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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

PUBLIC

With Confidential Annex 1 and Confidential Annexes A and B

Prosecution's Response to Defence No Case to Answer Motions

Source: Office of the Prosecutor

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

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Introduction

1. A no case to answer is not about the guilt or innocence of the Accused. At this stage of the proceedings, the Chamber should simply assess if the Prosecution has submitted evidence on each of the legal elements of the charges to the applicable standard: “whether there is evidence on which a reasonable Trial Chamber *could* convict.”¹ The Defence could have closed the presentation of their respective cases and sought a judgement of acquittal on the merits of the case. Instead, they chose to file no case to answer motions² which call for the application of a different standard of review by the Chamber.
2. A no case to answer motion is not an extraordinary procedure. While such motion may be better known to common law jurisdictions, they have been regular features before the *ad hoc* Tribunals.³ Since the applicable standard and scope of a no case to answer are not analogous to a final judgement, an oral practice was adopted before the *ad hoc* Tribunals to avoid lengthy analyses of the evidence and extended written decisions akin to final judgments. By 2004, Trial Chambers at *ad hoc* Tribunals were directed to hear oral submissions of the Parties and by oral decision “enter a judgement of acquittal on any count if there is *no evidence* capable of supporting a conviction.”⁴
3. The importance of the Chamber’s task in adjudicating the Defence Motions cannot be overstated. Mr Gbagbo, in his capacity as former President of Côte d’Ivoire, and Mr Blé Goudé, as former Minister of Youth, Vocational Training and Employment face serious charges of crimes against humanity of murder, rape, persecution and other inhumane acts. The Chamber has before it a wealth of evidence from which to rely on to decide the Defence Motions. The Chamber heard the *viva voce* testimony, including *via* video link, of 57 witnesses, of which

¹ ICC-01/09-01/11-1334, para. 32, (emphasis added).

² Motion of Mr Blé Goudé, ICC-02/11-01/15-1198-Conf and Mr Gbagbo, ICC-02/11-01/15-1199.

³ See rule 98*bis*, http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf and <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

⁴ Emphasis added. Rule 98*bis* was amended last in December 2004.

26 were insider witnesses. It also received in evidence, the prior recorded testimony of 25 witnesses under rule 68(3) of the Rules of Procedure and Evidence (“Rules”) and the submission of the prior recorded testimony of 14 witnesses under rule 68(2). Finally, the Chamber received the submission of more than 4620 items of evidence,⁵ including more than 380 items of audio-video material and over 1400 related transcripts and translations where applicable.⁶

4. The Chamber’s decision will not only examine the individual criminal responsibility of Mr Gbagbo and Mr Blé Goudé, it will also contribute to the all-important development of legal standards and legal certainty to a procedural mechanism with limited precedents before this Court.

Structure of the Prosecution’s response

5. The Prosecution’s response is divided into seven sections.

Section I- Introduction

6. Section I constitutes the introduction to the Prosecution’s response.

Section II – Standards to be applied in deciding a no case to answer motion and approach to evidence

7. In Section II, the Prosecution addresses first the standards to be applied in deciding a no case to answer motion and second, the approach to the assessment of the evidence. In this second part, the Prosecution argues that the Chamber should conduct a holistic evaluation of the Prosecution’s evidence. The Prosecution also reviews the principles to be applied when assessing the oral testimony of witnesses, including the evidence of insider witnesses. The assessment of other non-oral evidence, such as documents and the submission

⁵ This number includes both documents submitted *via* the testimony of witnesses, Bar Table Motions and decisions of the Chamber. If the Prosecution’s calculation is correct, this number is 4624.

⁶ All numbers provided were filtered from the metadata in eCourt; *see* ICC-01/05-01/13-2275, para. 600 *in fine*.

regime are also discussed. The assessment of hearsay evidence, including the reliability of documents from the United Nations Operations in Côte d'Ivoire is analysed, as are rule 63(4) of the Rules and the notion of corroboration. The use and assessment of circumstantial evidence are also discussed. Finally, the Prosecution addresses two discreet topics related to the assessment of a specific category of documents and the evidence of an insider witness.

Section III – Contextual elements of the crimes

8. In section III, the Prosecution first analyses the law applicable to the contextual elements of crimes against humanity, and further explains how each of these elements may be proved. Second, the Prosecution set out its case against each of the contextual elements of crimes against humanity. The Prosecution informs the Chamber that it has refined the number of incidents on which it relies for the purpose of demonstrating the commission of multiple article 7(1) acts.
9. Essentially, the Prosecution demonstrates how the evidence on record establishes that between 27 November 2010 and on or around 12 April 2011 in Abidjan, the pro-Gbagbo forces carried out a widespread and systematic attack, directed against a civilian population perceived as supporting Ouattara, which included a series of multiple acts of violence, including killing, attempted killing, rapes and severe injuries against civilians perceived to be Ouattara supporters.

Section IV – The charged crimes and victims

10. In Section IV, the Prosecution demonstrates that the evidence on record establishes, to the requisite standard of the no case to answer, each of the material elements of the crimes for the five charged incidents.
11. The Prosecution recalls that Mr Gbagbo is charged, under article 25(3)(a), with crimes against humanity – murder, other inhumane acts or attempted murder, and persecution – arising out of the 16 December 2010, 3 March 2011, 17 March

2011 and 12 April 2011 incidents, and the crime against humanity of rape – arising out of the 16 December 2010 and 12 April 2011 incidents; and Mr Blé Goudé with crimes against humanity – murder, other inhumane acts or attempted murder, and persecution – arising out of the 25 February 2011 and 12 April 2011 incidents, and the crime against humanity of rape – arising out of the 12 April 2011 incident.

12. For each incident, the Prosecution's presentation is driven by the material elements of the crimes. For the narrative of the events as they unfolded during the post-election crisis, the Prosecution refers the Chamber to its Trial Brief submitted on 19 March 2018.⁷
13. For all five charged incidents, the Prosecution first describes the law applicable to each of the material elements of the crimes charged. Second, the Prosecution sets out its case against each of the material elements of the crimes and where necessary, responds to specific Defence challenges to the Prosecution's case. Third, the Prosecution addresses more specifically arguments of the Accused. However, not all arguments by Mr Gbagbo and Mr Blé Goudé are addressed in the Prosecution's response since their relevance is of lesser importance in light of the requisite standard to be applied at this stage of the proceedings. Consequently, any unchallenged Defence should not be viewed as a concession on the part of the Prosecution.

Section V – Prosecution's case under article 25(3)(a)

14. In Section V, the Prosecution first sets out the law under article 25(3)(a) of the Statute.
15. Second, the Prosecution sets out its case against each Accused under article 25(3)(a), in summary form. The Prosecution argues that the evidence presented shows that a plan or agreement existed between Mr Gbagbo and members of his

⁷ ICC-02/11-01/15-1136-Conf-Anx1-Corr3.

Inner Circle, which included Mr Blé Goudé, to maintain Mr Gbagbo in power by all means, including by committing the crimes charged. Further to that, by 27 November 2010, the implementation of the Common Plan had evolved to include a State or organisational policy to launch a widespread and systematic attack against civilians perceived to support Alassane Ouattara. For a more detailed elaboration of its case under article 25(3)(a), the Prosecution again refers the Chamber to its Trial Brief.⁸

16. Third, the Prosecution addresses Mr Gbagbo's arguments, as set out in Annex 5 of the Gbagbo Motion, related to the individual criminal responsibility of the Accused Mr Gbagbo under article 25(3)(a), and Mr Blé Goudé's broad arguments related to the Common Plan/Policy (insofar as these are not addressed in Section III of this Response (Crimes Against Humanity), and his responsibility under article 25(3)(a).
17. The Prosecution also addresses in Section V, the Defence arguments related to the Prosecution allegation that Mr Gbagbo (i) failed to take the measures within his power to prevent or halt the commission of these crimes during the post-election crisis or to punish perpetrators; and (ii) failed to refer the matter to the competent authorities for investigation and prosecution.
18. Last, the Prosecution addresses Mr Blé Goudé's arguments related to his individual criminal responsibility under article 25(3)(a).

Section VI - Prosecution's case under article 25(3)(b)(c) and (d)

19. This section addresses the three remaining modes of responsibility under article 25(3). As such, it encompasses the Prosecution's response to the broad arguments made by Mr Gbagbo in his motion at Annex 5, paragraphs 1-8, 589-599 and Mr Blé Goudé in his motion at paragraphs 502-508.

⁸ Sections IX.A and X.A.

20. As in Section V, the Prosecution first sets out the law on individual criminal responsibility under each respective mode before setting out its case against the Accused in summary form.
21. The Prosecution submits that there is – at minimum - sufficient evidence, if accepted, on which a reasonable Trial Chamber could convict Mr Gbagbo of all the crimes charged based on articles 25(3)(b) or (d) as a mode of liability, and Mr Blé Goudé of all of the crimes charged based on articles 25(3)(b), (c) or (d) as a mode of liability.
22. For the avoidance of any doubt, Mr Gbagbo is charged, under articles 25(3)(b) and (d), with crimes against humanity - murder, other inhumane acts (or attempted murder), and persecution – arising out of the 16 December 2010, 3 March 2011, 17 March 2011 and 12 April 2011 incidents, and the crime against humanity of rape – arising out of the 16 December 2010 and 12 April 2011 incidents.
23. Mr Blé Goudé is charged, under articles 25(3)(c) and (d), with crimes against humanity – murder, other inhumane acts (or attempted murder), and persecution – arising out of the 16 December 2010, 25-28 February 2011, 3 March 2011, 17 March 2011 and 12 April 2011 incidents, and the crime against humanity of rape – arising out of the 16 December 2010 and 12 April 2011 incidents.
24. Mr Blé Goudé is also charged, under article 25(3)(b), with crimes against humanity – murder, other inhumane acts (or attempted murder), and persecution – arising out of the 16 December 2010, 25-28 February 2011 and 12 April 2011 incidents, and the crime against humanity of rape – arising out of the 16 December 2010 and 12 April 2011 incidents.
25. Throughout the process of responding to Mr Gbagbo and Mr Blé Goudé's motions, the Prosecution has re-evaluated its evidence with a critical eye with the goal of ensuring the fairness and efficiency of proceedings. In response to Mr Blé

Goudé's arguments on the nexus between Mr Blé Goudé and the 3 March and 17 March 2011 incidents,⁹ the Prosecution does not oppose the second ground of relief Mr Blé Goudé requests, specifically, the dismissal of the charges against him related to the third and fourth incidents. It is the Prosecution's hope that such relief will assist in expediting the proceedings going forward.

26. In the event this relief is granted, the Prosecution would like to remind the Chamber that there would be no substantive change in the crimes or modes of liability facing Mr Blé Goudé for the crimes of murder, rape, other inhumane acts (or attempted murder) and persecution committed in the context of the incidents of 16 December 2010, 25-28 February 2011, and 12 April 2011.¹⁰

Section VII- Prosecution's case under article 28

27. As with the other modes of liability, the Prosecution first sets out the law under article 28 of the Statute before setting out its case against the Accused all the while responding to some of the Defence challenges as set in their respective no case to answer motions.

28. In this last Section, the Prosecution demonstrates how Mr Gbagbo failed, as a superior, to exercise control properly over his subordinates through his failure(s) to prevent and/or to repress the charged crimes, or to submit them to the competent authorities for investigation and prosecution.

29. The Prosecution also demonstrates how, by virtue of his position and his acts, Mr Gbagbo was a superior, had control over his subordinates and that, despite having knowledge of crimes committed by his subordinates, he systematically failed to take necessary and reasonable measures to prevent or repress the commission of these crimes.

⁹ Motion of Mr Blé Goudé ICC-02/11-01/15-1198-Conf-Corr, paras. 663-670.

¹⁰ See Section VI.F and VI.H (Prosecution's Case under article 25(3)(c) - Mr Blé Goudé) and Prosecution's Case under article 25(3)(d) - Mr Blé Goudé).

Confidentiality

30. The Prosecution submits its response as Confidential in Annex 1 since it refers to evidence which has been presented in the course of (partial) closed sessions or submitted as confidential in the record of the case. The Prosecution will file a public redacted version of its response in due course.

Conclusion

31. For the demonstration provided in Confidential Annex A, the no case to answer motion of Mr Blé Goudé should be granted to the extent stated in paragraph 25. The remainder of the motion of Mr Blé Goudé and the motion of Mr Gbagbo should be rejected since there is evidence on which a reasonable Chamber could convict both Mr Gbagbo and Mr Blé Goudé for the crimes as charged.



Fatou Bensouda, Prosecutor

Dated this 10th day of September 2018

At The Hague, The Netherlands