

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No: *ICC-02/11-01/15*

Date: 25 April 2018

**TRIAL CHAMBER I**

**Before:** Judge Cuno Tarfusser, Presiding Judge  
Judge Olga Herrera-Carbuccia  
Judge Geoffrey Henderson

**SITUATION IN COTE D'IVOIRE**

**IN THE CASE OF  
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE***

**PUBLIC**

**Public Redacted Version of "Corrected Version of 'Defence's written observations on the continuation of the trial proceedings pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124)," 24 April 2018, ICC-02/11-01/15-1158-Conf-Corr**

**Source:** Defence of Mr Charles Blé Goudé

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

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## I. Introduction

1. Shortly following the conclusion of the testimony of the last witness the Prosecution called to testify, Trial Chamber I ('the Chamber') issued the "Chamber's Order on the further conduct of the proceedings" ('the Order').<sup>1</sup> It invited the Prosecution, for the benefit of the Chamber and the parties to file a trial brief, and ordered the Defence for Charles Blé Goudé and Laurent Gbagbo to make submissions as to the continuation of the trial proceedings once they had been apprised of the brief's content.
2. Pursuant to the Order, the Defence for Charles Blé Goudé ('the Defence') files the present observations ("Observations"), to inform the Chamber that most importantly it does wish to submit a no case to answer motion requesting the full acquittal of Mr Charles Blé Goudé.
3. In these Observations, the Defence endeavours to provide the Chamber with: first, its submissions with respect to the Prosecution's Trial Brief, and second, the announcement that it wishes to file a no case to answer motion and the test that the Defence requests the Chamber to apply when disposing of a no case to answer motion. Since the Defence maintains that the Prosecution has not adduced evidence capable of sustaining a conviction, there is no need to present additional evidence.
4. However, the Defence is also mindful of the Chamber's second instruction requesting information as to the presentation of evidence by the Defence. Therefore, in the second section of its submissions, the Defence will provide the Chamber - assuming *arguendo* that there would be a case to answer - with *provisional* information on the following: (1) the aspects of the Prosecution's

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<sup>1</sup> ICC-02/11-01/15-1124.

case that it does not contest, (2) aspects that the Defence intends to challenge by the way of presenting additional evidence, (3) a brief outline of facts that hitherto have not been discussed during trial and in relation to which the Defence intends to present evidence. This preliminary information will only become relevant if the Chamber dismisses Mr Blé Goudé's motion for acquittal and determines that he has a case to answer. Again, it is the position of the Defence that the case can be disposed of now, and that Mr Blé Goudé is not guilty of the crimes he is charged as a matter of law.

## **II. Procedural history**

5. On 9 February 2018, the Chamber issued its "Order on the further conduct of the proceedings" inviting the Prosecution to file a trial brief detailing the evidence in support of the charges and ordering the Defence teams to make specific submissions no later than 30 days upon notification of such a trial brief ("Order").<sup>2</sup>
6. On 19 March 2018, the Prosecution filed the "Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124)" ("Trial Brief").<sup>3</sup>

## **III. Confidentiality**

7. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the Defence files its Observations as "confidential" since it makes reference to the evidence cited in the Trial Brief, which is confidential. The Defence will file a public redacted version of these Observations shortly.

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<sup>2</sup> ICC-02/11-01/15-1124.

<sup>3</sup> ICC-02/11-01/15-1136-Conf-Anx1-Corr.

#### IV. Applicable Law

8. Article 66, which pertains to the presumption of innocence, puts the onus on the Prosecution to prove the guilt of an accused beyond a reasonable doubt. Further, under Article 67(1)(a), the accused has a right to be “informed promptly and in detail of the nature, cause and content of the charge[s]...”.
9. With regard to the functions and powers of the Trial Chamber, Article 64(2) and (3) provide that the Trial Chamber “shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused...” and that it shall “confer with the parties and adopt procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings”. Under Article 64(6)(f), the Trial Chamber may “rule on any relevant matters.” Similarly, Rule 134(3) states that “after the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial.”
10. Recently, in *The Prosecutor v. Ntaganda*, the Appeals Chamber determined that a ‘no case to answer procedure’ is compatible with the Court’s statutory framework, and that a Trial Chamber “may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to Article 64(6)(f) of the Statute and rule 134(3) of the Rules.”<sup>4</sup>

#### V. Submissions

##### *V.1. Defence observations in relation to the Trial Brief*

11. At the outset, the Defence notes that, despite major deviations between the allegations made by the Prosecution in the Pre-Trial Brief and the testimony

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<sup>4</sup> ICC-01/04-02/06-2026, para 44.

of witnesses heard before the Chamber – exposing the weakness in the Prosecution’s evidence – and withdrawal of several witnesses allegedly key to the Prosecution’s case, the Prosecution has maintained its narrative and made very little adjustments in the Trial Brief to reflect these differences.

12. Further, although the Prosecution withdrew an estimated [REDACTED] from its List of Witnesses,<sup>5</sup> it filed a 367 page Trial Brief, which substantially exceeds both the Chamber’s recommendation<sup>6</sup> and the Pre-Trial Brief that was filed at a time where the Prosecution’s List of Witnesses contained [REDACTED] and the parties had not yet submitted agreements on facts to the Chamber.<sup>7</sup>
13. The Defence also notes that some portions of the Trial Brief do not contain any reference to evidence submitted to the Chamber, even on very contentious issues like [REDACTED].<sup>8</sup> Moreover, it is observed that in support of an important number of allegations in the Trial Brief, the Prosecution relies solely on [REDACTED].
14. The Defence also notes that substantial portions of the allegations contained in the Trial Brief refer to the testimony of [REDACTED].<sup>9</sup> It appears that the Prosecution has built its narrative by assembling and selecting partial portions of individual testimonies, without taking into account the

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<sup>5</sup> ICC-02/11-01/15-788-Conf-AnxC ; ICC-02/11-01/15-823-Conf; ICC-02/11-01/15-949-Conf; ICC-02/11-01/15-981-Conf; ICC-02/11-01/15-1030-Conf; ICC-02/11-01/15-1061-Conf; ICC-02/11-01/15-1154; ICC-02/11-01/15-1022 ; ICC-02/11-01/15-998; ICC-02/11-01/15-996-Conf.

<sup>6</sup> ICC-02/11-01/15-1124, para. 15: *“the Chamber considers it reasonable to expect that the trial brief shall not exceed 300 pages”*.

<sup>7</sup> ICC-02/11-01/15-148-Conf-Anx2-Corr which contains 250 pages.

<sup>8</sup> See for example, the Trial Brief, [REDACTED].

<sup>9</sup> See for example, the Trial Brief, paras. 25-29; footnotes 216-218; 220-226; 248-253; 277-307; 310-318; 802-809; 811-838.

contradictions and the alternate narratives introduced by its own witnesses, some of them being insider witnesses.<sup>10</sup>

15. The Prosecution has expressed in its cover filing that “[i]n a case of this magnitude, and consistent with the present stage of the trial, it is not possible to recite in this Mid-Trial Brief all the relevant evidence before the Chamber. The Prosecution has therefore assessed those matters it considers of importance, and endeavoured to support them with sources deemed to be of pertinence.”<sup>11</sup> The Defence strongly opposes this approach as it contravenes the Chamber’s instructions with regard to the specific characteristics the Trial Brief was to have:

“At this stage, in accordance with its statutory powers and responsibilities and with a view to meeting its obligation to ensure the fairness and expeditiousness of the trial, the Chamber considers it indeed necessary to invite the Prosecutor to file a trial brief containing a detailed narrative of her case in light of the testimonies heard and the documentary evidence submitted at trial. More specifically, she should indicate to the Chamber in which way she thinks the evidence supports each of the elements of the different crimes and forms of responsibility charged.”<sup>12</sup>

16. As a consequence of such presentation, the Defence is deprived from acquiring a complete and detailed view of the Prosecution’s evidence and how it connects to the Prosecution’s narrative. It is hence overly complicated for the Defence to respond to an incomplete presentation of the Prosecution’s evidence and it would be unfair for the Defence to respond to the present evidence while being later potentially confronted with alleged evidence that has not been raised in the Trial Brief.

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<sup>10</sup> See for example, the Trial brief, paras. 30-34, which alternates between portions of [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]’s, testimonies, despite some clear contradictions between the testimonies given [REDACTED] and [REDACTED].

<sup>11</sup> ICC-02/11-01/15-1136, para. 7.

<sup>12</sup> ICC-02/11-01/15-1124, para. 10. Emphasis added.

***V.2. The standard of review that should be applied to the Defence's anticipated no case to answer motion***

17. In these Observations, the Defence will not address the merits of its anticipated no case to answer motion since such submissions would exceed the scope of the Order.<sup>13</sup> However, the Defence wishes to make submissions on the standard of review that should apply to the Chamber's assessment of the Prosecution's evidence in disposing of the Defence's anticipated no case to answer request once this is filed. The Prosecution briefly addressed this issue in the cover filing to its Trial Brief.<sup>14</sup>

18. Before the commencement of trial, the Defence did not oppose that a no case to answer procedure should follow the approach adopted by Trial Chamber V(a) in *The Prosecution v. Ruto & Sang*. "Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)" ('Decision No. 5'), outlined the test to be applied in determining a no case to answer motion, and stated in relevant part:

The test to be applied...is whether there is evidence on which a reasonable Trial Chamber could convict. In conducting this analysis, each count in the Document Containing the Charges will be considered separately and, for each count, it is only necessary to satisfy the test in respect of one mode of liability, as pleaded or for which a Regulation 55 of the Regulations notice has been issued by the Chamber. The Chamber will not consider questions of reliability or credibility relating to the evidence, save where the evidence in question is incapable of belief by any reasonable Trial Chamber.<sup>15</sup>

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<sup>13</sup> ICC-02/11-01/15-1124, para. 14 (ordering the Defence teams to indicate whether or not they wish to make any submission of a no case to answer motion).

<sup>14</sup> ICC-02/11-01/15-1136, para. 9.

<sup>15</sup> ICC-01/09-01/11-1334, para. 32.



19. The Defence respectfully submits: first, if the Chamber chooses to apply the aforementioned standard, it should, first, not be limited to a quantitative assessment of the evidence, but be at liberty to also examine its quality. Second, if the Chamber determines that the Prosecution's evidence is not capable of sustaining a conviction beyond a reasonable doubt, then under Article 64(2), it should enter an acquittal. The acquittal should stand even if the Chamber could imagine the possibility of a different trier of fact coming to a different conclusion. Third, the Defence requests the Chamber to take into account the complexity and the size of the case when determining the time limit and page limits for the Defence's no case to answer motion.

**A. When determining whether the evidence is capable of sustaining a conviction, the Chamber should assess the quality of the evidence and not just its quantity**

20. When determining under Decision No. 5 whether a reasonable trial chamber could convict Mr Blé Goudé, the Chamber should not be limited to a quantitative assessment of the evidence. In *Ruto & Sang*, the limits on Trial Chamber V(a)'s ability to assess credibility and reliability under Decision No. 5 became a live issue when the Prosecution submitted that in disposing of a no case to answer the Chamber was limited to a quantitative assessment. Judges Fremr and Eboe-Osuji profoundly disagreed. The Presiding Judge of that Chamber found that in most national jurisdictions, the proper test is:

where a judge comes to the conclusion that the Prosecution's evidence, taken at its highest, is such a that a jury properly directed *could not properly* convict upon it, it is his duty upon a submission being made, to stop the case" (emphasis added).<sup>16</sup>

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<sup>16</sup> ICC-01/09-01/11-2027-Red-Corr, para.47 (n)234 (Reasons of Judge Eboe Osuji)

In adding the word “properly,” Judge Eboe-Osuji reasoned that a Chamber must take a “realistic view” of the evidence and decide whether appellate review would be likely to sustain a conviction on that evidence.<sup>17</sup> He further added that a judge must bear in mind this consideration when taking the Prosecution’s evidence at its highest.<sup>18</sup>

21. Therefore, taking the Prosecution’s evidence “at its highest” does not mean “picking out the plums and leaving the duff behind.”<sup>19</sup> It involves assessing the evidence as a whole, and taking into account its strengths and weaknesses.<sup>20</sup> In doing so, judges can identify parts of the Prosecution’s evidence, which are “found to be totally at variance with other parts,” and thereby analyse significant inconsistencies within the evidence.<sup>21</sup>

22. Like Judge Eboe-Osuji, Judge Fremr took the Prosecution evidence as a whole and did not just make a quantitative assessment of the Prosecution evidence when applying the standards of Decision No. 5. Thus, Judge Fremr found that a reasonable tribunal could not rely on hearsay evidence that originated from an anonymous source.<sup>22</sup> Similarly, the Judge also reasoned that the core allegations against the accused “should be proved by sufficiently solid evidence to enter a conviction,”<sup>23</sup> In observing the significant importance of one of the witnesses to the allegations of the accused, he assessed the credibility of the witness and held that the witness’ evidence did not “afford a

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<sup>17</sup> ICC-01/09-01/11-2027-Red-Corr, para. 63 (Reasons of Judge Eboe Osuji)

<sup>18</sup> ICC-01/09-01/11-2027-Red-Corr, para. 64 (Reasons of Judge Eboe Osuji)

<sup>19</sup> ICC-01/09-01/11-2027-Red-Corr, para.48(Reasons of Judge Eboe Osuji)

<sup>20</sup> ICC-01/09-01/11-2027-Red-Corr, para.48 (n) 241 (Reasons of Judge Eboe Osuji)

<sup>21</sup> ICC-01/09-01/11-2027-Red-Corr, para.48(Reasons of Judge Eboe Osuji)

<sup>22</sup> ICC-01/09-01/11-2027-Red-Corr, para. 41 (Reasons of Judge Fremr)

<sup>23</sup> ICC-01/09-01/11-2027-Red-Corr, para. 56 (Reasons of Judge Fremr)

solid basis upon which a reasonable Trial Chamber could rely for proper conviction.”<sup>24</sup>

23. In the instant case, the Defence agreed to the application of Decision No. 5, months before the parties in *Ruto & Sang* made their submissions as to the proper interpretation of the principles contained therein. The Defence would have never agreed to their application had it known that the Prosecution wished to eviscerate the Chamber’s power to assess whether there was acceptable evidence against Mr Blé Goudé. In the event the Chamber decides that Decision No. 5 should apply, the Defence requests that it apply the decision’s principles in accordance with the standard of evidential review elucidated by Judges Fremr and Eboe Osuji, and highlighted by the Defence in these present submissions. Such a review safeguards Mr Blé Goudé’s presumption of innocence under Article 66.

24. The Defence wishes to further note that the presumption of innocence takes on a ‘substantial value’ in cases which are based on circumstantial evidence.<sup>25</sup> Before the commencement of trial, the Prosecution in the instant case submitted that “this is a case that is based on circumstantial evidence.”<sup>26</sup> The Trial Brief only reinforces this conclusion.<sup>27</sup> In *Ruto & Sang*, a case based on mainly circumstantial evidence, the Court determined that it had to reject *all* realistic possibilities pointing to the accused’s innocence in determining whether a reasonable trial chamber could convict under Decision No. 5.<sup>28</sup> It was not sufficient for the purposes of defeating a no case to answer motion to show that out of the many inferences that could be made on the basis of the

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<sup>24</sup> ICC-01/09-01/11-2027-Red-Corr, para. 56 (Reasons of Judge Fremr)

<sup>25</sup> ICC-01/09-01/11-2027-Red-Corr, para. 74 (Reasons of Judge Eboe Osuji)

<sup>26</sup> ICC-02/11-02/11-T-9-CONF-ENG, p. 39: 3-5

<sup>27</sup> See Trial Brief, para. 768.

<sup>28</sup> ICC-01/09-01/11-2027-Red-Corr, para. 23 (Reasons of Judge Fremr); ICC-01/09-01/11-2027-Red-Corr, para. 75 (Reasons of Judge Eboe Osuji)

evidence, one pointed to the guilt of the accused.<sup>29</sup> Since the Prosecution had finished its presentation of evidence, the inference the Prosecution was putting forward had to be the only reasonable, or the most reasonable inference that could be drawn.<sup>30</sup> Further, Judge Eboe-Osuji concluded, “the viability of an inference pointing to guilt, in a circumstantial case, must depend on other *solid* evidence independent of the primary fact upon which the inference is based” (*emphasis added*).<sup>31</sup> Thus, mere speculation should never fill critical gaps in the Prosecution’s evidence.<sup>32</sup> In the instant case, the Defence requests the Chamber to apply these principles when determining whether inferences can be drawn against Mr Blé Goudé, especially since by the Prosecution’s own admission the case rests on circumstantial evidence.

**B. The Court’s statutory framework allows for the Chamber to enter an acquittal, even if the Prosecutor has met Decision No. 5’s test**

25. The Defence submits that the Chamber is not bound by the constraints of Decision No. 5, and that it has the freedom of fully assessing the credibility and reliability of the Prosecution’s evidence. In national jurisdictions, the purpose of limiting the credibility assessment of a judge at the no case to answer stage of the proceedings is to ensure the jury’s role as the ultimate arbiter of fact.<sup>33</sup> However, at international tribunals, this bifurcation of roles is completely absent; judges are both the triers of fact and of law. Thus, there is no justification for compelling a Chamber, which will ultimately decide the

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<sup>29</sup> ICC-01/09-01/11-2027-Red-Corr, Para. 48(n) 79 (Reasons of Judge Fremr)

<sup>30</sup> ICC-01/09-01/11-2027-Red-Corr, para. 23 (Reasons of Judge Fremr)

<sup>31</sup> ICC-01/09-01/11-2027-Red-Corr, para. 85 (Reasons of Judge Eboe Osuji).

<sup>32</sup> ICC-01/09-01/11-2027-Red-Corr, para. 79 (Reasons of Judge Eboe Osuji)

<sup>33</sup> ICC-01/09-01/11-2027-Red-Corr, paras 97-99, 108 (Reasons of Judge Eboe Osuji)

facts of the case, to continue with a case, despite it finding that the Prosecution's evidence is insufficient for a conviction.<sup>34</sup>

26. Under Article 64(2), the Chamber is compelled to ensure that trial is conducted fairly and expeditiously with full respect of the rights of accused. If upon review of the Prosecution's evidence, the Chamber is convinced that it could not convict Mr Blé Goudé, then it should acquit him of the charges. Such an approach not only ensures that Mr Blé Goudé is presumed innocent, but also that he is not forced to "undergo a trial where his innocence has already been established."<sup>35</sup> If upon hearing the submissions of both parties the Chamber finds that it could not convict, it would be an "impermissibly academic" and futile exercise to imagine whether another Chamber could, since the very judges that will decide the outcome of the case have already come to their decision.<sup>36</sup>

27. The Defence recalls that the onus is on the Prosecution to prove its case beyond a reasonable doubt under Article 66 of the Statute. Further, Mr Blé Goudé benefits fully from the right to remain silent under Article 67(1)(g), and is under no obligation to present any evidence. Therefore, the Chamber has the means and the ability under the Court's statutory framework to assess the credibility and reliability of the evidence to determine whether the evidence is capable of sustaining a conviction. The Prosecution should not be permitted to rely on the mere hope that the Defence will ultimately muddle their case, and introduce incriminating evidence.

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<sup>34</sup> ICC-01/09-01/11-2027-Red-Corr, para 98(Reasons of Judge Eboe Osuji) *citing Prosecutor v. Jelisić (judgment)* dated 5 July 2001 [ICTY Appeals Chamber], Partially dissenting opinion judge Pocar

<sup>35</sup> ICC-01/09-01/11-2027-Red-Corr, para 98(Reasons of Judge Eboe Osuji) *citing Prosecutor v. Jelisić (judgment)* dated 5 July 2001 [ICTY Appeals Chamber], Partially dissenting opinion judge Pocar

<sup>36</sup> ICC-01/09-01/11-2027-Red-Corr, para. 71(Reasons of Judge Eboe Osuji)

**C. The Defence requests a time limit and a page extension that reflects the size and complexity of the case**

28. The Defence's submission of its no case to answer motion will mark its most important filing to date. Given that the Defence is asking for a full acquittal, the motion's potential impact on the outcome of the case cannot reasonably be disputed by the parties. This filing will address complex legal issues, which will necessarily touch upon the substantive law underlying crimes against humanity, and potentially the four modes of liability that have been charged. Similarly, the Defence will need the time and the resources to respond to the different factual issues of the case. While the temporal scope of the charges may span only five months, the Prosecution's case theory depends on events dating back as far as the year 2000. The Defence's no case to answer motion will therefore necessarily generally touch upon the armed conflict that took hold of Côte d'Ivoire, which involved various state and non-state actors. It will also specifically address the presence of [REDACTED]. This adds an extra layer of complexity to the case.

29. The Defence therefore respectfully requests a reasonable amount of time from the Prosecution's official notification that it has closed its case to submit its no case to answer motion. The Defence submits that having a reasonable deadline which takes into account the complexity of the case will avoid unnecessary litigation caused by Regulation 35 requests by the Defence. In *Ruto & Sang*, Trial Chamber V(a) revised upon the request of the Defence the original deadline set by Decision No. 5 and ultimately allowed the Defence to file its no case to answer motion 6 weeks from the close of the Prosecution's case.<sup>37</sup>

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<sup>37</sup> ICC-01/09-01/11-1970. The Prosecution officially closed its case on 10 September 2015, and the Defence filed its no case to answer motion on 23 October 2015.

30. The present case is distinguishable from *Ruto & Sang* because of its complexity and size. The Prosecution noted this unique aspect of the instant case when it submitted that due to “the volume and wealth of evidence, the number of charges, incidents and modes of liability” it was obligated to exceed the Chamber’s recommended page limit for its Trial Brief. The Defence respectfully requests that the time limit to file a no case to answer motion reflect the time needed for the Defence to give the Chamber an appreciation of the Prosecution’s case as a whole, which includes taking into account a wealth of documentary evidence and the testimony of almost 100 witnesses.
31. The Defence avers that the Prosecution in *Ruto & Sang* did not submit a Trial brief. However, the Trial brief as the Prosecution noted is an “auxiliary tool” and does not represent all the relevant evidence that is before the Chamber.<sup>38</sup> Moreover, in *Ruto & Sang*, the Defence teams were aware more than one year before the close of the Prosecution case that a no case to answer procedure would be allowed by Trial Chamber V(a). Given that filing a no case to answer motion is not a matter of right for the accused at the ICC,<sup>39</sup> but merely a discretionary decision of the Trial Chamber, the Defence could not prioritize its limited resources on its preparation without the certitude that the Chamber would accept such a motion and thus has not been put in a position to anticipate such request.
32. The Defence respectfully recalls that it has limited resources, and that it will need the participation of nearly its entire team in drafting a no case to answer motion. During the preparation of these present submissions, the Defence received no fewer than three substantial Prosecution filings, of which one

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<sup>38</sup> ICC-02/11-01/15-1136, para. 7.

<sup>39</sup> See ICC-01/04-02/06-2026.

concerned an event [REDACTED].<sup>40</sup> This marked a time where the Defence's resources were strained due to a significant increase in workload. Therefore, the Defence respectfully requests that during the time allocated for the Defence to draft a no case to answer motion, all time limits be suspended until two weeks after the deadline for submitting the Defence no case to answer motion has expired. Such suspension will allow the Defence to concentrate its limited resources on drafting its request for judgement of acquittal, and avoid numerous Defence Regulation 35 requests for responses to new filings submitted by the parties or participants. In the event there is an urgent issue that requires prompt resolution by the Chamber, such a suspension need not apply. The Defence recalls that while drafting these Observations it requested and was granted an extension of time to respond to the Prosecution's request to submit documentary evidence under paragraphs 43 and 44 of the Directions on the Conduct of the Proceedings.<sup>41</sup> The Chamber decided that the Defence could render its response to that request on 7 May, which is two weeks after the submission of these Observations.<sup>42</sup>

33. Additionally, under Regulation 37 of the Regulations of the Court, the Defence respectfully requests the Chamber to extend the 20- page limit to reflect the aforementioned complexity and size of the case. In submitting its Trial Brief, the Prosecution submitted an additional 67 pages to the 300 page limit recommended by the Chamber. Similarly, for the Pre-Trial Brief the Prosecution requested and was granted a page limit extension from 120 pages to a maximum of 300 pages.<sup>43</sup> The Defence requests the Chamber grant it the same latitude in page limit as it did to the Prosecution on these two previous

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<sup>40</sup> See ICC-02/11-01/15-1152-Conf; ICC-02/11-01/15-1143-Conf; ICC-02/11-01/15-1138. The Defence does not include the submissions made by the participants in regard to [REDACTED].

<sup>41</sup> Email from [REDACTED] to [REDACTED] sent on 28.03.2018 at 14:19; Email from [REDACTED] sent on 28.03.2018 at 16:54.

<sup>42</sup> See Ibid.

<sup>43</sup> ICC-02/11-01/15-131



occasions. The Prosecution has charged Mr Blé Goudé with four alternative modes of liability for five incidents, all of which the Defence should be given the opportunity to address should it choose to do so.

*V.3. Defence observations in relation to the presentation of evidence in the extraordinary event the Chamber dismisses the Defence's no case to answer motion*

**(A) Aspects of the Prosecution's case the Defence does not contest**

*(i) Agreed facts*

34. On 7 May 2015, the Chamber instructed the parties to "liaise with a view to reaching agreements about non-contentious issues"<sup>44</sup> and further indicated that "[a] joint report on the progress made in this respect should be filed by 1 September 2015".

35. On 1 September 2015, the Prosecution, the Defence for Laurent Gbagbo and the Defence for Charles Blé Goudé jointly filed the "Rapport 'on the progress made [to reach] agreements about non-contentious issues" ("the First Report on Agreed Facts")<sup>45</sup> in which the parties informed the Chamber that they had reached several agreements on contextual and historical facts, on elements related to the [REDACTED], on [REDACTED].<sup>46</sup> These agreements were submitted as annexes of the First Joint Report on Agreed Facts under the form of [REDACTED].<sup>47</sup>

36. On 2 March 2016, the Prosecution, the Defence for Laurent GBAGBO and the Defence for Charles Blé Goudé filed the "Second Joint Report on Agreements

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<sup>44</sup> ICC-02/11-01/15-58, para. 27.

<sup>45</sup> ICC-02/11-01/15- 201-Conf, with two Confidential Annexes.

<sup>46</sup> *Ibid.*, para. 25.

<sup>47</sup> See ICC-02/11-01/15-201-Conf-Anx1 and ICC-02/11-01/15-201-Conf-Anx2.

on Evidence" ("the Second Report on Agreed Facts")<sup>48</sup> containing additional agreed facts, supplementing the First Report on Agreed Facts.<sup>49</sup>

37. As a result of the First and the Second Joint Reports on Agreed Facts, the Prosecution and the Defence have agreed to a total of [REDACTED] that the Defence will not contest if, by extraordinary, the presentation of a Defence case would be deemed necessary by the Chamber.

(ii) [REDACTED]

38. As for the evidence that the Defence does not intend to challenge, the Trial Brief contains a [REDACTED]. The Defence does not contest [REDACTED] except for two elements.

39. First, the Defence challenges the relevance to the charges of [REDACTED].<sup>50</sup> In the absence of [REDACTED], it is impossible to determine whether or not [REDACTED] under scrutiny fit the temporal and spatial scopes of the charges. Whereas it is up to the Defence to challenge the [REDACTED] by the Prosecution, when a [REDACTED], as submitted by the Prosecution, does not [REDACTED], it is up to the Prosecution which submits the evidence to prove the temporal context [REDACTED]. The same reasoning applies to the spatial context of the [REDACTED].

40. Second, while the Defence does not contest the presence [REDACTED], it does contest the interpretation given to such presence by the Prosecution, which contestation is evidenced by the various Defence responses to the Prosecution's requests to introduce documentary evidence under paragraphs 43 and 44 of the Directions on the Conduct of the Proceedings.<sup>51</sup> It also

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<sup>48</sup> ICC-02/11-01-15-456 with Annex A.

<sup>49</sup> ICC-02/11-01/15-456-AnxA.

<sup>50</sup> See for instance CIV-OTP-0028-0103, CIV-OTP-0041-0470.

<sup>51</sup> See, in particular, ICC-02/11-01/15-1099-Conf with 5 Confidential Annexes.

contests the interpretation attributed by the Prosecution to the [REDACTED]. Accordingly, the Defence challenges all the portions of the Prosecution's narrative that consist of partial and biased interpretations of facts, especially when such interpretations concern [REDACTED].

**(B) Aspects the Defence intends to challenge by way of presenting additional evidence**

41. As ordered by the Chamber, the Defence hereby presents the issues on which it intends, at this stage, to introduce additional evidence if, by assuming *arguendo*, the Chamber deemed it necessary for the Defence to present a case. While still in the process of assessing and analysing the Prosecution case, the Defence has noted that the evidence submitted by the Prosecution shows a number of issues that already contradict its own narrative. For the foregoing reasons, the Defence intends to present evidence on such issues. However, the Defence reserves its right to submit additional evidence on other issues that would arise from its ongoing analysis of the Prosecution's evidence.
42. First, the Defence intends to submit evidence on the [REDACTED] which is at the core of the alleged First Incident. Such [REDACTED] has already transpired from a substantial number [REDACTED] given before the Chamber. The Defence hence intends to clarify the [REDACTED] contrary to the Prosecution's assertion as [REDACTED].
43. Second, the Defence intends to submit evidence on [REDACTED].
44. Third, the Defence intends to submit evidence as to the sequencing of events that took place on [REDACTED]. The Defence will establish that the Prosecution's narrative on this point does not accurately reflect the reality on the ground.
45. Fourth, the Defence will submit evidence [REDACTED].

46. Fifth, the Defence will address the nebulous and chaotic nature of [REDACTED], which has already been touched upon by [REDACTED] called by the Prosecution and establish that Charles Blé Goudé was not in control [REDACTED].

47. Finally, the Defence will establish that there was [REDACTED]. It will establish that [REDACTED]. Witnesses called by the Prosecution have already [REDACTED] on the issue. The Defence will submit additional evidence on the matter, if the Chamber considers it necessary to hear evidence to be brought by the Defence.

**(C) Facts and circumstances that have not been discussed but for which the Defence intends to present evidence**

48. As ordered by the Chamber, the Defence hereby presents the facts and circumstances that have not been addressed by the Prosecution during the presentation of its case and that the Defence intends to address if, by assuming *arguendo*, the Chamber deemed it necessary to hear a Defence case. However, the Defence reserves its right to address other facts and circumstances that would arise from both its ongoing analyses of the Prosecution's evidence and its investigation.

49. First, the Defence will address the [REDACTED]. The Defence will hence show the numerous and continued actions undertaken by Mr Blé Goudé to [REDACTED]. The evidence will show that Mr Blé Goudé has been a long-time partner of the [REDACTED].

50. Second, the Defence will address the acts that Mr Blé Goudé performed during the [REDACTED]. Some insiders called by the Prosecution have already established that Charles Blé Goudé had not given inflammatory

speeches calling for violence from the audience. The Defence will emphasise the [REDACTED] throughout the post-electoral crisis.

51. Finally, the Defence will address several facts and circumstances that have arisen from [REDACTED].

52. The Defence deems it necessary to recall the context in which the material extracted from [REDACTED] came to its attention. The Defence was first informed of the [REDACTED].<sup>52</sup>

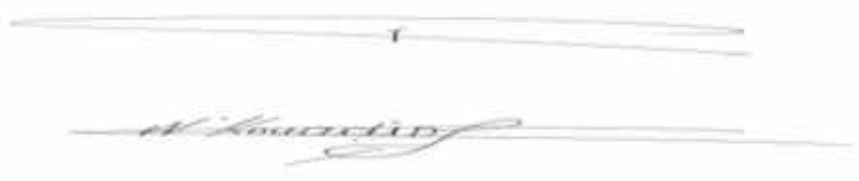
53. On [REDACTED], the Defence was notified of [REDACTED] following an [REDACTED] from the Prosecution.<sup>53</sup>

54. On [REDACTED] and on [REDACTED], the Prosecution [REDACTED].<sup>54</sup> After analysis of these materials, the Defence has determined [REDACTED]. In particular, it shows [REDACTED].

55. Therefore, based on the [REDACTED], the Defence will [REDACTED].

56. These elements will provide the Chamber with a [REDACTED].

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to be 'A. K. ...', is centered within a rectangular box. The signature is written in a cursive, flowing style.

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<sup>52</sup> [REDACTED]

<sup>53</sup> ICC-02/11-01/15-1109-Conf.

<sup>54</sup> Respectively [REDACTED].

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Mr Knoops, Lead Counsel and Mr N'Dry, Co-Counsel

Dated this

25 April 2018,

At The Hague, the Netherlands