,
19 Defence document. Absence of automatic obedience to President Gbagbo:

20 The Prosecutor alleges that the execution of crimes was possible thanks to the attitude
21 of quasi blind obedience to President Gbagbo and states at paragraph 86 of the DCC
22 that President Gbagbo and his supporters were convinced that their subordinates,
23 including the direct perpetrators of the crimes, had sufficient resources and would
24 then therefore obey their orders.

25 First, the allegation that President Gbagbo and his supporters were convinced that

1 their supporters had the resources to obey them, does not imply that they
2 automatically executed their orders. They could have simply been convinced of
3 these things without this necessarily translating into reality.

4 The cognitive element would have been relevant here had the Prosecutor provided
5 sufficient grounds to believe that President Gbagbo exercised effective control on the
6 forces of defence and security and that those orders were automatically obeyed. The
7 Prosecutor, however, does not offer any element to support or substantiate the claim
8 that President Gbagbo's orders were automatically followed and, by the way, there
9 were no orders as such.

10 The Prosecutor's arguments regarding the quasi automatic execution of orders speaks
11 to the resources available to the forces but does not offer any information regarding
12 the manner in which such orders may have been executed and, as I have said, the
13 Prosecutor did not provide any evidence whatsoever relating to the possibility of
14 President Gbagbo having given any orders linked to the events charged or to the
15 broader situation of the post-electoral crisis.

16 The Prosecutor, in addition to failing to establish the existence of an organised
17 structure relevant to the crimes, did not provide evidence on contribution either. No
18 action or conduct of President Gbagbo was aimed at contributing to a plan which, by
19 the way, did not exist. The Prosecutor -- or, rather, to the contrary,
20 President Gbagbo worked for negotiations and reconciliation and peace in
21 Côte d'Ivoire.

22 According to the Prosecutor, President Gbagbo's contribution was in terms of
23 defining and adopting a common plan for the crimes, that is paragraph 74 of the DCC,
24 creating a structure for the implementation of the plan, paragraph 75 and 76, DCC,
25 arming the forces, or pro-Gbagbo forces, paragraph 77 of the DCC, co-ordinating the

1 implementation of the common plan, paragraph 78 and 79 of the DCC, and orders
2 relating to the implementation of the common plan, paragraph 80 and 84 of the DCC.
3 The Prosecutor further alleges co-ordinated contribution from other -- from others
4 and the contribution by others may be ascribed to the accused but it does not
5 constitute essential contribution within the meaning of the requirements of the crimes
6 charged in the context of co-perpetration.

7 Defence will revisit this so-called common plan, particularly the plan of the
8 Prosecutor, that such a plan did not exist and that therefore it was not possible for
9 President Gbagbo to be part of its definition.

10 Lack of structure: Since there was no common plan, President Gbagbo could not
11 have set up a structure for the implementation of a plan that did not exist. We have
12 already demonstrated that there was no organisation set up to implement a
13 non-existent common plan or policy. However, we will examine the Prosecutor's
14 allegations in order to point out inconsistencies and contradictions within his case.
15 At paragraph 75 of the DCC, the Prosecutor asserts that President Gbagbo set up a
16 structure within the government and the defence and security forces for the
17 purpose -- and had, rather, absolute control over them. Let us recall that
18 President Gbagbo was the President of the Republic at the time and the Prosecutor
19 acknowledges this fact during the hearing of 22 February 2013, and pursuant to the
20 constitution of Côte d'Ivoire he should have had effective control over the armed
21 forces.

22 However, as we have already established, during the time of crisis, when there is
23 unrest and disorder, he did not have the resources to enable him to have control over
24 the soldiers. The forces of security and defence were deeply divided, for various
25 political reasons; Witness P-9, reference 0011-048, page 0488. And furthermore, the

1 international community deprived President Gbagbo of the little control he had by
2 arming and providing military support to the rebels.

3 Evidence of support by the international community to the rebels is found in
4 document 0018-0714, page 0715, 0018 and Defence document 2381, at pages 7 and 8,
5 document 1618.

6 In its attempt to prove that President Gbagbo set up a special structure, the
7 Prosecutor refers to an order by the Minister of Defence calling for the recruitment of
8 2,000 soldiers. This order is said to have been issued before the elections and had no
9 link with the post-electoral crisis. It was made at the behest of the Chief of General
10 Staff to increase the strength of the army which was seen to be insufficient at the time
11 and causing non-commissioned officers to be used in junior positions. P-9,
12 0011-0529, pages 0530 to 0532.

13 Those recruited during that period were in training during the time of the
14 post-electoral crisis and therefore could not have been involved. Furthermore, after
15 their training, they could not have been put to any use because there were no
16 weapons available. Document 0011-0529, pages 0533, 0534 and 0536.

17 In any event, recruiting young soldiers into a regular army, pursuant to regular and
18 normal proceedings, is a legal undertaking that does not require the setting up of
19 special structures. There is no evidence that President Gbagbo intervened in any
20 manner whatsoever in the selection of the youth who were recruited or that he
21 required that they be selected according to any specific criteria.

22 Finally, the initiative to conduct this recruitment exercise did not come from
23 President Gbagbo but, rather, from the Chief of General Staff.

24 The Prosecutor also alleges that President Gbagbo secured the loyalty of Blé Goudé,
25 and in paragraph 75 of the DCC he quotes documents dating from between 2004 and

1 2007 without showing any link between these documents and the events that took
2 place in 2010 and 2011.

3 Regarding the financial resources that some of the leaders of the patriotic groups
4 received, the documents of the Prosecutor affirmed the payment of certain modest
5 sums but, without any indication of the reasons for those payments, we should say
6 that political movements organised demonstrations and rallies and required some
7 sort of financial support.

8 Regarding the instructions that President Gbagbo allegedly gave, in order to continue
9 the recruitment of young people during the post-electoral crisis, the Prosecutor
10 shamelessly distorts his own witnesses' statement.

11 The Prosecutor alleges that President Gbagbo directed Blé Goudé and General
12 Mangou to continue enrolling young militias in the defence and security forces. This
13 allegation is based on the statement of P-11, who never said any such thing. Witness
14 P-11 never referred to young militias, but to young people.

15 Witness P-11 mentions an appeal made by the Chief of General Staff in the presence
16 of Blé Goudé, but he explained that the Chief of Staff was complaining about a
17 shortage of men.

18 Finally, P-11 had no idea on the possible role of President Gbagbo in that appeal. He
19 had no idea. According to him, it was obvious that President Gbagbo had to be in
20 agreement. He presupposes that President Gbagbo was aware, but at no time did he
21 suggest that the initiative for that appeal came from President Gbagbo, let alone that
22 he ordered it.

23 0016-0372, page 0374.

24 Just like he distorts the statement of the witnesses, the Prosecutor misrepresents the
25 substance of the documents. The memo addressed to President Gbagbo, and that is

1 0018-0059, does not in any way show that President Gbagbo oversaw the recruitment
2 of young people. In fact, that memo shows the exact contrary.

3 The document shows that the young people were not fighting for President Gbagbo
4 and that the said recruitment was not authorised by the Ivorian authorities. This
5 memo informed President Gbagbo, and I quote, "Attacks in the West Bangalo and
6 Duékoué by all indications are the work of gangs made up of Muslim members of the
7 self-defence groups previously set up to defend the national territory, but who had
8 resorted to using the pretext of their many grievances to act as highway robbers and
9 even as allies of the rebels that they had fought against." 0018-0059, page 0060.

10 This document says exactly the opposite of what the Prosecutor contends. It says
11 that various groups with links to the rebels recruited young people with the sole
12 objective of creating disorder. Even though the existence of mercenaries in the
13 Ivorian army was not sufficiently substantiated, the Defence would like to equally
14 refute the allegation of the Prosecutor, according to which President Gbagbo oversaw
15 the recruitment of mercenaries.

16 That allegation is based on a note dated 1 March 2011, 0018-0067. We do not know
17 who wrote that document and to whom it was destined and nothing indicates that
18 this note ever reached President Gbagbo. In any case, if this document contains any
19 proposals, there is nothing in the case file to even suggest that such proposals were
20 accepted.

21 The other document that is most heavily relied on by the Prosecutor to link
22 President Gbagbo to the recruitment of mercenaries is a handwritten note relating to a
23 meeting in the home of a minister on 28 April 2010, 0018-0084. This note equally
24 says the exact opposite of what the Prosecutor contends.

25 The meeting took place in the home of Minister Anaky. Did the Prosecutor tell you

1 who was Minister Anaky? Many, many years ago Minister Anaky was a member of
2 the FPI, but recently he created his own party, the Movement for the Forces of the
3 Future, which was part of the RHDP.

4 So Minister Anaky became a member of the National Union Government set up in
5 2005. He was the Minister of Transport, and the document is 1241, page 1244. The
6 document clearly states that Minister Anaky was a member of the opposition.

7 By itself, the meeting in Minister Anaky's home could not have as an objective to
8 carry out recruitments on behalf of President Gbagbo. It could only be used to
9 recruit on behalf of Alassane Ouattara.

10 But there is worse. When you look attentively at the document, you realise that the
11 RHDP was planning to organise a march which it would also destabilise and for that
12 purpose it had to recruit 40 Liberian mercenaries. One has to say that the plan was
13 quite Machiavellic, but President Gbagbo had nothing to do with it. It was those
14 opposed to him who were recruiting Liberian mercenaries.

15 After having attributed to President Gbagbo the militias allied to the rebels the
16 Prosecutor also attributed to him the mercenaries recruited by the RHDP, and yet
17 President Gbagbo had no link with either of the two groups and this underscores the
18 weakness of the Prosecution case.

19 Absence of weapons: Let us now consider the allegations concerning weapons. In
20 paragraph 77 of the amended DCC, the Prosecutor claims that there was a huge cache
21 of weapons and ammunition in the basement of the presidential palace. That
22 weapons cache is mainly supported by a letter from the President of the Security
23 Council Committee on Côte d'Ivoire, and in that letter the President mentioned large
24 quantities of arms and ammunition retrieved from the presidential palace after the
25 arrest of President Gbagbo, document 0021 to 0125, page 0160, paragraph 142, except

1 that the document affirms in that same paragraph, that is 142, that ONUCI apparently
2 handed over those weapons to the Forces Nouvelles without keeping the slightest
3 trace, meaning that there is no evidence - no concrete or tangible evidence - that that
4 weapons cache actually existed.

5 And a certain number of questions arise: Why did ONUCI, created by the United
6 Nations, hand over arms that they seized to the Force Nouvelles, which like every
7 other force in Côte d'Ivoire was under UN embargo.

8 But there is another question: Why would President Gbagbo be keeping arms and
9 ammunition in the presidency, whereas his forces and commanders were repeatedly
10 complaining that they did not have sufficient arms and ammunition? If there were
11 weapons in the presidency, there would only be one reason why they were found
12 there: President Gbagbo did not want to use those weapons.

13 And what evidence do we have regarding weapons procurements? According to the
14 allegations of the Prosecutor, before the election President Gbagbo instructed his
15 subordinates to buy weapons abroad.

16 Of course there was weapons trafficking during the period of unrest, which began in
17 1999, but once again it is necessary to recall that the Ivorian army found itself without
18 resources facing a well-armed rebellion which was constantly being resupplied.

19 Document 0025-0078 and 0018-0727.

20 Let us point out that the weapons trafficking took place well before the elections and
21 it does not have any link with the events charged by the Prosecutor, but what is even
22 more important is that there is nothing to link President Gbagbo with the weapons
23 trafficking.

24 Of course, he was the President of the Republic and one can suppose that he was
25 aware that certain civil servants and officers were purchasing weapons. However,

1 we are dealing with a criminal case here and assumptions are not enough. Evidence
2 has to be produced. There is nothing to indicate that President Gbagbo was aware of
3 the weapons trafficking.

4 The UN group responsible for investigating arms in Côte d'Ivoire was unable to find
5 any trace of transactions that were conducted by the presidency. Document
6 0021-0125, paragraph 59. Based on the information gathered by that group, certain
7 high-ranking officers in Laurent Gbagbo's government were involved in weapons
8 trafficking and the operative word here is "trafficking."

9 These officers are well-identified and they are Generals Bredou and Kassaraté,
10 0021-0125, annex 7, page 0223. The two generals were never taken to task by the
11 new government and were in fact rewarded with new positions in the new
12 administration. Document 1561 and 1562.

13 The loyalty of these two generals to President Gbagbo was always doubtful and their
14 actions were not necessarily linked to the policy of President Gbagbo. 0016-0256,
15 pages 0265 and 0279, and 0014-0204, page 0221.

16 In any case, the Prosecutor did not produce any probative evidence that they acted on
17 the basis of orders from President Gbagbo, or that President Gbagbo was aware of
18 those transactions, neither did he produce any evidence that the weapons procured
19 were placed at the disposal of the forces loyal to President Gbagbo. How can one
20 possibly know whether those weapons were used by the rebels, or not? These were
21 smuggled weapons and they could have been intended for just about anybody.

22 Regarding the procurement of weapons after the elections, there is no evidence of that.
23 On the contrary, the evidence presented shows that no transactions were conducted
24 after 28 November 2010. Document 0021-0125, pages 0146 and 0147.

25 We have a memo which indicates that President Gbagbo, through the intermediary of

1 an unknown individual, requested weapons from the President of the Democratic
2 Republic of Congo. Document 0018-0264.

3 What is the value of such a document whose author is totally unknown? Did the
4 Prosecutor go to inquire from the President of Congo whether he had received such a
5 letter? Did he try to find out who drafted that document? He should have
6 cross-checked, but he did not do so. This document does not have any probative
7 value, besides which we do not even know whether it is authentic.

8 President Gbagbo was aware that the defence and security forces did not have
9 enough weapons and ammunition, but the Prosecutor has no evidence that he
10 supplied weapons to those forces during the post-electoral crisis. The evidence
11 presented here shows that during the crisis the FDS did not receive anything. P-10,
12 0016-0175, page 0177.

13 The idea of a well-equipped and heavily armed army in Côte d'Ivoire is pure fiction.
14 The alleged arming of the regular and republican forces in Côte d'Ivoire never took
15 place.

16 The affair of the Belarusian helicopters, which compelled the UN to apologise for
17 having wrongly accused the Belarus government of having delivered helicopters to
18 the Côte d'Ivoire, shows that this story of the arming of the regular forces of
19 Côte d'Ivoire was an imaginary one. Document 0674 and 1559.

20 Lack of co-ordination.

21 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I'm sorry, I
22 will interrupt you. I'm told that you are going way too fast, particularly when you
23 mention the ERN numbers, and this makes it difficult to include these numbers in the
24 transcripts, and this makes it even more important for you to submit written
25 presentations at the end of the presentation, and I assume that you handed over those

1 presentations yesterday to the Prosecutor?

2 MR MACDONALD: (Interpretation) It is not correct, your Honour. We received
3 PowerPoint presentations but we did not receive any hard copies. If copies were
4 given to interpreters and court reporters, we could be given such copies too because
5 you have realised that it is impossible to follow the transcript. We are trying to take
6 down notes, but we are still lost because we have not received the written
7 presentations.

8 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) You really do
9 have to distribute the written presentations to the Chamber and to the Prosecutor
10 because it is very difficult to follow in court. I hope that this evening, and even
11 before, if you have your presentations of yesterday, you can hand them over to the
12 Prosecutor with copies to the Chamber and also do so at the end of the hearing of
13 today.

14 Thank you.

15 MS FAUVEAU IVANOVIC: (Interpretation) Thank you, your Honour. I'm sorry
16 for presenting too fast and I will try to slow down.

17 Let us now consider what the Prosecutor said regarding the co-ordination of the
18 implementation of the alleged common plan. The Prosecutor alleges that
19 President Gbagbo organised meetings and regularly held discussions with the
20 members of his inner circle, including Mrs Simone Gbagbo, Blé Goudé and the FDS
21 high command. Of course President Gbagbo did frequently discuss with
22 Mrs Simone Gbagbo, she's his wife, but the Prosecutor does not provide any evidence
23 to show that these discussions had any link whatsoever with the post-electoral crisis,
24 let alone with the events charged.

25 As to the meetings with Blé Goudé, yes, they did take place. Blé Goudé at the time

1 was the Minister of Youth Affairs. There were meetings with Blé Goudé and other
2 ministers. President Gbagbo was the President of the Republic and the country was
3 in a state of crisis. What could have been more normal than to convene meetings
4 and try to find a solution to the crisis?

5 Meetings certainly took place, except that the Prosecutor did not provide the slightest
6 evidence to show that the objective of these meetings was the perpetration of criminal
7 acts. In the DCC only one meeting was identified, the meeting of 3 December 2010.
8 The problem with that meeting of 3 December 2010 is that no information is provided
9 as to who attended that meeting, let alone the objective of the meeting, and in fact
10 nothing indicates that this meeting had a criminal objective. The fact is we do not
11 know anything about that meeting.

12 There is a handwritten document, 0018-0220, which talks about that meeting, but
13 nobody knows whether it is a diary, an agenda or a report. In any case, even if this
14 meeting took place, it was a meeting of a humanitarian nature because, on page 0022,
15 there was a plan to provide assistance to the members of the population in difficulty.
16 We would like to point out that assistance was to be provided for the entire
17 population, without any discrimination.

18 It is stated that the common plan had as purpose to carry out violent attacks against
19 Alassane Ouattara and the members of his political camp, and yet during the meeting
20 of 3 December 2010, the discussions centred on assistance to the population. So if
21 that meeting did indeed take place it cannot be considered as a contribution to the
22 alleged common plan.

23 There were also daily meetings at the General Staff quarters, headquarters, but
24 President Gbagbo did not participate in those meetings. Even the chief of the
25 president's military staff, General Touvolé Bi Zogbo, did not attend those meetings,

1 0011-0395, page 0411.

2 The Prosecutor claims that President Gbagbo was briefed on the content of those
3 meetings, but where is the evidence to support that? In fact, the Prosecution
4 evidence shows that President Gbagbo had very little contact with the commanders of
5 the armed forces during the post-electoral crisis. The Chief of General Staff met with
6 him only about three times.

7 If generals wanted to send messages to him, they sent those messages through his
8 military chief, General Touvoly Bi Zogbo, but that also was rare; 0011-0361, page 0364,
9 and 0011-0395, pages 410 to 411. There is no trace of any such messages in the case
10 file.

11 As to the commander of CeCOS, he had two meetings with the president and, during
12 those two meetings, the Chief of Staff was also present. The meetings that were
13 attended by the CeCOS commander were obviously the meetings of the Supreme
14 Council of Defence, referred to by the Minister of Defence in his statement, and which
15 were convened on two occasions during the post-electoral crisis; document 1273, page
16 1297.

17 This means that all-in-all, the Prosecutor was able to identify three meetings between
18 the military commanders and President Gbagbo during the entire period of the crisis;
19 that is a period of more than four months. Three meetings. How is it possible for
20 these three meetings to be described as frequent? How can one conclude, on the
21 basis of those three meetings and in the absence of any minutes, that
22 President Gbagbo was informed of the contents of the meetings? How can anyone
23 claim that he had one-on-one meetings with the commanders in order to review the
24 meetings?

25 Since the Prosecutor could not identify many meetings between the president and

1 military commanders, he tried to attribute the responsibility on President Gbagbo for
2 the activities of Mrs Simone Gbagbo, but Mrs Gbagbo, even though he belonged to
3 the presidential camp, had her own political party and followed her own political life.
4 She was the Secretary-General of the National Congress for Resistance and
5 Democracy, CNRD, and she was the MP of Abobo. As part of her duties, which
6 were not dependent on the position or activities of her husband, she organised
7 meetings and led a campaign against pro-rebel armed groups in Abobo. She did
8 what was necessary to provide assistance to needy members of the population. P-9,
9 0011-0361, page 0371 and P-11, 0016-0301, page 0309.

10 According to the Prosecutor, President Gbagbo often participated in the crisis
11 meetings convened by Mrs Gbagbo, but we really do not know anything about it.
12 Witness P-69 was rather evasive when it came to those meetings and he does not even
13 know who convened them.

14 As to Witness P-44, he was categorical; President Gbagbo was not present.
15 0014-0073, page 0719.

16 Witness P-11 also stated that President Gbagbo was not present, 0016-031 -- or, rather,
17 0016-0301, page 0309.

18 Regarding the meetings of the CNRD, it should be said that the CNRD was a political
19 movement close to the presidential majority, but there is no evidence to show that
20 President Gbagbo actively participated in the movement's activities during the crisis.
21 The Prosecutor refers to what Mrs Simone Gbagbo allegedly wrote down during the
22 meetings by referring to a diary that he claims belonged to Mrs Gbagbo, but we do
23 not know whether it actually belonged to her. She wrote down, according to the
24 Prosecutor, that there was a need to fight and win, and that to achieve this objective
25 the President of the Republic had to be consulted. But the Prosecutor is fabricating

1 evidence out of nothing because, in the diary, it can be read that there was a need to
2 fight and win but, on the other hand, there was nothing to indicate that the president
3 had to be consulted to achieve that aim. The diary simply indicates much further
4 down that Ivoirians should be consulted, and the PR should be consulted; document
5 0018-0881, page 0888.

6 If we accept that "PR" stands for "President of the Republic," there is still no possible
7 link between those consultations and the need to fight and win. In any case,
8 whoever wrote those words first of all thought about Ivoirians because before
9 consulting anyone else, according to that diary, the Ivoirians had to be consulted.

10 According to the Prosecutor, Mrs Simone Gbagbo lumped together the northerners
11 and the rebels; transcript of 21 February, page 4. It was not Mrs Gbagbo who
12 lumped those two together; it was the Prosecutor.

13 During the same hearing he accused Mrs Gbagbo of having written in her diary,
14 during a meeting of the CNRD, and this is 0018-0810, page 0832, "Incitement for the
15 FDC to respond to rebel weapons." Is it strange to try to respond to armed rebels
16 who were attacking President Gbagbo, the Ivorian institutions and the civilian
17 population? And why did the Prosecutor not point out that on the same page the
18 following words are inscribed, "Organise an appeasement campaign in the regions to
19 avoid confrontation."

20 When you read those notes together you realise that the person who wrote them
21 distinguished clearly between the northerners and the rebels and that the said CNRD
22 meeting had a single objective, that is to calm down the situation.
23 Furthermore, do we know to whom that diary belongs? Not really. The Prosecutor
24 contends that it belongs to Mrs Gbagbo because it was found in the residence, and we
25 explained at the beginning of the presentation that we had doubts about documents

1 coming from the presidential residence and we told you why, so I will not come back
2 to that.

3 Also in the DCC it is stated that during the meetings participants deliberately avoided
4 discussing the necessity to put an end to the massacre of civilians, despite the
5 criticisms that were widely reported in the media.

6 First of all, the authorities and the forces of law and order would not intervene
7 because of criticisms against them in the media, and the reality of the fact is usually
8 quite different from what is reported in the media.

9 Moreover, we do not have any proof or evidence of what was discussed in those
10 meetings. The only meetings that we know anything about, for example the daily
11 meetings at the General Staff, had as their objective to find a solution to the untenable
12 situation and to put an end to the suffering of the population.

13 Mrs Simone Gbagbo also convened meetings in order to discuss the surge in violence
14 and to find a way to put an end to that violence. 0016-0449, page 0464.

15 The participants in those meetings did not always have much information about the
16 events, but the events were nevertheless debated and nobody was ever prevented
17 from raising them. 0016-0130, page 139; 0016-0152, pages 0154 and 0155; 0014-0326,
18 pages 0337 and 0338; 0014-0340, page 0345.

19 Moreover, when the rebel attacks intensified, a crisis command post was set up to
20 counter those attacks because the main responsibility of the FDS was to provide
21 security for the population. P-9, 0011-0556, page 0558.

22 Lastly, the members of the government discussed the events reported by the media
23 and the Minister of Defence requested a report from the Chief of General Staff and the
24 supreme commander of the gendarmerie on the events that surrounded the women's
25 march. Document 4508, pages 4510 and 4511.

1 Your Honour, can we move briefly into private session?

2 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Court officer,
3 please move us into private session.

4 (Private session at 3.03 p.m.)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Open session at 3.04 p.m.)

14 THE COURT OFFICER: We are in open session, your Honours.

15 MS FAUVEAU IVANOVIC: (Interpretation) Thank you.

16 In light of the above, one should and must wonder which information was received
17 by President Gbagbo and what was his real knowledge of the situation. The
18 Prosecutor did not produce any evidence that President Gbagbo was informed of the
19 real situation on the ground. In the absence of such information, how could he have
20 co-ordinated anything?

21 Lastly, there were investigations carried out on the events under the presidency of
22 President Gbagbo, and these would have led to engaging the responsibility of the
23 perpetrators of those acts who belonged to official and regular forces.

24 0001-0285,0001-0256 and 0001-0264.

25 P-68 stated that, as soon as there was an incident, the gendarmerie was mobilised to

1 investigate. 0028-0023, page 0025, paragraph 11.

2 P-100 stated that investigations were carried out on the activities of CeCOS.

3 0020-0193, pages 0213 to 0214.

4 The Minister of Defence also confirmed that the Public Prosecutor was requested in

5 March to investigate the alleged crimes, document 1273, page 1298, and the

6 investigation was supposed to take place on the events that took place on

7 16 December 2010. It also concerned the women's march that took place and the

8 shelling that took place in Abobo. 0001-0285, page 0286.

9 President Gbagbo, shocked by the possibility that women could have been killed,

10 personally dispatched officers from the palace to find out what had happened.

11 Document 3724, page 3731.

12 Let us now move on to the instructions, or rather the absence of instructions from

13 President Gbagbo. To begin with, the Prosecutor should have been more logical in

14 the presentation of his allegations and yet, after having stated that President Gbagbo's

15 orders were executed or implemented almost automatically, he alleges that

16 President Gbagbo ordered the use of the army as early as December 2010, and in

17 support of that allegation we are told that the army intervened only on

18 22 February 2011. 0011-0341, pages 0350, 0351.

19 Either President Gbagbo did not issue that order, or the army did not obey him. In

20 any case, the requisition of the army did not have as objective to attack the population,

21 but to put an end to the violence. P-9, 0011-0341, page 0353.

22 It is also difficult to believe that this was actually an order, because the army carried

23 out its own assessment of the situation and decided not to intervene. 0011-0341,

24 page 0357.

25 The fact of the matter is that the Prosecutor did not show us a single official order

1 from President Gbagbo and he probably is not able to do so because, according to
2 Witness P-44, President Gbagbo gave instructions only to ensure security, safeguard
3 law and order and restore peace. His instructions were never to the detriment of the
4 population. Document 3704, page 3717.

5 The specific instructions that President Gbagbo gave was to put an end to the actions
6 of the Invisible Commando, to ensure that they no longer had any room to
7 manoeuvre, that they were no longer able to shoot at people and that there should be
8 fewer deaths. 0011-0505, pages 0522 and 0525. He also gave general instructions to
9 protect the villages. 0011-0395, page 0416. There was also a general instruction to
10 protect the population and their property. 0016-0426, page 0431. These instructions
11 of a general nature were not in any way illegal. On the contrary, it shows that
12 measures had to be taken to protect the population.

13 Regarding the order that President Gbagbo allegedly gave to place the Golf Hotel
14 under siege as soon as the provisional results were announced, we do not have any
15 proof of that. Witness P-44 mentions a decision that President Gbagbo took, but he
16 says that this was in January, or even February. 0014-0768, page 0794. Furthermore,
17 this witness does not know who took this decision and he explains that this was in
18 fact a decision relating to the maintenance of law and order. Document 3704, page
19 3716.

20 It should be pointed out that Prosecution Witness P-44 described the Golf Hotel as a
21 military camp that could be used as a base for attacks, and he considered that
22 measures taken around the Golf Hotel were consistent with legitimate defence.
23 Document 3704, page 3713.

24 The other document who mentioned the blockade, that is Witness P-46, stated that he
25 does not know when that blockade was put in place and that he never saw any order

1 from the President ordering the erection of such a blockade, and he explained that it
2 was the FRCI soldiers who arrived first and were then followed by the regular army
3 soldiers. 0014-0271, page 0285.

4 The FRCI soldiers were not pro-Gbagbo soldiers, they were soldiers of the rebel army,
5 and so I wonder in which country would a regular army allow armed rebels to set up
6 base in a residential neighbourhood without blocking them off? And I would like to
7 point out that, even though this hotel was the base of the rebel forces who were
8 heavily armed, the opposition leaders, particularly Alassane Ouattara and Guillaume
9 Soro, did not seem to be stranded there. Document 2381, pages 2386 and 2387.

10 The Prosecutor states that Alassane Ouattara and Guillaume Soro could come and go
11 as they wished and that they were accompanied by hundreds of armed rebels, which
12 was a real army, well-trained and heavily armed. Document 0001-0226, 0018-0028,
13 0045-1238 and document 1396, page 1403.

14 In fact, when one takes the time to analyse the allegations of the Prosecutor, one sees
15 that the Prosecutor distorts the evidence. They state that President Gbagbo sought
16 the use of the army to fight against the rebels, but the Prosecutor relies on Witness P-9,
17 but Witness P-9 states that the army was requisitioned to put an end to the violence.
18 0011-0430.

19 He never said that President Gbagbo insisted for the army to use heavy weapons.

20 He never said that President Gbagbo did not take into account the observations of his
21 military commanders. In fact, the evidence shows that, having received the request
22 for intervention, the army assessed the situation and decided that this was once again
23 an exercise of the maintenance of law and order and the army was not necessary.

24 Transcript 0011-0341, pages 0350 to 0353, 0356 and 0357.

25 The army only intervened after the death of a number of policemen on

1 22 February 2011; 0001-0341, pages 0350, 0352. This decision seems to have been
2 taken by the army without any intervention on the part of President Gbagbo;
3 0011-0341, page 0357.

4 In paragraph 82 of the DCC the Prosecution alleges that President Gbagbo tasked his
5 Chief of Staff, General Mangou, with the co-ordination of FDS operations, in order to
6 stop the demonstrators from gaining access to the headquarters of RTI.

7 We should recall in addition that the headquarters were under guard. In addition to
8 the fact that this instruction is in no way illegal, we have no trace of this instruction.

9 The unfolding of the demonstrations on 16 December 2010, which we have mentioned
10 so I shall not revisit this issue, clearly shows that the forces of law and order had not
11 been tasked with attacking the demonstrators but, rather, with maintaining public
12 order that had come under threat.

13 What is more, the Prosecutor concedes timidly, but he does concede, because he says
14 in the following sentence that the forces of law and order had been deployed in order
15 to disperse the demonstrators. Forces of law and order are often deployed to
16 disperse demonstrators in any country of the world.

17 The instructions received by the FDS were not to shoot at the demonstrators, and to
18 be courteous towards the population; 0011-0455, page 0456.

19 Even if the Prosecutor concedes that the forces of law and order were not deployed to
20 attack the demonstrators but to disperse them, he then alleges that pro-Gbagbo forces
21 attacked the demonstrators without any restraint.

22 Let us suppose that there were attacks, attacks the Prosecution is talking about, there
23 is no nexus between the excesses that may have occurred and the instructions,
24 perfectly legal instructions, received by the FDS.

25 Remember the instructions received by the FDS. We talked about these last Monday;

1 notably, that weapons should not be used, that fire should not be -- they should not
2 open fire on the demonstrators and that they should only use conventional means.

3 Had there been any excesses, if there were excesses, they were condemned by the
4 powers that be. An investigation was ordered. 0001-0226, page 0232.

5 And what should we say about the entire fabrication that General Mangou ordered,
6 as mentioned in paragraph 84 of the DCC, that demonstrations in the street and
7 demonstrations threatening public order should be stopped and that weapons of war
8 were to be resorted to in order to disperse the demonstrators?

9 To obtain such an allegation the Prosecution must have taken the statement of P-10
10 apart, which in reality said that they were equipped with weapons of war because
11 they were faced with troops who were waging war. Witness P-10 never spoke of the
12 use of heavy weaponry against demonstrators, even if he did say that the
13 demonstrators were often armed. 0016-0046, page 0060.

14 It is certain that in distorting the statements of its own witnesses by piecing together
15 parts of different sentences that are not at all connected, the Prosecution can reach any
16 results he desires. It is also certain that in proceeding in such a manner, the
17 Prosecution will never produce credible and tangible evidence establishing
18 substantial grounds to believe that President Gbagbo committed the crimes of which
19 he is charged.

20 There was continued manipulation of information and the Prosecution takes out of
21 context a sentence in which President Gbagbo allegedly told the commanders of his
22 forces that they should hold onto and not lose control over Abobo. Firstly, it is not
23 very clear as to what President Gbagbo really said during the meeting; rather, it was
24 an example of general instructions that the President of the Republic might give to
25 people. 0016-0084, page 0097. And what is more, this meeting is to be placed in

1 context; notably, during violent attacks led by the Invisible Commando in Abobo.

2 The Prosecutor is trying to string the words together that Abobo should not be lost,
3 that the president is said to have uttered, and which correspond to a perfectly legal
4 instruction with imaginary public statements on the part of the president saying that
5 he wanted to clean up Abobo and turn it into a cemetery.

6 Of course we have no trace of such statements by the president. If these statements
7 were made in public, why is it that the Prosecution failed to find them in the media?
8 Radio, television and newspapers all have archives, so it can't be difficult to come by.

9 In reality, President Gbagbo never made such statements. They do not exist. The
10 only instructions given with regard to Abobo were to put a stop to the Invisible

11 Commando misdeeds in Abobo and to free up the international passage through
12 Abobo. Witness P-9, 0011-0505, page 0522 and 0011-0529, page 0538.

13 These instructions did not comprise any mention of attacking the population; rather,
14 they had the interest of the civil population at heart and were perfectly legal.

15 As for President Gbagbo's alleged calls on 9 April 2011 to the forces loyal to him,
16 mentioned in paragraphs 36 and 83 of the DCC, this is a further distortion on the part
17 of the Prosecution. In reality, no calls were made upon the forces to continue the
18 fight. There was a communiqué, a press communiqué issued by the presidency
19 spokesperson in a situation of extreme distress. On 9 April 2011 there were no
20 longer any forces loyal to President Gbagbo present; there were only rebel attacks by
21 heavily armed rebels supported by international forces against part of the population
22 who were still loyal to President Gbagbo. President Gbagbo was trying to save his
23 own life.

24 Finally, in an ultimate attempt to show obedience to President Gbagbo and
25 instructions received from him, the Prosecution says that General Mangou would

1 always consult President Gbagbo before taking any decision whatsoever.

2 We have not found any trace of any such consultation during the post-election crisis.

3 The Prosecutor provides as evidence of these alleged consultations the minutes of a
4 meeting which took place in July 2006, 0018-0438.

5 Now, these meetings -- these minutes are not valid evidence for the period under
6 study. Firstly, there is nothing to show that General Mangou's words reflected
7 reality, and even if this had been the case, this was in 2006. But we are concerned
8 with events which occurred at the end of 2010, beginning of 2011. So even if
9 evidence presented by the Prosecution might be useful as an indication that General
10 Mangou consulted President Gbagbo in 2006, it does not tell us anything of their
11 relations in 2010 and 2011.

12 Finally, the Prosecutor makes no mention of any link between President Gbagbo and
13 the four elements -- events underpinning the charges, aside from a few vague
14 references to these events scattered throughout this part of the DCC. Now, there
15 must be a link between the alleged contribution of the person charged and the
16 criminal acts. The contribution must result in the commission of the crime. The
17 Prosecutor has shown no such nexus.

18 Madam President, your Honours, the Prosecutor has not established anything. He
19 has not brought any tangible and solid evidence establishing substantial grounds to
20 believe that President Gbagbo made an essential contribution to the common plan
21 and to the execution of the crimes charged. Everything shows that
22 President Gbagbo's actions were aimed at negotiating, at reconciliation, which the
23 Defence shall demonstrate in the last part on responsibility concerning the alleged
24 common plan devised by President Gbagbo which, in reality, never existed. Madam
25 President, would this be the right time to take the break because I'm about to embark

1 upon a new part of my presentation?

2 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) We shall
3 suspend now and we shall come back at 5 to 4.

4 (Recess taken at 3.26 p.m.)

5 (Upon resuming in open session at 3.58 p.m.)

6 THE COURT USHER: All rise.

7 Please be seated.

8 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Maître Altit,
9 you may address the Court.

10 MR ALTIT: (Interpretation) Maître Fauveau Ivanovic will continue her
11 presentation on responsibility -- on liability.

12 MS FAUVEAU IVANOVIC: (Interpretation) The existence of a common plan is the
13 essential precondition to all co-perpetration and is necessary to show the presence of
14 criminal responsibility in application of Article 25(3)(a), but also in application of
15 Article 25(3)(d).

16 Even if in the Lubanga judgment the Trial Chamber found that the commission of the
17 crime is not necessarily the main objective of co-perpetrators according to the
18 jurisprudence of the Pre-Trial Chamber, the common plan must involve an element of
19 criminality. This is even more important in the case of indirect co-perpetration.

20 The existence of an agreement, or common plan, need not necessarily be explicit and
21 it may be deduced from the concerted actions subsequently or previously led by the
22 co-perpetrators. However, in order to reach the finding of the existence of a
23 common plan on the basis of essential contribution of the accused, the acts of essential
24 contribution must be established in compliance with the application of the Rules of
25 Procedure.

1 In this case, as the Defence has just demonstrated, the acts of essential contribution
2 were not supported by the requisite sufficient evidence for the charges to be
3 confirmed. The Prosecutor should therefore have brought further evidence of a
4 common plan. We shall show that the Prosecutor also failed to show -- failed to
5 show the existence of a common plan.

6 In paragraphs 4, 33 and 59 of the amended Document Containing the Charges, the
7 Prosecutor alleges that President Gbagbo adopted a policy aimed at launching violent
8 attacks against his political opponent, Alassane Ouattara, as well as the members of
9 his political party and civilians perceived as his supporters, in order to maintain
10 power by all means possible, including the use of lethal force.

11 According to the Prosecutor, this policy may be characterised as an agreement or
12 common plan. Obviously, a policy aimed at launching violent attacks upon a
13 political opponent existed -- had it existed, it would have fulfilled all the conditions
14 required for it to be considered a common plan involving the or engaging the criminal
15 liability of all those who devised it. However, the evidence presented by the
16 Prosecutor does not show the existence of such a policy. The Prosecutor has not
17 provided any evidence that the policy of President Gbagbo was aimed at attacking
18 anybody at all, but before embarking upon an analysis of an alleged plan one should
19 say that, were this plan to exist, it was devised elsewhere.

20 On 4 March 2011, the day after the women's march, an article revealed the existence
21 of a secret meeting in Djekanou, where the rebels allegedly agreed that they would
22 incite bloody clashes in order to cause absolute carnage and attribute genocide to the
23 existing regime. 0027-0190. This meeting was mentioned by other newspapers as
24 well. 0035-0975.

25 This idea is by no means new. It is already present in document 0018-0727, which in

1 the year 2006 floated the idea of creating blood baths in order to accuse

2 President Gbagbo.

3 What is more, need we recall that Alassane Ouattara had been threatening to

4 destabilise the country for years? Did he not already state back in 1999, quote, "We

5 shall strike this power at the right time and it shall fall"? Exhibit 0275. Did he not

6 for a number of years arm the rebels with weapons that finally brought him to power

7 and can he deny being behind the rebellion?

8 But the rebel chiefs are categorical. According to Abdoulaye Traoré, Alassane

9 Ouattara paid for rebels -- for the rebels weapons. Page 001-0020 (sic), page 0021.

10 Another rebel, Koné Zaccaria, confirms that Alassane Ouattara bought weapons for

11 them. Koné Zaccaria also states that the rebels took up arms for Alassane Ouattara,

12 0021-7584, page 7591, and Prosecution Witness P-44 stated that since 2002 the rebels'

13 objective was to overthrow the regime by all means in order to place Alassane

14 Ouattara on the throne. Item 3704, page 3709.

15 The meeting held at the house of the former Minister Anaky, a member of the RHDP,

16 reveals the plan to organise an RHDP demonstration, but also to destabilise with the

17 assistance of Liberian mercenaries probably to attribute the unrest to

18 President Gbagbo. 0018-0084.

19 The RDR and the Forces Nouvelles created a destabilisation crisis and the

20 destabilisation movements had to be organised. These destabilisation movements

21 involved or had the objective of organising destruction, killings and fires. 0025-0056,

22 page 0057.

23 The rebels needed a plan. They needed a plan, because they had nothing to criticise

24 Gbagbo - President Gbagbo - of. They had -- they needed a plan in order to

25 overthrow him, but overthrowing him was not sufficient. They had to remove him

1 entirely from the political scene in Côte d'Ivoire.

2 On the other hand, President Gbagbo did not need a plan. He had all reason to
3 believe that he had been legitimately elected and he was in the presidential palace,
4 but he came under attack. Both he and those supporting him and those close to him
5 came under attack. His only mistake was to attempt to defend republican
6 institutions, sovereignty and the independence of Côte d'Ivoire.

7 What is more, nothing in the Prosecution's case file indicates the existence of a
8 criminal political policy on the part of President Gbagbo. We need only examine the
9 main evidence presented by the Prosecutor to realise that President Gbagbo had no
10 other plan than to lift the country out of a crisis with the means he had always used;
11 notably negotiations and dialogue.

12 The Prosecutor alleges that President Gbagbo publicly announced that he was
13 prepared to resort to violence in order to maintain power. We have not seen any
14 public statement by President Gbagbo. However, he was one who often gave
15 interviews. Instead of providing the only form of reliable evidence in support of an
16 allegation of such type, notably a statement by President Gbagbo, the Prosecution
17 refers to hazy witness statements that do not even manage to say where or when
18 President Gbagbo allegedly made such statements.

19 In order to substantiate this allegation, the Prosecutor refers to a statement made by
20 President Gbagbo. "I shall not be beaten," he says. "Here I am and here I stay."
21 This statement is not relevant to the allegation of the Prosecutor. The date of this
22 statement, which does not incite violence, shows its true meaning. This statement
23 was made in October 2010, in the midst of the election campaign. 0003-0484.

24 So what could President Gbagbo say to his voters? Could he tell them that he was a
25 loser, that he was ready to concede defeat and hand over power? In this case he

1 would not have put himself forward in the elections. These statements need to be
2 placed in their context. They cannot be assessed in a vacuum and interpreted to fit,
3 or to suit, the Prosecution's needs.

4 And what should be said of the Prosecution's interpretation of the slogan it attributes
5 to Gbagbo's election campaign; notably, "We win or we win"? Is this -- is this a
6 violent slogan? Is it inappropriate for an election campaign?

7 Election campaign slogans are part of a seduction and marketing operation, not part
8 of a political programme. Their aim is to rally the greatest number of voters possible,
9 so it is normal to appear optimistic, self-confident and sure of one's victory. This
10 would have been the only plausible and possible explanation of the slogan, "We win
11 or we win," but above all this slogan is not a slogan from President Gbagbo's
12 campaign.

13 We shall now see a video, where Antoinette Alani sings a song with this slogan, "We
14 win or we win."

15 MR MACDONALD: (Interpretation) Could we have the date of the video so that we
16 can situate this in time?

17 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: Yes, what is the date of that
18 video?

19 MS FAUVEAU IVANOVIC: (Interpretation) It was during the campaign. I shall
20 give you the date after the pause, if you allow?

21 (Viewing of the video excerpt CIV-D15-0001-3944)

22 MS FAUVEAU IVANOVIC: (Interpretation) We can also say that this slogan, "We
23 win or we win," is used by the supporters of the national football team, the famous
24 Elephants, that is the Côte d'Ivoire national football team, but we can also see the
25 official billboards for President Gbagbo's campaign and see that there are a number of

1 slogans in this campaign, none of which was, "We win or we win."

2 The slogans used in his presidential campaign were, "We have restored peace. Now
3 let us concentrate on developments. Let's move forward," 0021-7584, page 7587; or,
4 "I vote Gbagbo for Côte d'Ivoire," 0021-7584, page 7591; or, "Gbagbo 100% President
5 for Côte d'Ivoire," item 4483; or, "I choose the original. I vote Gbagbo," item 4484.

6 Then the Prosecutor criticises President Gbagbo for having informed -- several
7 months before the election for having informed the FDS officers of the need to fight
8 the bandits. Of course he is criticised for using the term "bandit," but this is a word
9 from the French language and one need only consult a French dictionary to see that
10 the term "bandit" refers to criminals leading attacks on people, or possessions.

11 And President Gbagbo used this term in the most basic and ordinary meaning, when
12 at the beginning of his speech he stated, and I quote, "Thanks to you in this town and
13 in this region, normal conscientious citizens will be able to go to work undisturbed.
14 They must be able to go to the cinema. They must be able to go to the ball. They
15 must be able to enjoy themselves undisturbed. They must be able to walk around
16 with their money in their pocket without being afraid. Because of your presence, all
17 those who want to rob honest individuals will have to think twice before going out."
18 This is 0018-0005, transcript 0019-0007, page 0008.

19 This speech does not concern the political opponents of President Gbagbo, but the
20 ordinary criminals that exist in all countries and all towns of the world against whom
21 all powers in the world are fighting. What is more, in his speech President Gbagbo
22 says that this unrest is not linked to the war. Quote, "I was still a member of the
23 opposition when there were fights here and a tradesman was killed. I was still a
24 member of the opposition. So it hasn't come about today. Why is Divo seething?
25 Why is Divo all worked up? We have no idea." This is the same transcript, page

1 0009.

2 In reality, Divo is a rich, agricultural area which attracts all sorts of highway bandits
3 because there is also a gold mine. These highway bandits are particularly active
4 when cocoa is traded and they commit many murders and armed robberies. This
5 situation justified the establishment of a republican security campaign and it was in
6 this context that President Gbagbo addressed the FDS officers, and should we say that
7 this was set up when Guillaume Soro was prime minister.

8 One cannot extract a single word from a speech, because words have a meaning when
9 taken in their context. Contrary to the allegations of the Prosecution, there is no
10 nexus between President Gbagbo's speech heralding a new police unit and the
11 subsequent events.

12 There is no link between this speech which only spoke of mainstream criminality and
13 the speeches made by other individuals several months later in quite a different
14 situation, when war was raging in Abobo.

15 The Prosecutor not only distorts President Gbagbo's statements, he also does so with
16 the statements made by those people close to President Gbagbo and even those of his
17 own witnesses.

18 When the Prosecutor alleges that Blé Goudé incited young people to resort to violence,
19 he bases this statement on witnesses -- on the statement of Witness P-11. P-11 says,
20 "During all the meetings Mr Blé Goudé said 'We shall win, with the lord of all armies,
21 with our bare hands'." These were the words that he always used: "We shall
22 triumph without weapons with our bare hands." 0016, through 0372, page 0379.

23 I must say that I find it impossible to detect any call for violence in such a speech, and
24 I would emphasise that this same witness, Witness P-11, stated that the pro-Gbagbo
25 camps' speeches said, merely said that Gbagbo had won and that legality would

1 triumph, also stating that these speeches were not violent, that there were no words
2 such as "go to war ," 0016-0372, page 03766.

3 Indeed, Charles Blé Goudé did, at a given moment in time, call upon young people to
4 enlist in the army. He did so in March 2011, on 19 March 2011, more than three
5 months after the beginning of the post-election crisis.

6 Why did Charles Blé Goudé launch such an appeal? We need to place this appeal in
7 its context to understand that it is a means to avoid an even bigger catastrophe.

8 In March 2011 there was disorder everywhere. The population was organising itself
9 as best it could and in order to avoid young people forming independent groups

10 Charles Blé Goudé called upon them to enter the regular forces. This was not a call
11 to go to war, but an appeal to reason, and an appeal for reason. It was better to take
12 the young people in hand than to leave them to organise themselves. And Blé
13 Goudé called the Ivorians, called upon the Ivorians not to fight each other and not to
14 take up arms, video 0586, contrary to the allegations of the Prosecutor.

15 (Viewing of the video excerpt 0586).

16 MS FAUVEAU IVANOVIC: (Interpretation) Indeed, against all common sense, the
17 Prosecutor describes all statements by those close to President Gbagbo, as well as
18 those by President Gbagbo himself, as calls for violence. However, contrary to
19 Alassane Ouattara, who refused all dialogue and called openly at the beginning of
20 January 2011 for the use of force against President Gbagbo, document 0508 and 1690,
21 President Gbagbo only called for dialogue and negotiation. He always preferred
22 dialogue and always strove for reconciliation; 3695 page 3697.

23 Witness P-44, a Prosecution witness, stated that President Gbagbo always wanted to
24 bring people together by peaceful means, and he added that President Gbagbo was a
25 unifier, he was somebody who used dialogue, who stretched out a hand to his

1 opponents in order to find solutions. He was always somebody who sought
2 solutions. 3704, pages 3708, 3709.

3 How can just one describe President Gbagbo's speech on 21 December 2010 as a threat
4 of using violence? One need only read through this speech to realise that it was a
5 peaceful speech, a call for negotiations and reconciliation.

6 Let us see what President Gbagbo said during his speech 0018-0590, pages 0593 and
7 0594. After having deplored all of the victims of the unrest in a country,
8 President Gbagbo said as follows: "My position with regard to the conquest and the
9 exercise of power are well-known. To my mind, one should not seek power for
10 power's sake but to serve the population. One should not use power to inflict
11 suffering upon the people. I want no more blood to be shed. I want no more war
12 to be waged. I do not wish for the blood of any single Ivorian to be shed. I do not
13 want a war in Côte d'Ivoire that can extend to neighbouring countries and weaken
14 them -- or weaken them."

15 Is this a declaration of war? No, Madam President, your Honours, this is a peaceful
16 speech. This is a peaceful speech, followed by concrete proposals aimed at bringing
17 Côte d'Ivoire out of this period of unrest as fast as possible.

18 As President Gbagbo went on to say, "I am ready, in full respect of Ivorian law and
19 procedures that we have freely established for ourselves, to receive an assessment
20 committee tasked with examining the post-election crisis in Côte d'Ivoire. It will be
21 tasked with objectively analysing the facts and the election process in order to reach a
22 peaceful solution to the crisis." He went on to say, "I call upon Ivorians to show
23 restraint. Our approach has been made by diplomatic means and it is by such means
24 that we intend to obtain satisfaction. I call upon young people to remain calm.

25 I am reaching out for dialogue. I am reaching out to the opposition, to Mr Ouattara,

1 to the armed rebellion that is supporting him." And he had finishes with these
2 words: "I trust our ability to construct -- I have trust in our ability to construct a
3 nation in peace, democracy and prosperity. Let us move away from war, from the
4 path of war. Let us retrieve the past progress and peace."

5 It is obvious that this speech does not advocate violence, this speech is a speech for
6 peace. But it is not only one of peace, it is also an appeal to reason, to negotiations,
7 to dialogue and reconciliation. Unfortunately, President Gbagbo did not receive any
8 following.

9 As for the interview of 31 December 2010, and the speech given on the very same day,
10 the Prosecutor is not merely content with taking President Gbagbo's words out of
11 context. He also twists them. So in paragraph 36 of the amended DCC, we can
12 read that President Gbagbo stated, in an interview of 31 December 2010, and I quote,
13 "The constant pressure applied by his political opponents including the UN made
14 confrontation more probable." However, President Gbagbo never talked about
15 pressure on the part of his political opponents. He merely said that if pressure
16 continues as now, this pressure will incite confrontation.

17 Contrary to the allegations of the Prosecution with regard to this interview,
18 President Gbagbo is not hell-bent on retaining power by all means possible. When
19 the journalist asked him whether he would leave power he said, "I shall see, I shall see
20 when the time comes," before adding that he only wanted one thing, for the votes to
21 be recounted; 0007-0167, and the transcript is 0021-0095, page 0099.

22 Finally, rather than making do with the excerpts of this interview, notably, the
23 documents I have just referred to, the Prosecution should have obtained all of this
24 interview in order to properly assess President Gbagbo's statements. This is
25 Defence videos 0588 and 0589, and transcript 0605 and 0617, showing the entirety of

1 this interview.

2 It shows, or this video shows that as in all other videos, President Gbagbo was merely
3 requesting that an investigation be led into the investigation and the recounting of the
4 votes. What is more, Prosecution Witness P-44 confirms that President Gbagbo
5 suggested a recount of the votes but this position was always refused by the other
6 side. Item 3704, page 3710.

7 (Viewing of the video excerpt CIV-D15-0001-0591).

8 MS FAUVEAU IVANOVIC: (Interpretation) Another Prosecution witness, P11, also
9 states that President Gbagbo only requested for the votes to be recounted; 0016-0372,
10 pages 0381, 0382. Also President Gbagbo never said that he would not relinquish
11 power and that he would stay put. President Gbagbo was convinced that most
12 Ivorians had voted for him and stated to the nation in his new year message, "As I
13 was yesterday in 2002, I am here again today. I am just where the Ivorians placed
14 me with their vote." Yes, he did say "We shall not back down," but this did not mean
15 that he would retain or remain in power at all costs. This meant, "I am elected and I
16 shall not cede to pressure." That this be the only interpretation of
17 President Gbagbo's speech is clear to see in the rest of his speech during which he
18 explains the reasons for the suggestion that an assessment committee be set up to
19 establish the facts and truth as to the manner in which the elections were held in
20 Côte d'Ivoire; 0018-0599, page 0611, 0601.

21 Furthermore, this speech ends with the following words: "Tonight, on the eve of the
22 new year, I would like to make a solemn appeal to all the personalities who are still at
23 the Hotel du Golf. I am asking them to go home. The time for war is over. The
24 time for dialogue is here. Let us join hands and create a chain of solidarity and love
25 around our dear homeland Côte d'Ivoire." These words are not those of a bellicose

1 individual, nor of somebody who was holding on to power. They are the words of
2 somebody who is upholding of constitutional values, and who feels close to his
3 country and to his people. These are the words of reason, of dialogue, and
4 reconciliation and these are the words of President Gbagbo.

5 The examples provided by the Prosecutor do not show the existence of a policy to
6 attack civilians loyal to Ouattara's cause. Quite the contrary: All the speeches, the
7 interviews and the statements made by President Gbagbo point towards a dialogue
8 with his opponents. They show efforts to come out of the delicate situation and find
9 a solution.

10 What is more, a document from the President's cabinet, dated 10 December 2010,
11 confirms the search for a diplomatic or political solution and a rejection of any
12 military approach. 0025-0762, page 0763. Contrary to Alassane Ouattara, who
13 refused all dialogue, President Gbagbo accepted any proposal and mediation. Item
14 1234.

15 President Gbagbo was proclaimed president by the Constitutional Council, the only
16 organ authorised to announce the results of the presidential election in Côte d'Ivoire.
17 Despite the fact that he was lawfully holding the position of President of the Republic,
18 he did not claim victory. He requested a recount of the votes.

19 Madam President, your Honours, President Gbagbo did not have any plan. No
20 common plan ever existed. President Gbagbo only wanted the constitution, the
21 republican institutions and the will of the Ivorian population to be respected. He
22 merely requested an investigation into the elections and a recount of the votes.
23 The Prosecution has shown no objective element necessary for liability in application
24 of Article 25(3)(a). We shall also see subsequently that he did not establish the
25 subjective elements either.

1 The concept of coercion or co-perpetration based -- also comprises subjective elements.
2 We have already indicated that, in the context of responsibility under Article 25(3)(a),
3 the person charged must satisfy the subjective elements of the crimes charged;
4 notably the elements of knowledge and intention under the Statute, to know and to
5 admit that the material elements of the crime will result in the implementation of the
6 crime and know the results for there to be co-perpetration with other perpetrators.

7 THE INTERPRETER: The interpreter does not have access to this part of the
8 presentation.

9 MS FAUVEAU IVANOVIC: (Interpretation) We shall later revisit the requirements
10 of Article -- in terms of all co-perpetrators must be conscious that the implementation
11 of a common plan will result in the realisation of the material elements of the crime
12 and they must accomplish their acts with the willingness and deliberate aim of
13 realising the material elements of the crimes, or in the knowledge that in the ordinary
14 course of events the -- this will result in the crime.

15 They should also be conscious of the factual circumstances which will enable them to
16 exercise control over the crime with the other co-perpetrators. These criteria require
17 that the person charged be aware of the essential character of their role in the
18 implementation of the crime and that they be capable to obstruct its implementation
19 and consequently the commission of the crime.

20 The subjective elements necessary for indirect co-perpetration are directly linked to
21 the common plan, which did not exist. President Gbagbo therefore cannot satisfy
22 the requisite subjective elements.

23 We shall emphasise, however, that the undertakings on the part of President Gbagbo
24 were towards negotiation and reconciliation. He had no intention that any crimes
25 result from his actions. He wanted negotiations to take place.

1 We have just seen in the speeches of President Gbagbo that President Gbagbo did not
2 try to impose his will in any means at all. He was trying to find a peaceful solution
3 to the crisis.

4 As president proclaimed by the Constitutional Council, the only organ in the
5 Côte d'Ivoire authorised to proclaim the president, President Gbagbo was suggesting
6 that the votes be recounted. This gesture shows that President Gbagbo did not have
7 the will, or the intent, to hold on to power. This gesture shows that
8 President Gbagbo did not have the will, or the intent, to use his power as President of
9 the Republic in order to maintain his position of power. This gesture shows that his
10 only aim was to respect the will of the Ivorian people.

11 Madam President, your Honours, the Prosecutor has not brought sufficient evidence,
12 nor objective elements, nor subjective elements, required for the application of Article
13 25(3) of the Statute. He has not brought sufficient evidence establishing substantial
14 grounds to believe that the crimes charged in the DCC be attributed to
15 President Gbagbo, and I shall now allow Maître Altit to address the Court.

16 MR ALTIT: (Interpretation) Now, Professor Dov Jacobs is now going to talk to us
17 about liability under Article 25(3)(d) and Article 28, but I believe that he might run
18 over somewhat by a few minutes; maybe three minutes I'm told. There we are.

19 MR JACOBS: (Interpretation) Madam President, your Honours, the Defence would
20 like now to present a number of elements related to responsibility under Article
21 25(3)(d) and call upon the Chamber not to confirm the charges under this mode of
22 liability.

23 Before developing its underlying reasoning, the Defence would first like to examine
24 the relationship between the modes of liability under 25(3)(a) and 25(3)(d) and the
25 impossibility of combining the two.

1 In the amended DCC of 17 January 2013, the Prosecution spoke while mentioning
2 Article 25(3)(d) of, I quote, "Another possible legal characterisation of the facts,"
3 without stating whether the two modes were to be considered cumulatively or in the
4 alternative.

5 After your question in this regard during the first day of the hearing, Madam
6 President, my colleague from the Office of the Prosecutor stated that he wanted
7 President Gbagbo to be committed to trial for both modes. This statement is not
8 however in keeping with the case law of this Court, which has on several occasions
9 rejected the possibility of considering them cumulatively.

10 So the Chambers of this Court have on a number of occasions reaffirmed the
11 difference between 25(3)(a), which concerns the commission of the crimes, and the
12 following paragraphs, that is to say 25(3)(b, (c) and (d), which refer to the various
13 forms of complicity. The Judges have established a hierarchy within their distinction:
14 First the commission of the crime is to be considered and then the element of
15 complicity.

16 This approach is illustrated, for example, in the decision on the Confirmation of
17 Charges in Katanga, and I quote, "If - if - the Chamber finds that there is sufficient
18 evidence establishing substantial grounds to believe that the accused is jointly
19 responsible as the main perpetrator, any other consideration with regard to his
20 responsibility as an accomplice will be considered moot."

21 This hierarchy within the modes of liability also implies that it is not possible for them
22 both to be confirmed, contrary to the Prosecution's request, according to Pre-Trial
23 Chamber II in Ruto, Kosgey and Sang which expressed, and I quote, "... doubts as to
24 the validity of an approach based on drawing concurrent conclusions on modes of
25 liability presented in the alternative, an individual cannot be considered as main

1 perpetrator and accomplice for one and the same crime," end of quote.

2 In the light of the aforementioned, the Defence respectfully requests the Chamber not
3 to accede to the request for confirmation of a combination of both modes of liability.

4 It is only if responsibility is not engaged under 25(3)(a) that it could be engaged under
5 25(3)(d), because a person cannot be the perpetrator and an accomplice in the
6 commission of one and the same crime.

7 The Prosecutor in its rush to add a further mode of liability has not taken the time to
8 understand this distinction of common sense between the two modes of liability.

9 This confusion explains the Prosecution's lack of reasoning and evidence on the mode
10 of liability under 25(3)(d).

11 Conditions of -- before examining the Prosecutor's reasoning, we should briefly recall
12 the conditions governing responsibility under 25(3)(d).

13 Firstly, it must be established that there was a group of persons acting with a common
14 purpose in order to commit a crime falling under the jurisdiction of the Court, so the
15 Prosecutor must identify (1) the members of the group; (2) their criminal intent.

16 Secondly, the person charged must be shown to have contributed to the commission
17 of the crimes directly.

18 Thirdly, we need to identify the intent to contribute, either by facilitating the
19 commission of the crime or through the knowledge of the criminal intent of the group
20 acting with a common purpose.

21 In light of these conditions, it seems evident that the Prosecutor has not provided
22 sufficient evidence establishing substantial grounds to believe that President Gbagbo
23 contributed to the commission of the crime within the meaning of Article 25(3)(d).

24 The two most problematic aspects of the Prosecution reasoning with regard to
25 determination of the group acting with a common purpose and the alleged

1 contribution of President Gbagbo on the one hand is -- the contribution of
2 President Gbagbo.

3 With regard to the group acting with a common purpose, it is identified in the DCC
4 as, I quote, "Commanders and members of the pro-Gbagbo forces, including Gbagbo."
5 Beyond this vague statement the Prosecutor never specifically identifies in the DCC
6 either the members of the group, nor their criminal intent.

7 The Prosecutor constantly refers back to previous paragraphs in the DCC. This is
8 footnote 464 of the DCC. If we look closely at these paragraphs, they provide no
9 further clarification on these points. Let us look through them rapidly.

10 The first reference is to paragraphs 32 to 42, which cover the alleged existence of an
11 organisation within the meaning of Article 7(2), and do not for one moment allow the
12 precise identification of any group members acting with a common purpose, nor their
13 intent with regard to the four crimes alleged in the charges.

14 The Defence further notes the Prosecution's rather liberal use of the term "specifically".
15 Accordingly, on 20 February last, my colleague from the Office of the Prosecutor
16 stated, and I quote, "Lastly, and specifically, within the organisation of Laurent
17 Gbagbo there are leaders from the Galaxie Patriotique. The Galaxie Patriotique is a
18 hazy assembly of the various groups supporting Gbagbo. It is hazy and involves a
19 number of groups. You should see that the Prosecutor is being -- is lacking
20 clarification in this regard.

21 This second reference is to paragraph 59. That paragraph alleges the existence of a
22 common plan between President Gbagbo, and I quote, "the members of his inner
23 circle," without any further details once again about the members.

24 The third reference is in paragraph 85 of the DCC, which mentions the co-ordinated
25 contributions of the other members, without specifying who those people are, and

1 specifically contributing to a common plan and being a member of a group, acting
2 with a common purpose, is not the same thing. That is the reason why there are
3 different modes of responsibility in the Statute and this is what the Prosecutor seems
4 once again to want to ignore.

5 Lastly, the last reference is at paragraph 90 of the DCC, which seems to cover the
6 knowledge of, and I quote, "the co-perpetrators of the crimes." And who are these
7 people? The paragraph does not identify them. And what is the criminal intent?
8 It is not mentioned either. None of the four references makes it possible for the
9 Defence to identify precisely who are the members of the group acting with a
10 common purpose or their criminal intent.

11 The Defence would like to deplore the exaggerated use of references by the
12 Prosecutor. For example, in the hearing of last Friday, my learned friend made
13 several references to at least 14 footnotes which are supposed to contain elements
14 relating to the intent of the group acting with a common purpose.

15 In fact, those references are not the same as those included in the DCC, and this
16 means that the DCC itself was not sufficiently precise. Moreover, these references
17 made during the hearing are not enough to provide details about the nature, the
18 cause and content of the charges.

19 In the final analysis, the game imposed on the Defence and on the Chamber by the
20 Prosecution does not lead anywhere. It is rather like the staircase going round and
21 round in the Escher tables. The Prosecution never demonstrates that there is a group
22 acting with a common purpose with criminal intent and specifically acting
23 independently of President Gbagbo.

24 On the contrary, the Prosecutor repeatedly tried to show that, without
25 President Gbagbo, there would be no common plan or any independent

1 decision-making by the so-called co-perpetrators. As an example, the Prosecution
2 stated on 21 February that President Gbagbo was, and I quote, "the person ultimately
3 responsible for the policy of violence against the civilians," and he also stated that
4 Simone Gbagbo could not organise a rally without the agreement of her husband.
5 The following day the Prosecutor further contended that it was President Gbagbo
6 who gave instructions to both Simone Gbagbo and Blé Goudé who, according to him,
7 could not act without the agreement of President Gbagbo. We need to know what
8 the Prosecutor wants. Is President Gbagbo a perpetrator or an accomplice?
9 Without his inner circle -- or, rather, is his inner circle a mass of co-perpetrators that
10 blindly follow his orders? The information provided to support the Prosecution
11 narrative cannot simply be used once again to prove something that is practically the
12 contrary.

13 The defects of the DCC regarding the alleged contribution of President Gbagbo. The
14 Defence has already raised the issue of the difficulty of invoking, as the Prosecutor
15 does, the same contributions in relation to the two modes of responsibility, going so
16 far as including President Gbagbo in the group acting with a common purpose and
17 attributing to him the definition of the common plan of that group. If
18 President Gbagbo did indeed do all that, why would he be a contributor rather than a
19 perpetrator?

20 Furthermore, Maître Fauveau Ivanovic has clearly demonstrated within the
21 discussion of 25(3)(a) that the contributions alleged against President Gbagbo are not
22 admissible because they have not been sufficiently substantiated. More specifically,
23 in relation to 25(3)(d), the Defence would like to underscore the fact that, contrary to
24 what the Prosecutor affirms, the contribution to be demonstrated is not the same in
25 the two modes of responsibility. Within 25(3)(a), contribution is understood in

1 relation to the common plan. On the other hand, under 25(3)(d), contribution is
2 understood within -- or rather, in relation to the crime.

3 The Prosecution seems to want to ignore this distinction when they stated during the
4 hearing of Friday, and I quote, "The element of Article 25(3)(d), according to which
5 the accused contributed to the crime is included in the element of 25(3)(a), according
6 to which the accused made a contribution to the common plan and to the crime." By
7 expressing himself in that way, my learned colleague of the OTP is trying to
8 circumvent the difference between the two modes of responsibility by using
9 linguistics, and yet one cannot lump together contribution to a common plan with
10 contribution to a crime, and as underscored by Judge Van den Wyngaert in her
11 dissenting opinion in the Katanga case, the proof of essential contribution to a plan
12 does not necessarily imply the contribution -- nonessential contribution to a crime.

13 I will not dwell on intent under 25(3)(d) because Maître Ivanovic will deal with that.

14 From the above, it is clear that the Prosecutor does not fully grasp the real nature of
15 the mode of responsibility under 25(3)(d) and particularly the difference with the
16 mode of responsibility under 25(3)(a). The consequence of this is that, in the final
17 analysis, the Prosecutor did not produce any of the constituent elements of the mode
18 of responsibility under 25(3)(d), neither the existence of a group with a common
19 purpose, nor the criminal intent of that group, nor the contribution of
20 President Gbagbo in the commission of the crimes. Because of the foregoing, the
21 Defence respectfully requests the Chamber to not confirm the charges under this
22 mode of responsibility.

23 Having concluded with a mode of -- with a mode of responsibility under 25(3)(d), the
24 Defence will now move on to a few observations on responsibility of -- on superior
25 responsibility under Article 28.

1 Following a question from Judge Kaul, the Prosecution answered that it considered
2 that this form of responsibility could be engaged on the basis of the evidence
3 provided. You will understand, your Honours, that this leaves the Defence in the
4 delicate situation in which the Prosecutor made a statement, or an affirmation, on the
5 mode of responsibility which is not provided for in the DCC, and the Defence is not
6 in a position to respond.

7 In the Bemba case, the Pre-Trial Chamber invited the Prosecutor to review its DCC.
8 However, the difference is that, in Bemba, the issue of the mode of responsibility
9 under Article 28 had not been raised either by the Judges or by the Prosecution in the
10 confirmation of charges hearing. It therefore seems to us that, to the extent that the
11 Prosecutor has declared in the hearing that superior responsibility has been engaged,
12 it would be contrary to the principle of adversarial proceedings and of fairness in the
13 audience for the Defence not to be able to respond. It therefore seems to us that the
14 most reasonable option would be to adjourn the hearing and to call on the
15 Prosecution to make relevant submissions which will make it possible for the
16 Defence to respond.

17 Thank you.

18 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.

19 It is time for the break. Do you want to add anything? Otherwise, we will break
20 for half-an-hour.

21 MR ALTIT: (Interpretation) I simply wanted to inform you of what will happen.
22 We will deal with crimes against humanity, beginning with Professor Jacobs, and
23 then with Mr -- or with Maître Ivanovic.

24 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Very well, we
25 will break now and reconvene at 5.30.

1 (Recess taken at 4.58 p.m.)

2 (Upon resuming in open session at 5.31 p.m.)

3 THE COURT USHER: All rise.

4 Please be seated.

5 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Mr Altit, you
6 have the floor.

7 MR ALTIT: (Interpretation) Thank you, Madam President.

8 I would like to provide the reference for the video to the Prosecutor; the reference he
9 was asking for a short time ago. The reference is that it was online on
10 30 January 2007 for the first time, 2007 on the internet for the first time, and we are
11 referring here to the video by Antoinette Alani.

12 By the way, your Honour, Professor Jacobs will now deal with crimes against
13 humanity and Maître Ivanovic will follow and conclude his presentation.
14 Maître Jacobs, please.

15 MR JACOBS: (Interpretation) With regard to the crimes against humanity, the
16 Defence would like to make a few introductory remarks on the contextual elements of
17 the crimes against humanity for the rights of the Defence.

18 The conflict between the collective dimension of international crimes and individual
19 responsibility is well-known to all. This is something that is at the heart of
20 international criminal law and that goes beyond the scope of this hearing.

21 That which is not challenged is how the collective dimension of the crime is included
22 in the definition of the crime, and this relates to the full exercise of the rights of the
23 Defence, particularly when it comes to crimes against humanity which are charged in
24 this case.

25 There is a requirement for a widespread and systematic attack against a population of

1 a civilian population. In order to prove that the Prosecutor alleged more than 50
2 diverse events, based on NGO reports and media articles, how can the Prosecutor
3 simply accumulate such events?

4 But since this is an element of the crime against humanity it contrary to the full
5 exercise of the rights of the Defence for the suspect not to be able to defend himself in
6 regard to this element, as is the case with the other elements of the crimes against
7 humanity.

8 From this proposition, there are two possibilities. The first would obviously be to no
9 longer include the contextual element of the general and widespread nature of the
10 attack against a civilian population in the definition of the crime against humanity.
11 This is definitely unthinkable in light of the historical evolution of this crime, given
12 that its collective nature is at the heart of the definition.

13 The second possibility, which is more realistic, is to impose upon the Prosecutor, on
14 whom the burden of proof rests, a duty to be sufficiently rigorous in a manner to
15 ensure the maximum safeguard of the rights of the Defence.

16 This rigour is required at three levels:

17 Firstly, it is important that the events selected should be sufficiently identified and
18 limited. For example, the Prosecutor may not, like he did in the DCC, include in
19 what he referred to as a single event, namely the demonstration at the RTI, all the
20 incidents that happened in the course of the following days, in neighbourhoods that
21 were sometimes far away from the scene of the demonstration, without necessarily
22 establishing any link between the two.

23 Secondly, it is important to impose a high threshold of probative value on the
24 Prosecutor. In that way, NGO reports and media articles cannot be used in lieu of
25 proper investigations.

1 To begin with, journalists and NGO employees who interview people do not do the
2 same job and do not have any obligation to provide information that could be used
3 within the much stricter framework of a criminal case, but in particular this creates an
4 obvious inequality of arms.

5 In fact, if these secondary sources had to be accepted to prove an event without any
6 investigation, it would suffice for the Prosecutor to download a report of Amnesty
7 International or of Human Rights Watch without leaving his office, whereas the
8 Defence would have to go to the field to carry out a parallel investigation if they
9 wished to challenge the truthfulness of the information.

10 This is simply a de facto reversal of the burden of proof, which is explicitly prohibited
11 by Article 67(1)(i) of the Statute. As a result, any event that is not corroborated by an
12 investigation conducted by the Prosecutor himself should not be considered by the
13 Chamber.

14 Thirdly, and lastly, there is a requirement of legal rigour that should be imposed on
15 the Prosecutor. A DCC should not merely consist of a series of affirmations. It has
16 to be a demonstration, based on facts that are proven to a certain degree of certainty,
17 and it should be based on precise legal principles.

18 But - and I hope that the Chamber will forgive me my deviation here - on reading the
19 DCC one almost forgets that this is a document that has to be presented in front, or
20 rather before a judicial institution responsible for administering the law.

21 There is a similar lack of legal rigour when it comes to both the constituent elements
22 of the crime against humanity and the responsibility under 25(3)(d). For example,
23 where is the legal definition of a widespread and systematic attack? Where's the
24 definition of an organisation within the meaning of 7(2)(a)? What is the civilian
25 population?

1 All those elements were the subject of lengthy negotiations during the drafting of the
2 Rome Statute. All those elements were the subject of several and sometimes
3 contradictory clarifications and elaborations in the case law of the various
4 international tribunals, including this Court.

5 It is therefore impossible to understand that the Prosecutor only refers to the law and
6 to legal principles in a superficial manner both in the DCC and during the audience,
7 or rather during the hearing.

8 The final consequence of this is that the Defence does not know what specifically the
9 Prosecutor is seeking to prove beyond an accumulation of the facts.

10 In the final analysis, and that is my conclusion, in light of this triple requirement of
11 factual probative and legal rigour, that the Prosecutor's DCC should be assessed
12 particularly when it comes to the constituent elements of the crimes against humanity.
13 To overlook any one of these requirements would impose on the Defence the burden
14 of proof, which is incompatible with a fair trial and which would also be incompatible
15 with the interests of justice.

16 So, Madam President, your Honours, you are the guarantors of these interests of
17 justice.

18 I thank you.

19 MR ALTIT: (Interpretation) Maître Ivanovic will now address the Court.

20 MS FAUVEAU IVANOVIC: (Interpretation) Article 7 of the Statute stipulates that
21 for an act to qualify as a crime against humanity, as specified under Article 7(1), it
22 must have taken place as a part of a widespread or systematic attack directed any
23 civilian population, with knowledge of the attack. These facts are therefore outlined
24 in Article 7 and relate to any particular part of the population in pursuit of a specific
25 policy relating to such an attack.

1 Consequently, in order to establish the existence of a crime against humanity, the
2 Prosecutor must establish that there was an attack against a civilian population which
3 was widespread and systematic. The Prosecutor must also prove that there is the
4 existence of an organisation, whose purpose was to conduct such an attack, and such
5 demonstration must be made to point out that the attack was targeting a civilian
6 population.

7 President Gbagbo was the President of a State. Had President Gbagbo had a
8 criminal intent, any criminal intent, President Gbagbo -- the Prosecutor's job, rather,
9 would have been very easy to the extent that he could have argued that President
10 Gbagbo implemented a criminal policy using the state apparatus, but such was not
11 the case and the Prosecutor cannot make that contention.

12 Unable then to allege that the state apparatus was the structure for executing a
13 criminal policy, the Prosecutor alleges in blurry terms at paragraph 33 of the DCC
14 that President Gbagbo and his inner circle, including Simone Gbagbo, Charles Blé
15 Goudé and several members of the Galaxie Patriotique, as well as some senior
16 politicians and senior officials of the pro-Gbagbo forces, were part of that organisation
17 within the meaning of Article 7(2) of the Statute.

18 First of all, from a legal point of view the definition of organisation itself is
19 controversial -- is a controversial issue in the case law of the ICC. You see, the
20 definition offered by the Prosecutor is non-specific, because it is difficult to know who
21 the members of the so-called organisation are. It is impossible to identify the
22 politicians and senior officers of the pro-Gbagbo forces who were part of the so-called
23 organisation. Therefore, these words are entirely meaningless.

24 It would appear that the Prosecutor makes no distinction in regard to the policy and
25 organisation between a common plan and the policy of an organisation. By the way,

1 at paragraph 54 he alleges that the policy may be characterised as an agreement or
2 common plan between President Gbagbo and his inner circle.

3 We submit that there is a difference between a policy within the meaning of
4 Article 7(2), whose main purpose should be to target a civilian population, and a
5 common plan which is accomplished when the crimes are so committed.

6 The plan - the common plan - must focus on such considerations to the extent that
7 they would have been the result of the crimes committed according to those four
8 incidents mentioned.

9 We shall revisit this issue of an ill-defined non-existent organisation, but we have
10 already shown that there was no common plan, hence no specific policy, and that a
11 non-existent organisation cannot have a policy. We shall therefore rather focus on
12 the other elements of the crimes against humanity, as alleged to be an attack on a
13 civilian population.

14 In any event, there were no systematic and widespread attacks against a civilian
15 population. Such an act would be required, but the absence thereof automatically
16 suggests that President Gbagbo cannot be answerable for the acts that the Prosecutor
17 is attempting to charge him for.

18 Contrary to the Prosecutor's allegations, evidence adduced does not demonstrate that
19 the forces of President Gbagbo were under his authority and carried out these attacks.
20 The Defence recalls that under established and consistent international case law, the
21 words "widespread and systematic," as appearing in the Statute, exclude any random
22 and isolated attacks.

23 We shall also show that what happened in Côte d'Ivoire, at that time, amounted to
24 random acts which were part of banditry and criminality which usually occurs in
25 times of trouble in any given country. In the same way, in the 45 incidents

1 mentioned by the Prosecutor, on 20 February, we can see that these were all random
2 and isolated separate unrelated incidents.

3 In fact, the Prosecutor outlined a list of criminal acts which occurred in Abidjan
4 during the post-electoral crisis, and that list simply does depict the criminal actions
5 that took place at that time in Côte d'Ivoire, but which do not meet the requirements
6 of Article 7 of the Statute of the Court. Beyond the fact that these incidents, taken as
7 a whole, do not constitute an attack against a civilian population, the Prosecutor still
8 failed to provide concrete and solid evidence to substantiate his allegations.

9 He claims at paragraph 21 of the amended DCC that pro-Gbagbo forces identified
10 their attackers at roadblocks. If the Prosecutor had conducted inculpatory and
11 exculpatory investigation, he would never have come to such a conclusion. Yes,
12 there were roadblocks in Côte d'Ivoire but they were erected by both camps, P-046,
13 0014-0236, page 0235. However, measures had been taken to prohibit the setting up
14 of roadblocks or, at the very least, deter people from setting them off. P-46,
15 0014-0233, page 0236.

16 However, there were also barricades that were set up by inhabitants of various
17 neighbourhoods. P-10, 0016-0175, page 0185. In fact, we need to distinguish
18 between roadblocks and barricades and not confuse them and ascribe their being set
19 up to pro-Gbagbo, young militia.

20 The Prosecutor ought to have asked the question why people of various
21 neighbourhoods needed to set up barricades?

22 In any event, neither roadblocks, nor barricades were set up within the context of any
23 policy whatsoever allegedly designed by President Gbagbo.

24 Further still, the evidence we have referred to points to the fact that President Gbagbo,
25 through his administration, took measures to dismantle the roadblocks and to stop

1 them from being set up.

2 In support of his theory of attacks on the civilian population, at paragraph 21 of the
3 DCC, the Prosecutor alleges that pro-Gbagbo forces targeted inhabitants of
4 neighbourhoods in Abidjan which were considered to be Alassane Ouattara's
5 strongholds; namely, Abobo, Adjamé, Koumassi, and Treichville, as well as various
6 communities to the east of Côte d'Ivoire which were traditionally supporters of
7 Alassane Ouattara. This theory is not based on any serious probative consideration.
8 It relies mainly on the report of the Secretary-General of the United Nations on the
9 ONUCI and on statements by pro-Ouattara militants and supporters. The
10 Prosecutor provides no sources in this connection.

11 Reality on the ground was entirely different. The disorder was created by the illegal
12 and irregular announcement of provisional results by the electoral commission.

13 Various attacks were carried out against forces -- the regular forces of law and order
14 in the neighbourhoods mentioned by the Prosecutor. 0002-0277, 0002-0280,
15 0018-0577, 0017-0035, page 0037.

16 In those neighbourhoods various crimes were committed against President Gbagbo's
17 supporters. They were even attacked before the elections. 0018-0448, 0017-0035,
18 page 0037.

19 In December 2010 and January 2011, the forces of law and order for those months
20 alone lost more than 30 of their members in Abobo. 0002-0280, Witness P-9,
21 0011-0455, page 0476 and 0477.

22 The police was forced out of that neighbourhood as well as CeCOS. P-10, 0016-0104,
23 page 0107 and 0108, and P-46, 0014-0326, page 0328.

24 The Prosecutor vaguely alludes to the Invisible Commando which he characterises at
25 paragraph 22 of the DCC as the "so-called group," but the Prosecution evidence also

1 shows that the Invisible Commando, which is even well identified to this day, set the
2 Abobo neighbourhood afire and to the sword. The Invisible Commando was made
3 up of men who were in civilian attire and who fired on the population, as well as on
4 the forces of law and order, and then spirited away. 0011-037, page 0380.

5 The FDS lost about 36 officers. Soldiers and gendarmes who were not part of the
6 operation, but who lived in Abobo, were killed simply because they were members of
7 the forces of defence and security. 0011-0455. And the enemy was the Invisible
8 Commando, who was heavily armed, much more armed than the regular army, and
9 which was deployed everywhere, in all the sectors of Abobo. 0016-0084, pages 0090,
10 0091.

11 The Invisible Commando killed many people. But before the Invisible Commando
12 arrived in Abobo, everything was calm, according to Witness P-11. 0016-0413, page
13 0419.

14 Witness P46 stated that the Invisible Commando attacked the population as well as
15 men in uniform, and that policemen who lived there were killed on their way home.
16 0014-0354, page 036.

17 The Invisible Commando was present in Abobo, and used weapons of war. P-46,
18 0016-0354, page 0363.

19 Quite naturally, the Prosecutor cannot afford to recognise the existence of the
20 Invisible Commando because, if he were to recognise the existence of this bloody
21 rebel group which was wreaking havoc in various neighbourhoods by attacking all
22 those who directly or indirectly upheld order and respected public authority, he
23 would have simply dealt a fatal blow to his own theory on attacks -- or regarding the
24 attacks on civilian population.

25 Let us look at how the Prosecutor describes or defines the attacks on a civilian

1 population. According to the Prosecutor, the attacks started during the second
2 round of the elections. In support of that theory, the Prosecutor relies on Witness
3 P-44. However, Witness P-44 does not confirm or uphold the Prosecutor's theory.
4 He simply states that violence broke out after the elections, 0014-0601, page 0613, and
5 0014-0684, page 0697, without providing any further details as to who started or who
6 was the perpetrator of that violence.

7 Let us recall that Witness P-44 also asserted that, in Abobo, policemen and gendarmes
8 were being killed. The FDS was in Abobo to do its duty; that is to bring security to
9 Abobo and ensure public order, and not to attack the population. They were the
10 ones who came under attack. Document 3704, page 3715.

11 Let us look at some of the 45 incidents mentioned.

12 Regarding the incident alleged to have taken place on 27 November at the Abobo
13 mayor's office, as described by Witness P-184, we must note that this witness is in fact
14 not really credible, but he did not identify the perpetrators. He simply said that
15 there were four dead bodies wearing fatigues, but as we know, everybody wore
16 fatigues, and by the way, Witness P-9 warned the Prosecutor not to rely on fatigues
17 because people who were not soldiers wore fatigues, in order to disguise as soldiers
18 and gendarmes and police officers so that responsibility for their acts should be
19 ascribed to the FDS. 0013-0556, page 0563.

20 The victims of that attack are not identified. The Prosecutor did not bother to
21 identify them. How then did the Prosecutor come to the conclusion that the victims
22 were pro Ouattara civilians and that the attackers were pro-Gbagbo forces? This is a
23 mystery. It is even more of a mystery to the extent that Prosecution Witness P-46
24 said that, in Abobo, those belonging to the LMP, that is of the presidential majority,
25 had been killed. 0014-0354, page 030357.

1 Then there is the allegation that a Malian was killed, according to the Prosecutor,
2 during that electoral period. This allegation is based exclusively on Witness P-107's
3 statement, which is inconsistent. This witness places that murder during the
4 pre-electoral period, that is 0020-0064, page 0071, paragraph 47, and then goes on to
5 say that it happened in the period after the announcement of the election results,
6 paragraph 52.

7 Regardless, the Prosecutor should have conducted further investigations to at least
8 discover the identity of the victim and the exact date of the incidents, as well as the
9 perpetrators.

10 According to the Prosecutor, from 27 to 29 November 2010, the FDS severely
11 repressed demonstrations that had been organised in Abobo. This theory is based
12 on two reports: 0003-0352 and 0003-0565. None of these reports provide any
13 details, no source of information. They are vague, both regarding the victims, as
14 well as the victims of the alleged attacks. It is true that both reports refer to victims,
15 but abstain from stating which side the victims belonged to. The identity of the
16 victims is unknown.

17 By the way, one may wonder as to the veracity of the information contained in the
18 report following an investigation at the behest of the Prosecutor. 0003-0565, page
19 0568.

20 Of course, the Prosecutor disregards the very statement of his own witness, P-9, who
21 stated that people were bearing arms in Abobo and shooting at other people,
22 0011-0556, page 0560, and who went on to specify that shots were fired from amongst
23 the demonstrators. 0011-0376, page 0380.

24 The same applies to the incident of 1 December 2010 at Yopougon, where members of
25 CeCOS are alleged to have killed six persons, wounded 14 and arrested seven.

1 The Prosecution narration is based on two reports. None of the reports provides the
2 source of the information and the identity of the victims is unknown. However, the
3 report identifies the alleged perpetrators of the incident; namely the CeCOS. Why
4 did the Prosecutor not interview members of the CeCOS about this incident? Why
5 did he only rely on the report?

6 There was an incident in Yopougon on 1 December 2010, but it does not tally with the
7 Prosecutor's version of it. On 1 December 2010, a patrol was dispatched on a
8 mission following an anonymous call. It was ambushed and the FDS fired back and
9 people died, but this was an incident that was an act of provocation and that was
10 further investigated. CIV-OTP-0001-0226, page 0236.

11 During the same period in which the Prosecutor situates these incidents for which no
12 tangible and concrete evidence has been provided, violence was raging in
13 Côte d'Ivoire. All observer missions to the elections mentioned the acts of violence
14 that occurred during the second round of elections. The Prosecutor only refers to
15 these reports.

16 Lawoson Cheick, spokesperson of CEPECA, declared as follows, "The militants and
17 representatives of Laurent Gbagbo were molested, attacked, while the militants or
18 supporters of LMP were verbally and physically attacked." 0001-0341.

19 The observer mission of the African Union denounced cases of death, death threats,
20 intimidation, confinement and physical assault against MP activists and
21 representatives by the new forces and the RDR activists. 0001-0322, page 0323.

22 The AU mission did not settle for general assertions, but went on to make specific
23 comments. Mr Coulibaly Sita, one of the LMP supervisors, was brutally beaten up
24 and then killed. Madam Traore Kady was undressed and given a snake beating
25 before being thrown into jail. Mr Yéo Kalifa, LMP member, died following wounds

1 that were inflicted on him by the Forces Nouvelles. These three incidents are only
2 part of a list of incidents identified by the African Union Mission. 000100322, pages
3 0323 to 0328.

4 Isn't it surprising that the African Union Mission did not identify any incident
5 involving victims of the RHDP? We must then ask the legitimate question, whether
6 the incidents narrated by the Prosecutor actually occurred during the second round of
7 the elections? Clearly, the situation depicted by the Prosecutor is not a picture of
8 what actually happened in Côte d'Ivoire.

9 Now, let us turn to the allegations of the Prosecutor once more.

10 Incidents that allegedly took place from 3 to 4 December 2010 are simply a replica of
11 an article of Amnesty International. Although these incidents mentioned that people
12 were killed on 3 December 2010 there is no information as to whether they were
13 civilians or combatants, yet we know that people were armed in Abobo. Regarding
14 the incident of 4 December we have more details, but no information as to the
15 perpetrators of that incident.

16 The document the Prosecutor relies on for these two incidents provides the identity of
17 the victims. Why did the Prosecutor fail to conduct further investigation into these
18 killings? Why did he not try to find out the identity of the family, or the victims, or
19 the families of those victims? Why did he not interview the families of those victims?
20 Why did he not question witnesses who provided this information to Amnesty
21 International? To all these questions, there is only one possible answer. The
22 Prosecutor did nothing, because these events as narrated never took place.

23 The allegation regarding the operation against the PDCI headquarters is also vague,
24 because it relies on a UNHCR report which does not provide identity of victims nor
25 sources. The Prosecutor should have had the opportunity to interview others. A

1 witness was interviewed, but that witness provides information which is contrary to
2 the Prosecutor's narration. There was a fight at a roadblock and the police
3 intervened at that roadblock because of that situation. 0014-0174, page 0197.

4 The same applies to the events of 4 January at paragraph 25 of the DCC. Contrary to
5 the Prosecutor's assertion that unarmed persons were within the premises of the
6 PDCI, it would appear that at that time armed rebels were occupying the head office
7 of the PDCI. 0001-0226, page 0235.

8 In paragraph 25 of the DCC, the Prosecutor alleges that between 11 and
9 12 January 2011 the FDS headquarters was attacked at PK18 and at least nine persons
10 were killed. Of course, the nine dead are not identified.

11 In fact, in the night of 11 to 12 January 2011, policemen on a regular patrol were
12 attacked at neighbourhood PK18. The police commissioner of the 43rd precinct was
13 attacked by heavily armed rebels. During that very night, and in the course of those
14 events, 14 well-identified policemen were killed. Their names are indicated in
15 document 0001-0236, page 0239, 0240.

16 We shall not delve into each of these incidents, because none of them stands up to
17 serious scrutiny because they all follow the same pattern. They are contained in
18 various reports, or newspaper articles, which do not provide their sources.

19 The Prosecutor did not deem it necessary to conduct further investigations. The
20 Defence deems it inadmissible to simply refer to excerpts from documents that are
21 published for public consumption without cross-checking their veracity.

22 Based on the elements provided by the Prosecutor it is simply impossible to
23 determine whether these incidents actually took place, but even -- even if the
24 incidents took place, they do not amount -- they only amount to random and isolated
25 incidents which cannot be ascribed to the republican forces and less so to President

1 Gbagbo.

2 Under the jurisprudence of the Court, an attack against a civilian population has to be
3 planned, directed and organised and not simply made up of random and isolated
4 acts.

5 However, we would like to speak to some of the crimes that were committed in the
6 east -- in the west of the country. Serious crimes were committed in the west of the
7 country, but the attack or the offensive the Prosecutor refers to at paragraph 27 of the
8 DCC, that offensive was carried out by pro-Alassane Ouattara forces for the
9 pro-Gbagbo forces could not have carried out that attack. Pro-Ouattara forces were
10 there towards the end of March and committed several crimes. 4354.

11 How can you ascribe the events to the west of the country to President Gbagbo's loyal
12 forces, when it is common knowledge that the rebel forces were there and committed
13 those crimes? It is true that crimes were committed in the west of the country, but
14 they were not committed by pro-Gbagbo forces.

15 Clashes occurred between the regular forces and the rebel forces. The Prosecutor
16 acknowledges this himself. It is therefore not possible to argue that these clashes did
17 not cause victims within the civilian population, but what is clear is that the civilians
18 were not targeted by any forces loyal to President Gbagbo.

19 Witness P-9 talks about the mission of the pro-Gbagbo forces, which was to protect
20 the population, 0011-0430, 0011-0556, and everybody's concern was to provide
21 protection for the civilian population. 0016-0321, page 0332. The Minister of
22 Defence asked the Head of State, or the Chief of General Staff, to do everything to
23 provide security for persons and their property. 0016-0413, page 0443.

24 Under Article 7 of the Statute, for there to be a crime against humanity the attacks
25 must be launched against the civilian population. International jurisprudence does

1 not require that the civilian population should be the exclusive target, but it must be
2 the main target.

3 However, we have just seen that the Prosecution witnesses state that the republican
4 forces had as their mission the protection of the population and that orders were
5 given to protect and secure the population. It seems to us that the Prosecution thesis
6 is in direct contradiction with the evidence produced.

7 The fact is that the evidence produced by the Prosecutor shows that there was
8 fighting between the armed forces loyal to President Gbagbo and the armed groups
9 which were fighting on behalf of Alassane Ouattara.

10 Prosecution witnesses P-9, P-10, P-11 and P-46 all talk of armed attacks against the
11 forces of law and order. Witness P-9 explains that people in civilian clothes were
12 carrying weapons. 0011-0556, page 0560.

13 Witness P-68, when questioned by the Prosecutor, confirms that armed individuals
14 were disguised as civilians and that rebels used civilians to attack the forces of law
15 and order. 0028-0023, page 0025. This evidence does not constitute substantial
16 grounds to believe that the forces loyal to President Gbagbo carried out attacks
17 directed at the civilian population, and we are going to show that there were no
18 systematic or widespread attacks.

19 In paragraph 30, the Prosecutor listed the elements of a widespread attack, and in
20 paragraph 31, he mentioned the elements of a systematic attack. We have seen that
21 the FDS never carried out attacks directed against a civilian population. They were
22 law and order operations and there was fighting between the armed forces and the
23 opposing camps. There were responses to the attacks launched by the rebels against
24 the regular forces, but there were no attacks directed against the civilian population.
25 In fact, the number of victims has never been clearly established, and the Defence

1 suspects that President Gbagbo's supporters are among the victims taken into account
2 by the Prosecutor.

3 In the final analysis, a certain number of victims, and a considerable number, could be
4 soldiers, members of the Forces Nouvelle and of the various rebel groups which were
5 operating in Côte d'Ivoire ever since 2002 and which were more than active at the
6 time of the events charged.

7 Regarding the systematic nature of the attack, The Prosecutor, as I have just said in
8 paragraph 31, alleges that the official forces of the State, particularly the FDS, played a
9 major role in the conduct of the attacks and acted in co-operation with assailants with
10 no official duties; that is mercenaries and young militias.

11 Later on, he alleges that the forces of law and order, present on the ground,
12 sometimes did not intervene to protect the victims and, rather, participated in the
13 commission of the crimes. I'm wondering how the forces of law and order, present
14 on the ground, did not intervene only sometimes, given that the Prosecutor alleges
15 that they played a major role in the conduct charged. There is already a major
16 contradiction in the thesis of the Prosecutor, and this is in fact incompatible with a
17 systematic attack.

18 The Prosecutor referred to the incidents on roadblocks but he forgot to state that his
19 own witness, P-46, stated that those roadblocks were also erected by pro-Ouattara
20 forces. He also forgot, and this is even more important, to state that the loyal forces
21 at the time tried to prevent these roadblocks.

22 The Prosecutor alleges that heavy weapons were also used by pro-Gbagbo forces in
23 densely populated areas, and this was contradicted by Prosecution witnesses.

24 In fact, heavy weapons were used in that neighbourhood because the Invisible
25 Commando, which was present in Abobo, was in possession of such weapons.

1 0016-0104, page 0112 and document 0001-2381.

2 Lastly, the systematic nature of the attacks has not been established because the facts
3 alleged by the Prosecutor, to the extent that they were actually committed, would
4 have been committed by disparate groups who neither followed the same rules nor
5 even were answerable to the same authority. They were not acting within the
6 framework of a pre-conceived policy. It therefore follows that the Prosecutor has not
7 presented sufficient evidence constituting substantial grounds to believe that a
8 systematic and widespread attack was launched against the civilian population. As
9 a consequence, the acts which could have been committed on 16 December, during
10 the demonstrations at the RTI on 3 and 17 March in Abobo, and after the arrest of
11 President Gbagbo in Yopougon, the reality of which is quite different, indicates that
12 these cannot constitute crimes against humanity and cannot be tried in this Court.
13 In addition, the Defence considers that if such an attack took place against the civilian
14 population, it was not launched in the implementation or in advancement of the
15 policy of the State or the organisation with the objective of carrying out such an
16 attack.

17 Madam President, your Honours, the Prosecutor has not produced sufficient
18 probative evidence constituting substantial grounds to believe that the objective
19 elements of the crimes have been constituted.

20 We should now move on to examine whether there is a subjective element. For
21 anyone to be considered as criminally responsible for crimes against humanity, it is
22 not sufficient for the objective elements of the crime to be constituted. There are also
23 subjective elements.

24 Under Article 30 of the Statute, no one can be criminally responsible and liable for
25 punishment for a crime within the jurisdiction of the Court unless the material

1 elements were committed with intent and knowledge. Article 32 of the Statute
2 explains that there is intent if, in relation to conduct, that person means to engage in
3 the conduct or if, in relation to a consequence, that person means to cause that
4 consequence or is aware that it will occur in the ordinary course of events.

5 Under Article 33 of the Statute, there is knowledge, means, awareness that a
6 circumstance exists or a consequence will occur in the ordinary course of events.

7 Accordingly, it must be established that the material elements of the crime in question
8 were committed with intent and knowledge.

9 Based on jurisprudence, paragraphs 2 and 3 of Article 30 of the Statute envisage two
10 degrees of intent.

11 In the first degree, the suspect is required to have knowledge that his omissions will
12 bring about the material elements of the crime and that he committed the acts or
13 omissions, deliberately knowing that he would cause the material consequences.

14 In regard to direct intention at the first level, the element of will has primacy to the extent
15 that the suspect wants or deliberately wishes to cause an unlawful consequence.

16 With regard to direct intention, in the second degree, it does not require that the suspect
17 should effectively have intent, but he should have knowledge of the fact that the
18 consequence will take place in the ordinary course of events.

19 In that context, the element of intent reduces significantly and is replaced by the cognitive
20 element; that is the knowledge on the part of the suspect that his acts would bring about
21 the undesirable and unlawful consequence.

22 In the Pre-Trial Chamber in the Bemba case it was held that *dole eventualis*, which is the
23 third form of intent relating to negligence, was not incorporated into Article 30 of the
24 Statute.

25 This conclusion is supported by the formulation of the expression that the consequences

1 will occur in the normal -- in the ordinary course of events.

2 The Defence recalls that the very existence of the factual basis of crimes against humanity
3 has not been established, but in order to engage the responsibility of President Gbagbo the
4 Prosecutor had to show the existence of the required intent within the meaning of
5 Article 30 of the Statute and in relation to the four events that constitute the fragile basis of
6 his DCC.

7 The Prosecutor never shows that President Gbagbo had the required intent in relation to
8 those four events, and yet this is what has to be proven at the risk of completely
9 misrepresenting the very concept of criminal responsibility and omit it completely in the
10 general affirmations. The International Criminal Court is not a commission of inquiry,
11 tasked with determining whether crimes were committed in that country. It is a criminal
12 court whose only concern is to ascertain whether specific crimes are attributable to a
13 person, or not.

14 In fact, liability for a crime against humanity cannot be engaged without knowledge of the
15 attack directed at a civilian population and without the awareness that the acts committed
16 constitute part of that attack.

17 The Defence has shown that such an attack never took place, but let us suppose that it did
18 indeed occur. President Gbagbo was not aware of this. All you need is to look at the
19 reports that President Gbagbo received. It is clear that they did not contain any
20 information about the attacks mentioned, and I would like to refer to the three reports
21 received by President Gbagbo: 0018-0104, 0018-0159 and 0018-0274.

22 The Defence also points out that when President Gbagbo inquired about the situation on
23 the ground from his minister, or rather from his ministers, he was informed by the
24 Minister of Defence and by the Minister of the Interior that, according to the reports that
25 reached the FDS command, there was no government operation in any zone of operation

1 under the responsibility of the police or soldiers with the objective of hunting down the
2 supporters of Alassane Ouattara.

3 Even if the Chamber determines that there was an attack it has to reach the conclusion
4 that President Gbagbo was not aware of such an attack because, if such an attack had
5 taken place and had been conducted by the republican forces, it would have been
6 reported to President Gbagbo. President Gbagbo was not aware of any attack against the
7 civilian population, nor did he have the will or intent to commit any such criminal act.

8 The Prosecutor has not produced the necessary probative evidence constituting
9 substantial grounds to indicate that this crime against humanity was perpetrated.

10 I will talk about persecution as a crime against humanity. The Prosecutor alleges that the
11 targets were chosen on grounds of ethnicity, religion and nationality.

12 The Defence would like to underscore the fact that it is not possible to attribute any
13 discriminatory policy to President Gbagbo. In fact, the Prosecutor did not produce any
14 evidence of the discriminatory conduct of President Gbagbo. On the contrary, the
15 evidence suggests that there was no discrimination on the part of President Gbagbo. He
16 made no distinction at all on the basis of ethnicity, religion, nationality or political
17 affiliation.

18 Witness P-44, who is a crucial witness of the Prosecutor, stated that the entire entourage of
19 the president came from the north. Members of his close protection unit came from the
20 north, the deputy director of his cabinet who later became his campaign manager was
21 from the north and most of the president's advisers were Dioulas. Document 374, page
22 376. He continued on the next page by stating that there was never any difference
23 between the northerners and the others either before or after the elections.

24 Another witness, a Defence witness, confirms that statement and adds that a good
25 number of high-ranking collaborators of the president were from the north, and he added

1 that there was never any discrimination at all. Document 3724, page 3728.

2 The former Minister of Defence declared that there was never any discrimination against
3 one group or the other based on ethnicity, religion, or political affiliation. Being a Baoulé,
4 he stated that before President Gbagbo no Ivorian president ever appointed a Minister of
5 Defence from outside his own ethnic group. Document 4499, page 4503.

6 Just like he did not make any distinction based on ethnic affiliation, President Gbagbo did
7 not distinguish between the various religions. Witness P-44 acknowledged that
8 President Gbagbo always assisted people who were going on pilgrimage to Mecca. 3370,
9 page 3707.

10 In reality, President Gbagbo contributed to the spread of Islam in Côte d'Ivoire and
11 always helped the Muslim community both at the level of the State and at a person level.
12 Page 1979, pages 1980 and 1981, and documents 1983, 1984 and 1985.

13 The absence of discrimination in the president's policy was reflected in the functioning of
14 the State. For example, recruitment into the gendarmerie was conducted solely on the
15 basis of merit. In fact, in the gendarmerie people from the north and Baoulé were in the
16 majority. 0016-0291, page 0294.

17 Regarding the allegations of political discrimination, those are simply preposterous. It is
18 well-known that in 2000 Alassane Outtara was not able to run for president because he
19 did not have Ivorian nationality. At that time President Gbagbo was not in power, but in
20 2010 Alassane Ouattara became a presidential candidate. How was it possible for him to
21 become a presidential candidate in 2010, whereas he was not allowed to run before that?

22 That of course is because President Gbagbo made it possible for him to do so. It was
23 President Gbagbo who allowed Alassane Outtara to become a candidate. Document
24 3695.

25 In 2007, Guillaume Soro, who is from the north and who moreover was the leader of the

1 rebels, was appointed prime minister. Many of the ministers in the government set up in
2 2007 and which was in power in 2010 were from the opposition and even from the rebel
3 groups. Document 1241. There were rebels working in the immediate office of the
4 minister of Defence. Document 4449, page 4502. Furthermore, President Gbagbo also
5 integrated rebel generals into the regular army. Document 0001-3764 and Defence
6 document 4499, page 4504.

7 It is true that some Dioulas were victims of persecution for political reasons. I would like
8 to ask the court officer to project video 0001-0196 as from 0056.

9 THE COURT OFFICER: Maître Fauveau Ivanovic, could you please specify the level of
10 confidentiality?

11 MS FAUVEAU IVANOVIC: (Interpretation) It is a public document.

12 (Viewing of the video excerpt)

13 MS FAUVEAU IVANOVIC: Yes, there were Dioulas who supported President Gbagbo
14 and there were -- they were exposed to all sorts of persecution, but that is not attributable
15 to President Gbagbo. After having tried to attribute the militias and mercenaries
16 recruited by the RHLP to Gbagbo, the Prosecutor also tries to attribute the acts of
17 persecution of the rebels to the president. Madam President, your Honours, any attempt
18 to attribute any discrimination on President Gbagbo is an impossible task. He had none
19 at all.

20 And now I will conclude. President Gbagbo was the legitimate President of Côte
21 d'Ivoire at the time of the events. The unrest that shook Côte d'Ivoire in 2010 and 2011
22 did not begin with the presidential elections, and unfortunately it did not end with the
23 arrest of President Gbagbo.

24 It is the result of the deep political division of the country, but particularly of the
25 thoughtless intervention of the international community in the internal affairs of

1 Côte d'Ivoire. How else to understand a document implicating France, which stated that
2 within the general context of the files that we received it was a matter of sacrificing a
3 people in order to obtain an objective and then accuse President Laurent Gbagbo and his
4 regime? 0018-0727.

5 The intention of France to offer the presidency to Alassane Ouattara is confirmed by other
6 documents, particularly a Defence document 0020, page 0022.

7 The accusation of President Gbagbo is a political decision, and yet politics has no place in
8 a courtroom. By accusing President Gbagbo, the Prosecutor betrayed his mission. He
9 betrayed the noble function of international justice. He has just presented a political case
10 based on newspaper articles and reports of various organisations. Worse still, he has just
11 endorsed the neo-colonial policy of certain States in Africa, a policy that is intrinsically
12 contrary to democracy and the rights of humans and peoples, a policy that is in direct
13 violation of the principles of the Charter of the United Nations.

14 He did not provide any tangible evidence to prove his allegations. He did not produce
15 any sufficient evidence constituting substantial grounds to believe that the crimes alleged
16 against President Gbagbo should be charged against him. He did not produce evidence
17 for his allegations relating to the RTI. He did not provide sufficient evidence for his
18 allegations relating to the women's march on 3 March 2011. He did not produce
19 sufficient evidence for his allegations relating to the shelling of the market on
20 17 March 2011, or to the events in Yopougon on 12 April. He did not provide sufficient
21 evidence of a widespread and systematic attack on the civilian population, and he did not
22 provide sufficient evidence of the existence of the subjective element required by
23 Articles 7 and 30 of the Statute.

24 The Defence points out that the principal objective of the confirmation hearing is to refer
25 to trial only persons against whom sufficiently serious charges have been filed, which

1 means that the hearing is a mechanism designed to safeguard the rights of the Defence
2 against abusive and baseless accusations.

3 Having seen and analysed the evidence of the Prosecutor, the Defence respectfully
4 requests the Chamber to not accept the political case presented by the Prosecution and to
5 strictly apply the law. Accordingly, the Defence requests that the charges against
6 President Gbagbo should not be confirmed.

7 Thank you.

8 MR ALTIT: (Interpretation) Thank you, your Honour. We are through for the day.

9 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.

10 We have come to the end of the Defence presentation. Tomorrow will be the day for the
11 closing arguments, and I would like to remind you to hand over your written
12 presentations to the Prosecutor and to the Chamber this evening so that they should be
13 taken on board for the closing arguments tomorrow.

14 That said, we have come to the end of this hearing. Do you have a question?

15 MR MACDONALD: (Interpretation) With your leave, very briefly. There is an
16 exchange of mail between the legal assistants and the Defence regarding filings that are
17 confidential, and the Prosecution would like those filings to be included in the case file so
18 that we should have access to them and maybe take them into consideration during our
19 closing arguments, and these filings may have a certain impact on the assessment of
20 credibility. I am raising this issue so that maybe the Chamber can allow us to make oral
21 submissions.

22 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Mr Altit?

23 MR ALTIT: (Interpretation) Yes, your Honour. With your leave, I would like my
24 colleague to speak.

25 MS NAOURI: (Interpretation) Thank you, Madam President.

1 We had agreed that the document should be tendered into the record, but it is a
2 confidential document. It is a sensitive document. It is a report, and we wanted the
3 confidentiality of that document to be respected, and if we had to discuss it, it should be
4 in closed session, including only the parties because we did not want to file -- to produce
5 this document in open session.

6 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Given that you
7 have agreed, and that the Chamber requested that document, it will of course be included
8 in the case file and taken into account by the Chamber. But if you have any additional
9 observations, you can include those in your written submissions, such that we will not
10 need to go into private session tomorrow.

11 The Chamber will examine the nature of the document in order to determine whether it
12 should remain confidential or not.

13 MR ALTIT: (Interpretation) Madam President, are we to understand that this document
14 will not be mentioned tomorrow in open session and that it can be referred to in the
15 written submissions?

16 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) You can of course
17 mention it, but without referring to the substance of that document and without violating
18 its confidentiality, but if there is a real need for a substantive debate, then it would be
19 preferable to include those in your written observations.

20 MR MACDONALD: (Interpretation) I think we can refer to the document without
21 violating its confidentiality; at least the Prosecution is able to do that.

22 Thank you.

23 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.

24 MR ALTIT: (Interpretation) the issue was not to violate the confidentiality of the
25 document, but actually not to reveal the contents of the document. We can mention

1 something without really going close to the contents of the documents. I hope I was
2 clear.

3 MR MACDONALD: (Interpretation) The Prosecutor will be able to refer to document
4 381-Conf without referring to its contents; that is the confidential elements. I believe that
5 is clear.

6 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Yes, I believe that
7 is clear, and if you are not able to settle this matter, we will go directly into private session,
8 if that is necessary.

9 We have now come to the end of the hearing.

10 MS MASSIDDA: (Interpretation) Thank you. A housekeeping matter: The
11 presentation of the Defence is going to be filed -- handed over to the Prosecutor and the
12 Chamber. We would like a copy also.

13 MR ALTIT: (Interpretation) We have no objection to that.

14 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you. That
15 is what I wanted to mention also.

16 The hearing is now adjourned and we will reconvene tomorrow at 2.30 p.m.

17 THE COURT USHER: All rise.

18 (The hearing ends in open session at 6.48 p.m.)