Opinion of Judge Cuno Tarfusser[G]

1. I fully concur with the Majority outcome of this trial. I could not be more in agreement with my fellow Judge Geoffrey Henderson in believing that acquitting both accused is the only possible, and right, outcome for these proceedings. For the purposes of the Majority reasoning, I confirm that I subscribe to the factual and legal findings contained in the 'Reasons of Judge Henderson' ('Reasons').

2. I do not consider it necessary, or wise, to engage here on a debate as to nature of the decision. I take note that, in the view of Judge Henderson, 'article 74 does not appear to provide the appropriate basis to render […] decisions on motions for "no case to answer"'[1]. At various stages of these proceedings, I had the opportunity to voice my view on the matter and, more specifically, on the 'no case to answer' proceedings.[2] At this juncture, I will recall the oral decision of acquittal, stating that, according to the Majority, 'there is no need for the Defence to submit further evidence as the Prosecutor has not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged'[3], as well as the decision rejecting, by Majority, the Prosecutor's request that Mr Gbagbo and Mr Blé Goudé remain in detention, which clarified that the Majority 'limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond'[4]. Crucially, I will also refer to Judge Henderson's statements that 'the practical effect of a decision that there is no case to

[*] It would have been my wish to file this opinion simultaneously with its official translation into French and I very much regret that this was not possible. The official translation is currently being prepared and will be filed by the competent services as soon as available.

[1] Reasons, para. 13.

[2] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on 'Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion', 13 June 2018, ICC-02/11-01/15-1182.

[3] Oral decision on Mr Gbagbo's *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, on the *Blé Goudé Defence No case to answer motion* and on the request for provisional release following the hearing convened by the Chamber on continued detention of the accused, transcript of the hearing, 15 January 2019, ICC-02/11-01/15-T-232-ENG, p. 3 line 2 to 4.

[4] Oral decision on the Prosecutor's request under Article 81(3)(c)(i) of the Rome Statute to maintain Mr Gbagbo and Mr Blé Goudé in detention pending appeal, transcript of the hearing, 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 4 line 13 to 15.

answer leads to an acquittal'[5] and that, 'even though a decision that there is no case to answer is not a formal judgment of acquittal on the basis of the application of the beyond reasonable doubt standard in accordance with article 74 of the Statute, it has an equivalent legal effect in that the accused are formally cleared of all charges and cannot be tried again for the same facts and circumstances'[6]; and it is my full agreement with and support for this equivalent outcome that I wish to stress. This, however, is to a large extent a purely theoretical debate; what instead is not at all theoretical is that the Majority acquitted Mr Gbagbo and Mr Blé Goudé from all charges because they are not sustained by the evidence.

A. Scope and purpose of this opinion

3. The reasons for this opinion are rooted in the profound differences between my legal background and approach and the ones of my fellow judges, some of which go to the very heart of crucial questions about international criminal justice and its ultimate legitimacy and sustainability. My belief that both accused should be acquitted, based on the assessment of the evidence and of its 'exceptional weakness'[7], is strengthened by other features of this case as a whole, including developments preceding the opening of the trial and the overall conduct of the Office of the Prosecutor and of the Defence throughout the proceedings. It is on these features that I wish to take a stand here.

4. For almost two years, I assisted to the Prosecutor's case unravelling before my eyes in the courtroom, where witness after witness, from the humblest of victims up to the highest echelons of the Ivorian Army, systematically weakened, when not outright undermined, the case they were 'expected', and had been called, by the Prosecutor to support. For almost four years, I have also been sifting through mountains of documents purportedly supporting that case, none of which could confirm it in the slightest, whether taken individually or as a whole; many, as highlighted in the Reasons, 'of doubtful authenticity' and/or 'containing significant

[5] Reasons, para. 13.

[6] Reasons, para. 17.

[7] Oral decision on the Prosecutor's request under Article 81(3)(c)(i) of the Rome Statute to maintain Mr Gbagbo and Mr Blé Goudé in detention pending appeal, transcript of the hearing, 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 4 line 5.

anonymous hearsay'.[8] As also stated in the Reasons, 'there are pervasive problems affecting a considerable number of documents that make their authenticity questionable', making it 'probably fair to say that a majority of documentary exhibits that were submitted by the Prosecutor in this case would not pass even the most rudimentary admissibility test in many domestic systems'[9]. Furthermore, when some of them were indeed explicitly and merciless exposed by credible witnesses as non-genuine, the Prosecutor did not always consider it necessary to directly challenge them, or otherwise address the matter.[10]

5. The level of 'overall disconnect', to borrow an expression from the Reasons,[11] between the Prosecutor's narrative and the facts as progressively emerging from the evidence, kept increasing. Accordingly, on 5 October 2017 I asked Witness P-0009, General Philippe Mangou, Chief of Staff of the Ivorian Army at the time of the post-electoral crisis, some questions aimed at eliciting information which might support the Prosecutor's case (in particular, whether he was aware that the CECOS might have been vested with 'secret missions' with a view to fighting the enemy[12], or if the endowments granted to the *Garde Republicaine* had justifications other than the need to properly carry out its mission in light of their specific operational requirements[13]); his resounding answers in the negative did not certainly take me by surprise.

B. The differences in approach with my fellow Judges and well-established ICC practices

6. I will first address the issue of the differences in approach within the bench, some of which so deep as to have repeatedly fractured the Chamber. The existence of such differences will come as no surprise to those who have followed the developments of this trial since my appointment to the Chamber on 21 December

[8] Reasons, para. 4.

[9] Reasons, para. 36.

[10] *See* infra, Section 'The OTP performance in the context of the prosecution'.

[11] Reasons, para. 865.

[12] P-0009, transcript of the hearing, 5 October 2017, ICC-02/11-01/15-T-200-Red2-FRA, p. 54 line 9 to 12.

[13] P-0009, transcript of the hearing, 5 October 2017, ICC-02/11-01/15-T-200-Red2-FRA, p. 58 line 13 to p. 59 line 18.

2015[14] and my election as its Presiding Judge on 11 January 2016[15], shortly before the commencement of the trial on 28 January 2016[16]. The Chamber failed to achieve unanimity on many crucial issues (the approach to the evidence;[17] the treatment of previous statements under rule 68 of the Rules;[18] whether the accused would be entitled to make an unsworn statement;[19] whether requests for leave to appeal would or would not meet the requirements of article 82;[20] to what extent and in what form

[14] The Presidency, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision replacing a judge in Trial Chamber I, 21 December 2015, ICC-02/11-01/15-372.

[15] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision notifying the election of the Presiding Judge and designating a Single Judge, 11 January 2016, ICC-02/11-01/15-384.

[16] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision granting the request of the Gbagbo Defence and re-scheduling opening statements, 28 October 2015, ICC-02/11-01/15-322.

[17] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405 and Dissenting opinion of Judge Henderson; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016, 9 December 2016, ICC-02/11-01/15-773 and Dissenting opinion of Judge Henderson, 13 December 2016; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision concerning the Prosecutor's submission of documentary evidence on 28 April, 31 July, 15 and 22 December 2017, and 23 March and 21 May 2018, 1 June 2018, ICC-02/11-01/15-1172 and Dissenting opinion of Judge Geoffrey Henderson; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the common legal representative of victims' application to submit one item of documentary evidence, 19 June 2018, ICC-02/11-01/15-1188 and Dissenting opinion of Judge Geoffrey Henderson.

[18] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016, ICC-02/11-01/15-573-Conf (a public redacted version was filed on the same day) and Partially dissenting opinion of Judge Henderson; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the 'Prosecution's application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550', 19 July 2016, ICC-02/11-01/15-629-Conf (a public redacted version was filed on the same day) and Partially dissenting opinion of Judge Henderson; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the 'Prosecution's application to conditionally admit the prior recorded statements and related documents in relation to Witnesses P-0106, P-0107, P-0117 and P-0578 under Rule 68(3)', 11 October 2016, ICC-02/11-01/15-722-Conf (a public redacted version was filed on the same day) and Partially dissenting opinion of Judge Henderson; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the 'Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088', 6 June 2017, ICC-02/11-01/15-950-Conf (a public redacted version was filed on the same day) and Partly dissenting opinion of Judge Henderson.

[19] Oral ruling rejecting Mr Blé Goudé's request to give an unsworn statement pursuant to article 67(1)(h) of the Statute and dissenting opinion of Judge Tarfusser, transcript of the hearing, 22 November 2018, ICC-02/11-01/15-T-230-ENG p. 19 line 19 to p. 23 line 7.

[20] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on requests for leave to appeal the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)', 7 July 2016, ICC-02/11-01/15-612 and Partially dissenting opinion of Judge Henderson; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*,

the Chamber should address the Prosecutor's concerns as regards public utterances by members of the Defence team[21]). I also had to live with some choices made (or omitted) at the stage of the preparation of the trial I was not (and could not be) comfortable with; developments in the courtroom might also have led some to guess that I was not always supported in the choices I would have made as regards the conduct of the proceedings, whether openly or not[22]. After 34 years of judicial experience, the last ten as a Judge at the ICC, I think this is the right moment and venue to spell out some issues which have been to me source for concern in general and throughout these proceedings.

7. The first set of these issues relates to my disagreement with many practices which, for no particular or better reason other than they *prima facie* appear to be the same as adopted by other international criminal tribunals, have been followed by the Chambers of this Court since its early days, have since become routine and are being implemented to this day, notwithstanding the changes in the composition of the Court's bench along the years.

8. First and foremost, I refer to the practice of writing decisions and judgments systematically extending into the hundreds of pages, irrespective of the seriousness of the charge, the level of complexity of the factual and legal issues or the soundness of the Prosecution's case; where the totality or overwhelming majority of the witnesses' testimonies and of other items tendered into evidence is referred to, summarised,

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Decision on request for leave to appeal the Decision concerning the Prosecutor's submission of documentary evidence on 13 June, 14 July, 7 September and 19 September 2016, 4 May 2017, ICC-02/11-01/15-901 and Partly dissenting opinion of Judge Cuno Tarfusser; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the request for leave to appeal the 'Decision on the 'Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088', 12 September 2017, ICC-02/11-01/15-1023 and Partially dissenting opinion of Judge Henderson; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the 'Demande d'autorisation d'interjeter appel de la décision orale rendue par la Chambre de première instance le 5 octobre 2017', 10 November 2017, ICC-02/11-01/15-1064 and Dissenting opinion of Judge Henderson; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the '*Demande d'autorisation d'interjeter appel de la* "Decision concerning the Prosecutor's submission of documentary evidence on 28 April, 31 July and 22 December 2017, and 23 March and 21 May 2018" (ICC-02/11-01/15-1172)', 12 July 2018, ICC-02/11-01/15-1197 and Dissenting opinion of Judge Henderson.

[21] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the 'Prosecution Notification of Conduct by Blé Goudé Defence Team Member', 5 June 2018, ICC-02/11-01/15-1176 and Separate opinion of Judge Cuno Tarfusser.

[22] *See*, for example, Oral decision to continue P-0097's testimony in closed session, Presiding Judge dissenting, transcript of the hearing, 8 June 2016, ICC-02/11/01/15-T-48-Red2-ENG p. 19 line 24 to p. 21 line 3.

assessed and commented upon, with little consideration of their respective degree of importance *vis-à-vis* the charge and its impact, if any, on the Chamber's determination. In most of these decisions and judgments, and contrary to the best practices adopted by most legal systems, one has to look for the facts in the midst of a myriad of findings of all sorts and it usually takes (even to the experienced reader, let alone to the average one, or to some of the victims for whom international criminal justice is supposed to exist) some effort merely to understand what the case was about, to identify the core elements in the Prosecutor's case or the core evidence relied upon, as well as the key findings specifically leading the Chamber to reach a particular conclusion; this making it extremely hard for any reader to identify and understand the crucial issues which have been truly determinative of the Chamber's disposition.

9. The Reasons of Judge Henderson represent only the latest example, as far as the number of pages, the amount of footnotes and of referenced items of evidence are concerned. In my view, these methods and style are not only unnecessary as a matter of law but also obstructive to the very accessibility and comprehensibility of international criminal justice and therefore detrimental to its ultimate legitimacy and sustainability.

10. The features and developments of this case have only served to further strengthen these beliefs. It is not the first time that I address this matter. In the *Abu Garda* case, back in 2010, while fully subscribing to then Pre-Trial Chamber I's conclusion that the charges should not be confirmed, I dissociated myself from the Majority by stating my view that, in that case, 'the lacunae and shortcomings exposed by the mere factual assessment of the evidence [we]re so basic and fundamental that the Chamber need not conduct a detailed analysis of the legal issues pertaining to the merits of the case, in particular as to the existence of the material elements constituting any of the crimes charged'.[23] I also stated, more specifically, that even at the pre-trial stage, the very nature and function of a criminal trial required first and foremost that a link be established between the historical events as charged and the alleged perpetrators as identified by the Prosecutor and that, 'whenever the evidence gathered by the Prosecutor does not allow such a link to be established, because it is

[23] Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, Separate opinion of Judge Cuno Tarfusser to the Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, (at pp. 99-103), para. 3.

flimsy, inconsistent or otherwise inadequate',[24] it was the pre-trial judge's duty to decline to confirm the charges and to refrain from conducting a detailed analysis of the other facts. It is, or should be, beyond controversy that the same principles are at least as relevant, if not more critically so, at the trial stage.

11. At the time of the *Abu Garda* confirmation proceedings, I acquiesced to a Majority Decision containing a lengthy reasoning far beyond what I thought was necessary and required; today, I find myself in a similar situation. However, ten years the wiser, I now consider it my duty to say it loud and clear: this approach, and this kind of compromises, where a particular *modus operandi* is followed for no better or stronger reason that this is the way things have always been done, lies at the heart of the trouble of the legitimacy of international criminal justice.

12. As the analysis of the evidence in the Reasons makes abundantly clear, this is certainly (yet) another case where the evidence is 'flimsy, inconsistent or otherwise inadequate' to say the least, such as to never possibly envisage sending the case to trial, let alone sustaining a conviction. Day after day, document by document, witness after witness, the 'Prosecutor's case' has been revealed and exposed as a fragile, implausible theorem relying on shaky and doubtful bases, inspired by a Manichean and simplistic narrative of an Ivory Coast depicted as a 'polarised' society where one could draw a clear-cut line between the 'pro-Gbagbo', on the one hand, and the 'pro-Ouattara', on the other hand, the former from the South and of Christian faith, the latter from the North and of Muslim faith; a caricatured, 'one-sided'[25] narrative, 'built around a unidimensional conception of the role of nationality, ethnicity, and religion (in the broadest sense) in Côte d'Ivoire in general and during the post-electoral crisis in particular',[26] progressively destroyed by the innumerable elements to the contrary emerging from the testimonies.

13. Witnesses from all walks of life have contributed to provide the Chamber with a picture of Ivory Coast simply irreconcilable with the one presented by the Prosecutor. The Chamber heard, since the early days, that '*les musulmans ne sont pas*

[24] Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, Separate opinion of Judge Cuno Tarfusser to the Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, (at pp. 99-103), para. 4.

[25] Reasons, para. 66.

[26] Reasons, para. 73.

seulement du nord'[27] and that '*[i]l n'est pas forcément tous ressortissant du Nord « partenaient » au parti d'Alassane […] [v]ous allez trouver des gens du Nord qui « partient » au parti de Gbagbo […] [et] des gens chez Gbagbo qui « partient » au parti de M. Houphouët-Boigny, le PDCI*'[28] (P-0625) ; that '*en Côte d'Ivoire, on a pris l'habitude, même, de ne plus connaître les origines des uns et des autres… puisque ce n'était pas notre problème*' and that '*la Côte d'Ivoire, pendant longtemps, s'est enrichie de ces compétences sans tenir compte de leur origine ethnique ou de leur appartenance locale*' (P-0048)[29]; that, in the Mami Faitai neighbourhood, '*il y avait toutes les races… tout le monde n'était pas des supporters de Gbagbo*' (P-0568)[30]; that the Doukouré neighbourhood, whilst '*c'est majoritairement pro-Ouattara […] ça veut pas dire qu'il n'y avait pas de pro-Gbagbo*'[31] (P-0459). Even witnesses confirming that the neighbourhoods of Yao Sehi and Doukouré were respectively inhabited by a majority of *guere* and *bété* (the former) and *dioula* (the latter), observed that, as regards other neighbourhoods, '*ce n'est pas évident, parce que les gens étaient plus ou moins... c'étaient des quartiers cosmopolites, les gens étaient mélangés*' (P-0440)[32]. As simply and eloquently stated respectively by Witnesses P-0449 and Witness P-0578, '*dans les quartiers, il y a toutes les ethnies*' (P-0449)[33] and '*il y a toutes les ethnies* […] *il y a même des étrangers; tout le monde vit ensemble*'[34] and '*il y a tous les partis politiques*' (P-0578)[35]. Against this background, the Prosecutor's use of the terminology 'pro-Gbagbo' or 'pro-Gbagbo force', sounded simplistic. Indeed, the Prosecutor never provided adequately precise criteria to

[27] P-0625, transcript of the hearing, 16 March 2016, ICC-02/11-01/15-T-31-Red2-FRA, p. 27 line 14 to 15.

[28] P-0625, transcript of the hearing, 9 March 2016, ICC-02/11-01/15-T-27-FRA, p. 12 line 19 to p. 13 line 5.

[29] P-0048, transcript of the hearing, 29 June 2016, ICC-02/11-01/15-T-55-FRA, p. 100 line 3 to 8.

[30] P-0568, transcript of the hearing, 15 November 2017, ICC-02/11-01/15-T-209-Red-FRA, p. 36 line 14 to 16.

[31] P-0459, transcript of the hearing, 8 May 2017, ICC-02/11-01/15-T-153-Red2-FRA, p. 60 line 18 to 19.

[32] P-0440, transcript of the hearing, 11 May 2017, ICC-02/11-01/15-T-157-Red2-FRA, p. 81 line 1 to 3.

[33] P-0449, transcript of the hearing, 22 May 2017, ICC-02/11-01/15-T-159-Red2-FRA, p. 101 line 21.

[34] P-0578, transcript of the hearing, 3 October 2016, ICC-02/11-01/15-T-84-Red2-FRA, p. 11 line 11 to 20.

[35] P-0578, transcript of the hearing, 3 October 2016, ICC-02/11-01/15-T-84-Red2-FRA, p. 49 line 16 (speaking of the Williamsville neighbourhood).

determine the composition of such groups and seemed to believe that this label would dispense her from providing 'actual proof of affiliation or identification with the relevant group'[36], apparently expecting the Chamber to accept it at face value. The definition increasingly emerged as both artificial and meaningless: artificial, because different witnesses appeared to use different criteria to identify the group; meaningless, since often used without any further qualification.[37]

14. For the Trial Chamber to reach the conclusion to acquit, I submit that it would have been enough to bear in mind a twofold, simple guideline: (i) that the charge, as confirmed by the Pre-Trial Chamber, constitutes the core of criminal proceedings and (ii) that it is essential, before proceeding to discuss other factual or legal issues, to establish a link between the facts alleged as criminal and the accused; once determined that the tendered evidence does not allow to establish such link, acquittal must ensue as a matter of course; what remains, if anything, becomes a matter of academic debate. All the Chamber should have done, in this case, is demonstrating why the case brought by the Prosecutor against Laurent Gbagbo and Charles Blé Goudé, whether under article 25 or article 28 (for Laurent Gbagbo) of the Statute, simply could not stand.

15. As regards the charges brought under article 25 of the Statute, I became increasingly aware that, particularly as regards Mr Gbagbo, they consisted in nothing more than a combination between neutral, institutional conducts, on the one hand, and readings of such conducts so as to make them consistent with the 'case theory', on the other hand; this in spite of such reading being not only *per se* implausible, but also insufficiently unsupported by either facts or evidence, when not outright negated by the same or other facts and evidence. As stated in the Reasons when addressing the Prosecutor's submissions as to the existence of a parallel structure, the relevant testimonies 'either do not support the specific allegations of the Prosecutor or lack probative value';[38] some of them are 'highly confusing and unpersuasive'[39]. Among many, especially in light of the situation of institutional crisis and tensions among the

[36] Reasons, para. 1394: 'The terminology "pro-Gbagbo force" is used as a means of identifying an alleged affiliation which, in itself, is not problematic. However, the use of this terminology alone cannot replace actual proof of affiliation or identification with the relevant group'.

[37] Transcript of the hearing, 13 November 2018, ICC-02/11-01/15-T-225-Red-FRA, p. 24 line 4 to p. 25 line 17.

[38] Reasons, para. 413.

[39] Reasons, para. 416.

different political groups, this is certainly true of the following: the adoption of measures in accordance with the Ivorian legal framework and in line with practices currently adopted in many States as means of ensuring public order, such as the requisition of the Army and the ordering of curfews; the convening of institutional meetings attended by the highest military and political authorities; the fact of having imparted 'instructions' to the Army in terms hardly going beyond a statement of encouragement and support to the FDS in an extremely difficult situation (in particular, the exhortation 'to continue', in spite of the difficulties and of the casualties[40], or the exhortation to '*tout faire*' to attain the objective of freeing certain critical strategic axes[41]), respecting the operational autonomy and discretion of the relevant military authorities. As stated in the Reasons, the weakness of circumstantial evidence is that 'wrong inferences may be drawn from a set of entirely true circumstantial facts or from facts which may have been mischaracterised'; as a consequence, 'the Chamber is required to narrowly evaluate the evidence for the underlying primary facts submitted to ensure not only that they are accurately portrayed but also […] to be sure that there are no other co-existing circumstances which would weaken or destroy that inference'.[42]

16. As regards Mr Blé Goudé, it is certainly true that – as detailed in the Reasons – he was 'supporting Mr Gbagbo politically and his presidency'[43]. However, the ensuing proposition that this support would have involved, or otherwise implied, the commission of crimes against the civilian population never found support in any of the evidence. As likewise noted in the Reasons, the Prosecutor did not allege 'that Mr Blé Goudé had a role in the formal command and control structure of the FDS'[44], or that he had 'command and control' on self-defence groups such as the GPP[45]. Those behaviours held by Mr Blé Goudé which can be considered proven to the relevant standard point rather, as made apparent by the Reasons, to an altogether different

[40] P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 32 line 14 to 20.

[41] P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 36 line 5 to 8.

[42] Reasons, para. 51.

[43] Reasons. para. 462.

[44] Reasons, para. 396.

[45] Reasons, para. 836.

narrative than the one proposed by the Prosecutor. This holds true, in particular, for his call to the youth for enlisting into the Army,[46] as well as for his many speeches advocating for dialogue, for the protection of the population and a calm approach to the complexity of the situation;[47] far from being encouraged, violence is explicitly repudiated[48] as a method in many of those speeches. As recalled in the Reasons, '[a]ffiliation to Mr Gbagbo is not criminal *per se*'[49].

17. A similar, if not worse, level of implausibility can be found in the charges brought under the heading of article 28 of the Statute against Laurent Gbagbo. As stated in the Reasons, 'the Prosecutor has failed to explain, for each of the charged crimes, precisely when Mr Gbagbo had knowledge or should have been aware of impending or completed criminal behaviour. With the exception of the alleged crimes committed on 12 April 2011, it is not clear whether Mr Gbagbo is charged with failure to prevent, repress, and/or refer to competent authorities. Moreover, the Prosecutor seems to equate awareness of civilian casualties with awareness of crimes committed against those civilians'[50]. More fundamentally, one would be forgiven to expect that the Prosecutor, in bringing about this mode of liability, would first address the issue of how the ideas of control and responsibility over one's subordinates, on the one hand, and of failure to use one's power to act in remedy, on the other, which are at the heart of this provision, would apply in a context as difficult and chaotic such as the post-electoral crisis. One would have expected the Prosecutor to explain how it would have been possible for Laurent Gbagbo, having fallen into captivity on 11 April 2011 ('after spending several days under siege at the Presidential Residence'[51]), to anyhow act (including by conducting investigations and meting out punishments)

[46] *See* Reasons, para. 1069.

[47] Video, CIV-OTP-0026-0022, transcript CIV-OTP-0052-0813 at 0816; Video CIV-OTP-0075-0060, transcript CIV-OTP-0087-0159 at 0160-0161; video CIV-OTP-0064-0078, transcript, CIV-OTP-0102-1754 at 1755; transcript CIV-OTP-0102-1756 at 1758; video CIV-OTP-0074-0060, transcript CIV-OTP-0087-0470 at 0472.

[48] Video, CIV-OTP-0075-0060, transcript CIV-OTP-0087-0159 at 0160-0161; video CIV-OTP-0064-0078, transcript CIV-OTP-0102-1756 at 1757; video CIV-OTP-0061-0581, transcript CIV-OTP-0086-0952 at 0954; transcript CIV-OTP-0086-0956 at 0957; video CIV-OTP-0064-0107, transcript CIV-OTP-0086-1001; video 0064-0114, transcript CIV-OTP-0086-1036 at 1039; CIV-OTP-0043-0269, transcript at CIV-OTP-0047-0611 at 0613, 0614; video CIV-OTP-0026-0018, transcript 0051-2220 at 2241; video CIV-OTP-0041-0474, transcript CIV-OTP-0044-2485 at 2487, 2488.

[49] Reasons, para. 1399.

[50] Reasons, para. 2031.

[51] Reasons, para. 1912.

upon events which had taken place between 16 December 2010 (at the earliest) and in the hours and days *following* his arrest. The Prosecution's investigation itself took several years: in light of the Prosecutor's statements at the opening of the trial and other stages of the proceedings,[52] as far the situation is concerned, it seems far from being completed. Instead, the sections on article 28 to be found in the Prosecutor's filings consist of hardly anything more than a repetition of the legal requirements of the provision, without any attempt at showing how these elements would fit into the specific and unique factual features of the situation in Ivory Coast at the relevant time. A similar level of bland neutrality characterises the many questions asked in the courtroom which one could identify as aimed at demonstrating that Laurent Gbagbo was responsible for failing to act in respect of the charged events: the transcripts are indeed riddled with questions posed in the most neutral of terms.[53] These doubts, and the Defence's objections to this effect[54] (focussing on those measures which somehow Laurent Gbagbo did manage to take in spite of the crisis),[55] remain unaddressed to this day. The severe statements in the Reasons, to the effect that it is 'difficult to escape

[52] Transcript of the hearing, 28 January 2016, ICC-02/11-01/15-T-9-ENG, p. 42 line 1 to 18. *See* also Office of the Prosecutor, *Situation in the Republic of Côte d'Ivoire*, Request for authorisation of an investigation pursuant to article 15, 23 June 2011, ICC-02/11-3; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Prosecution application for non-standard redactions to material related to another and ongoing investigation in the Côte d'Ivoire situation, 23 January 2018, ICC-02/11-01/15-1109-Conf (a public redacted version was filed on 1 February 2018).

[53] P-0046, transcript of the hearing, 20 February 2017, ICC-02/11-01/15-T-126-Red-FRA, p. 47 line 3 to p. 51 line 28; P-0011, transcript of the hearing, 9 March 2017, ICC-02/11-01/15-T-131-Red2-FRA, p. 8 line 6 to p. 13 line 2; p. 23 line 2 to p. 25 line 11; p. 39 line 23 to p. 42 line 23; transcript of the hearing, 10 March 2017, ICC-02/11-01/15-T-132-FRA, p. 87 line 7 to p. 90 line 17; transcript of the hearing, 13 March 2017, ICC-02/11-01/15-T-134-Red-FRA, p. 38 line 9 to 28; p. 56 line 23 to p. 57 line 6; p. 81 line 7 to 16; P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 42 line 14 to p. 48 line 3; p. 51 line 24 to p. 59 line 6; p. 105 line 25 to p. 107 line 13; transcript of the hearing, 30 March 2017, ICC-02/11-01/15-T-140-FRA, p. 4 line 9 to p. 12 line 16; P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 1 line 28 to p. 2 line 24; p. 43 line 16 to p. 47 line 7; p. 48 line 12 to p. 59 line 21; p. 62 line 18 to p. 63 line 3; transcript of the hearing, 2 October 2017, ICC-02/11-01/15-T-197-Red2-FRA, p. 5 line 1 to 28; p. 10 line 19 to p. 11 line 17; P-0047, transcript of the hearing, 8 November 2017, ICC-02/11-01/15-T-204-Red2-FRA, p. 9 line 2 to p. 12 line 14.

[54] Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Partie 3. L'absence de responsabilité pénale de Laurent Gbagbo, 23 July 2018, ICC-02/11-01/15-1199-Conf-Anx5-Corr *annexed to* Version corrigée de la « Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée » (a public corrected version was filed on 28 September 2018), paras 621-624.

[55] P-0011, transcript of the hearing, 13 March 2017, ICC-02/11-01/15-T-134-Red-FRA, p. 38 line 9 to 28; p. 56 line 23 to p. 57 line 6; P-0010, transcript of the hearing, 30 March 2017, ICC-02/11-01/15-T-140-FRA, p. 4 line 9 to p. 6 line 4; P-0564, transcript of the hearing, 17 January 2018, ICC-02/11-01/15-T-219-FRA, p. 61 line 6 to p. 62 line 20; Legal document, CIV-OTP-0001-0282; Report, CIV-OTP-0050-0003.

the impression that the Prosecutor asked the Chamber to give notice of a possible re-characterisation to article 28 more as a fall-back to secure a conviction at any cost than as a serious effort to give the correct legal expression to what happened in Côte d'Ivoire between November 2010 and April 2011',[56] are to be read in light of this background.

18. Against this scenario, one would wonder to what extent the level of detail of the analysis contained in the Reasons is really necessary, rather than amounting to an *obiter dictum*. The same question can be asked of much of the case-law of the Court, where hundreds and hundreds of pages, and thousands of footnotes in tow, are drafted on issues which have no bearing on the determinations actually taken. It is my belief, strengthened throughout these years of experience, that the problem of the 'expeditiousness' of international criminal trials, traditionally presented as ensuing from the purported 'exceptional complexity' of the cases before international criminal courts, has to a large extent rather to do with an ill-placed tolerance for such overextended discussions, as well as with the favouritism for an academic style which only contributes to detach international criminal justice from the very interests it is supposed to serve.

19. I also refer to the practice, not mentioned in the statutory texts, of entertaining a lengthy interlocutory phase between the closure of the pre-trial proceedings and the opening of the trial proper, promisingly called the phase of the 'preparation of the trial': in this case, such phase lasted no less than about sixteen months for Laurent Gbagbo and thirteen months for Charles Blé Goudé.

20. I should be forgiven if, coming on the bench as a neophyte of trials at the ICC, I took it for granted that a preparation this extensive would have at least consisted and resulted in focussing the evidence in relation to the charges, ie that the Prosecutor's list of evidence[57] (a document which is not provided for in the Statute at the trial stage, but which has become common practice to request), including both witnesses and documentary evidence, would have been submitted to close and strict scrutiny, with a view to limiting it to what would be likely relevant and admissible within the meaning of article 69 of the Statute. Instead, the 'preparatory' phase consisted

[56] Reasons, para. 2032.

[57] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex C List of Evidence, 30 June 2015, ICC-02/11-01/15-114-Conf-AnxC, *annexed to* Prosecution's submission of its List of Witnesses and List of Evidence.

essentially in deciding requests for leave to appeal[58], setting up protocols (on handling of confidential information;[59] on familiarisation and preparation of witnesses;[60] on vulnerable[61] and dual status witnesses[62]: most of such protocols are now to a large extent standardised, and have been for a long time); deciding issues of disclosure[63]

[58] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Defence requests for leave to appeal the 'Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters', 22 April 2015, ICC-02/11-01/15-42; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Defence requests for leave to appeal the 'Order setting the commencement date of the trial', 2 July 2015, ICC-02/11-01/15-117; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record', 10 July 2015, ICC-02/11-01/15-132; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on request for leave to appeal the 'Second decision on objections concerning access to confidential material on the case record', 17 August 2015, ICC-02/11-01/15-182; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on request for leave to appeal the 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court', 10 September 2015, ICC-02/11-01/15-212; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Defence requests for leave to appeal the 'Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents', 18 September 2015, ICC-02/11-01/15-228; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Defence request for leave to appeal the 'Directions on the conduct of the proceedings', 18 September 2015, ICC-02/11-01/15-229; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Gbagbo Defence request for leave to appeal the 'Decision on Defence requests relating to the Prosecution's Pre-Trial Brief', 21 October 2015, ICC-02/11-01/15-307. *See* also the oral decision on the Laurent Gbagbo Defence request seeking leave to appeal the order to conduct a medical examination rendered by the Chamber; the oral Decision on the Laurent Gbagbo Defence request seeking leave to appeal the 'Order to provide Appointed Expert with access to Mr Gbagbo's medical record' and the oral Decision on the Laurent Gbagbo Defence request seeking leave to appeal the 'Decision granting the request of the Gbagbo Defence and re-scheduling opening statements' and the 'Order on the classification of the Expert Reports and other related documents' in transcript of the hearing, 10 November 2015, ICC-02/11-01/15-T-5-ENG, respectively at p. 8 line 14 to p. 11 line 11; p. 11 line 12 to p. 14 line 2 and p. 14 line 3 to p. 15 line 12.

[59] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the Protocol establishing a redaction regime, 15 December 2014, ICC-02/11-01/11-737 and annex; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision adopting the 'Protocol on disclosure of the identity of witnesses of other parties and of the LRV in the course of investigations, use of confidential information by the parties and the LRV in the course of investigations, inadvertent disclosure and contacts between a party and witnesses not being called by that party', 31 August 2015, ICC-02/11-01/15-200 and annex.

[60] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on witness preparation and familiarisation, 2 December 2015, ICC-02/11-01/15-355 and annex.

[61] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on protocol on vulnerable witnesses, 4 December 2015, ICC-02/11-01/15-357.

[62] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision adopting mechanisms for exchange of information on individuals enjoying dual status, 31 August 2015, ICC-02/11-01/15-199 and annex.

[63] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecution requests for variation of the time limit for disclosure of certain documents, 18 August 2015, ICC-02/11-01/15-183-Conf (a public redacted version was filed on the same day); Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Second Decision on Prosecution's requests for variation of the time limit for disclosure of certain documents and to add some to its List of Evidence, 21 October 2015, ICC-02/11-01/15-306; Trial Chamber I, *The Prosecutor v. Laurent*

and adjudicating requests for redactions[64] and translations[65] between the parties, as well as providing clarifications[66]. Little attention was instead paid to the need to shape the trial by way of a serious filtering of the evidence. The Prosecutor was simply asked to file a list of evidence, and to provide an order of appearance for the first 20 of her witnesses, as well as 'witness summaries covering main facts'[67]: a document, this one, containing information as to their identity, language of testimony, witness 'type' (ie, insider, crime-base, expert) and salient facts on which they were 'expected to testify'.

21. While, on paper, one may recognise some kind of usefulness in this type of documents, the Chamber, having received them, did not seem to think it wise or necessary to exercise any kind of supervision or input, or to otherwise intervene. Witnesses were accepted as such, and 'admitted', for the simple reason that they had been included in the witnesses' list by the Prosecutor; had a scrutiny been made, either in terms of facts their testimony would (and could) cover, or of 'type' of witnesses, it would have been apparent that many of the issues on which a non-negligible number of those witnesses were 'expected' to testify were either falling outside the scope of the charges, and therefore irrelevant, or completely neutral, when not suitable to be (better) proven through documentary evidence. Instead, the Chamber responsible for the preparation of the trial adopted directions on the conduct of the proceedings[68] where *inter alia* it only indicated that, whilst not intervening at that stage on either the contents of the Prosecutor's list of evidence, or on her estimate

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Gbagbo and Charles Blé Goudé, Third decision on disclosure related matters and amendments to the List of Evidence, 30 November 2015, ICC-02/11-01/15-350-Conf.

[64] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Prosecution requests on redactions, 19 May 2015, ICC-02/11-01/15-68-Conf-Exp (a public redacted version was filed on 21 July 2015); Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Prosecution's request for authorisation to redact P-0422's statement, ICC-02/11-01/15-88-Conf; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Legal Representative of Victims' requests to maintain redactions to information relating to certain intermediaries, 2 September 2015, ICC-02/11-01/15-202.

[65] Oral decision on requests for translation in transcript of the hearing, 21 April 2015, ICC-02/11-01/15-T-1-Red-ENG, p. 36 line 23 to p. 37 line 14.

[66] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on requests for clarification concerning review of the case record and extension of time, 13 April 2015, ICC-02/11-01/15-30.

[67] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Order setting the commencement date for trial, 7 May 2015, ICC-02/11-01/15-58.

[68] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Directions on the conduct of the proceedings, 3 September 2015, ICC-02/11-01/15-205.

that as many as 522 hours would be needed for the presentation of the case, it 'took note' of 'the Prosecutor's undertaking that it [would] reduce the number of witnesses and/or evidence where possible' and highlighted that it 'may provide further directions to the parties aimed at improving the efficiency of the presentation of their evidence'. The tone and content of the provisions relating to the scheduling of Prosecution's witnesses also made it apparent that the Prosecutor was handed total discretion as to the determination of the calling order, as well as subsequent modifications thereto, subject only to (limited) obligations of notification.

22. I am of course mindful of the need for the bench to avoid prevaricating upon the discretion of the parties' strategy by too heavily interfering and dictating the way in which they should present their case. In other cases, I have rejected requests aimed at burdening the parties with the preparation of the 'in-depth analysis chart',[69] a system for a long time enthusiastically advocated by some of my colleagues, highlighting the need – in the absence of specific statutory provisions to the contrary – to defer to the parties' discretion and professional judgment in determining the method or format for presenting their case. I am also all too aware, however, of the likewise crucial need to avoid that costly time in the courtroom (all the more costly on the international stage, in light of the needs for interpretation and translation) be spent on matters which are trivial at best and of which it is predictable that they will be of no use for the purposes of the deliberations on the innocence or of the guilt of the accused. It is a Chamber's duty and responsibility to strike an appropriate balance between these needs, always bearing in mind the paramount principle of the fairness of the trial and its expeditiousness; while abundant references can be found to these principles, it is debatable to what extent this translates into practices meaningfully implementing them.

23. A focussed preparation would not only have reduced the risk to spend time in the courtroom on issues outside the scope of the charges, but also prevent the summoning of individuals whose type of knowledge of the facts – as easily ascertainable on the basis of their profile, background, type of knowledge of the facts or connection with either of the accused, or lack of it – could never be suitable to constitute the basis for, or otherwise contribute to, the fundamental determinations as

[69] Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo et al*., Decision on the 'Defence request for an in-depth analysis chart', submitted by the Defence for Mr Jean-Pierre Bemba Gombo, 28 January 2014, ICC-01/05-01/13-134.

to the innocence or guilt of the accused. The mind goes here to journalists, or staff of international organisation or NGOs, whose knowledge of and connection to the charged events on the ground and charged individuals was tenuous, indirect or inexistent and whose contribution to the trial, if any, should have been limited to tendering their reports and other material as documentary evidence.

24. Among the most significant examples, I consider that the following stand particularly out.

i. Witness P-0414 (three hearing days), a UNOCI call centre operator, illustrated how she would draft reports on the basis of information collected through the callers; to her credit, she kept highlighting that, 'at her level', she would have no information or insight as to the use which might be done by her superiors of the (unfiltered) information they received at the call centre.[70]

ii. Witness P-0369 (three hearing days), a Human Rights Watch researcher, testified about spending a few months on the ground during the post-electoral crisis conducting interviews with victims, in line with methods and objectives specific to the organisation, which prioritised the goal of giving victims a voice – as opposed to determining responsibilities – and did not necessarily imply checks on the very identity of their interviewees[71], or other matters of accuracy.

iii. Witnesses P-0087 and P-0088 (four hearing days), two British nationals working respectively as reporter and cameraman on a joint documentary shot between 17 March and 13 April 2011 in Cote d'Ivoire, explained at length that their work was aimed at documenting the humanitarian crisis in the country, notwithstanding the fact that the first spoke no French and the second had a limited knowledge of it; having both to rely on a 'local fixer'[72], whose job it was to 'act as translator on the ground' and 'put [them] in touch with the kinds [*sic*] of people they needed to meet'[73], either of them could

[70] P-0414, transcript of the hearing, 19 September 2016, ICC-02/11-01/15-T-74-Red2-FRA, p. 62 line 5 to 15; transcript of the hearing, 20 September 2016, ICC-02/11-01/15-T-75-Red2-FRA, p. 7 line 6 to 21; p. 27 line 3 to 22; transcript of the hearing, 21 September 2016, ICC-02/11-01/15-T-76-Red2-FRA, p. 27 line 21 to 28 line 15; p. 73 line 9 to 24.

[71] P-0369, transcript of the hearing, 18 May 2016, ICC-02/11-01/15-T-41-Red2-ENG, p. 22 line 10 to 24 line 10; p. 40 line 22 to p. 43 line 3.

[72] P-0088, transcript of the hearing, 11 July 2017, ICC-02/11-01/15-T-176-ENG, p. 8 line 10 to 12.

[73] P-0087, transcript of the hearing, 12 July 2017, ICC-02/11-01/15-T-177-ENG, p. 11 line 1 to 6.

provide little information except personal takes and impressions on the general atmosphere, in some instances based on the views of the fixer[74]. Furthermore, Witness P-0087 – who candidly acknowledged that he used 'a mixture of French and English'[75] and that his French 'improved' during his stay and through his contacts with the fixer[76] – stands out for his remarkably inaccurate – sometimes outrageously so – 'translations' of statements of people interviewed on the ground: Blé Goudé's question to the crowd: '*Jeunes de Cote d'ivoire, est-ce que vous etes prets à aller dans l'armée pour servir notre pays?*' is translated on camera by Witness P-0087 into 'he's asked everybody here if they are willing to fight and die for their country'[77]; Blé Goudé's statement to the effect that '*je me rends compte que ce n'est pas Ouattara qui nous fait la guerre, mais c'est l'ONU entire … et nous avons fait le choix de la résistence à l'ONU*' becomes 'Charles [ha]s essentially declared war on the supporters of Ouattara, on the United Nations, and on the French troops who are here', preceded by the comment that what Blé Goudé was saying was 'incredibly scary'[78]; the crowd's chant in French '*Sarkozy assassin, Sarkozy assassin*' is translated into 'they are all shouting; "Assassinate Sarkozy, assassinate Sarkozy"'[79]; the interviewee's statement '*nous voulons dire à Alassane, nous voulons dire à Sarkozy, que Laurent Gbagbo n'est pas a vendre. Laurent Gbagbo est un digne fils de l'Afrique*' becomes 'he says that people like Sarkozy and western leaders are all trying to colonise this country'[80].

[74] P-0088, transcript of the hearing, 11 July 2017, ICC-02/11-01/15-T-176-ENG, p. 14 line 14 to 21.

[75] P-0088, transcript of the hearing, 11 July 2017, ICC-02/11-01/15-T-176-ENG, p. 46 line 25 to p. 47 line 10.

[76] P-0087, transcript of the hearing, 12 July, 2017, ICC-02/11-01/15-T-177-ENG, p. 16 line 8 to 12; p. 17 line 4 to 16. Asked about his level of French at the time of the stay in Ivory Coast, he stated that his mother, an air hostess, spoke French fluently, and that he grew up 'around French speaking air hostesses and so on whenever we travelled'; he also stated that his partner is French.

[77] Transcript of video, CIV-OTP-0020-0500 at 0502 and 0504.

[78] Transcript of video, CIV-OTP-0020-0500, at 0504.

[79] Transcript of video, CIV-OTP-0020-0553, at 0555.

[80] Transcript of video, CIV-OTP-0020-0553, at 0554.

iv. Witness P-0431 (two hearing days), a British journalist and filmmaker, who – despite the fact that he does not speak French fluently[81] – sojourned in Ivory Coast in 2006 for the purposes of producing a documentary and provided to OTP with selected excerpts of his footage, from which he had excluded those clips which he considered not 'representative of what actually happened on those days'[82].

25. I believe that a phase of the preparation of the trial is only worth holding if the Chamber takes a proactive role from the start, including by way of a meaningful exercise aimed at the identification of issues critically relevant to the determination of the charges. Instructing the parties to prioritise and bring forward evidence relating to such issues first should have constituted the core of the Chamber's concern, all the more so in respect of a case constantly referred to as being of exceptional magnitude and complexity. A few months into the trial, the Chamber would revise its directions on the conduct of the proceedings,[83] albeit with a separate opinion by Judge Henderson, detailing his concern that 'that changing the rules after the trial begins, creates unhelpful confusion and uncertainty, which in the end may have an impact on the fairness of the proceedings'[84]. The revised directions did specifically try and address this concern; while the trial did to some extent benefit from the actual exercise of these powers (first and foremost, as a result of ordering the Prosecutor to bring forward the testimony of some critical insider witnesses, originally scheduled to appear almost at the very end[85], and also of taking the lead in scheduling the order of appearance of the witnesses[86]), it was obviously not possible to remedy the fact that

[81] P-0431, transcript of the hearing, 24 May 2016, ICC-02/11-01/15-T-43-Conf-ENG, p. 10 line 10 to 11.

[82] P-0431, transcript of the hearing, 25 May 2016, ICC-02/11-01/15-T-44-Red2-ENG, p. 59 line 3 to 6.

[83] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision adopting amended and supplemented directions on the conduct of the proceedings, 4 May 2016, ICC-02/11-01/15-498.

[84] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Separate opinion of Judge Henderson, 4 May 2016, ICC-02/11-01/15-498-Anx1, para.1.

[85] Transcript of the hearing, 5 April 2017, ICC-02/11-01/15-T-144-Conf-ENG, p. 94 line 7 to p. 95 line 5.

[86] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the schedule of hearings after the summer recess, the order and manner of appearance of all witnesses, 7 June 2017, ICC-02/11-01/15-952; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on an amended schedule of hearings and order of appearance of witnesses after the summer recess, 17 July 2017, ICC-02/11-01/15-990; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on further amended schedule of hearings and order of

the trial had started in the absence of any meaningful direction or input from the bench suitable to influence its shape and thus contribute to its focus.

26. One additional area where a stronger hand in the preparation of the trial would also have been particularly beneficial is the use by the Prosecutor of so-called 'expert witnesses'. No less than 12 days[87] were devoted to hearing seven of them in the courtroom: P-0410; P-0411; P-0564; P-0583; P-0584; P-0585; P-0601; and P-0606.

27. A glance at the subject matter of the various reports prepared by each of those experts, albeit cursory, at the time when they were included in the list of evidence would – and should – have allowed the bench to anticipate that, regardless of their content, no one of those reports would meaningfully assist the Chamber in discharging its responsibilities, whether as regards the determination of facts or the attribution of responsibility to either accused.

28. Expert Witness P-0410, a pathologist, tasked with examining the medical reports of ten witnesses and to determine whether their injuries and treatments would be 'consistent' with the description of the events provided by them, confirmed that, in general terms '*les séquelles présentées peuvent être considérées comme compatible avec les renseignements fournis par la victime sur la survenance des dites blessures, y compris s'agissant de leur chronologie*'[88].

29. Expert Witness P-0411, who styles himself in his resume as 'a risk manager, threat assessment specialist and leader', was tasked with conducting 'an expertise at several alleged shelling sites within Abidjan' to *inter alia* 'determine if possible what type(s) of mortar and/or other ammunition might have caused the alleged impacts'

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appearance of witnesses, 29 August 2017, ICC-02/11-01/15-1013; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Second decision on further amended schedule of hearings and order of appearance of witnesses**,** 21 September 2017, ICC-02/11-01/15-1034.

[87] Transcript of the hearing, 29 May 2017, ICC-02/11-01/15-T-162-ENG; transcript of the hearing, 30 May 2017, ICC-02/11-01/15-T-163-ENG; transcript of the hearing, 29 June 2017 (third session), ICC-02/11-01/15-T-168-Red2-ENG; transcript of the hearing, 30 June 2017, ICC-02/11-01/15-T-169-Red2-ENG; transcript of the hearing, 4 September 2017, ICC-02/11-01/15-T-185-Red2-FRA; transcript of the hearing, 5 September 2017 (first and second session), ICC-02/11-01/15-T-186-Red2-FRA; transcript of the hearing, 11 September 2017, ICC-02/11-01/15-T-189-ENG; transcript of the hearing, 11 October 2017, ICC-02/11-01/15-T-201-Red2-FRA; transcript of the hearing, 6 December 2017, ICC-02/11-01/15-T-217-Red-FRA; transcript of the hearing, 7 December 2017, ICC-02/11-01/15-T-218-Red-FRA; transcript of the hearing, 17 January 2018, ICC-02/11-01/15-T-219-FRA; transcript of the hearing, 19 January 2018, ICC-02/11-01/15-T-220-Red-FRA.

[88] *See* report, CIV-OTP-0059-0121 at 0133, para. 9; report, CIV-OTP-0059-0367 at 0382, para. 9; report, CIV-OTP-0059-0310 at 0323, para. 9; report, CIV-OTP-0059-0148 at 0160, para. 6; report, CIV-OTP-0059-0285 at 0296, para. 10; report, CIV-OTP-0059-0201 at 0214, para. 11; report, CIV-OTP-0059-0230 at 0242, para. 9; report, CIV-OTP-0059-0174 at 0183, para. 10. *See* also report, CIV-OTP-0059-0094 at 0103, para. 6.1; report, CIV-OTP-0059-0068 at 0080, para.13.

and 'the calibre of the mortars used', as well as 'whether the destruction and/or injuries visible on video CIV-OTP-0042-0593 are compatible with such shelling'; this more than two years after the alleged events, in an area which had never benefited from cordoning off or any other form of measure aimed at preserving the intactness of the site for forensic purposes. His conclusion was that 'given all the examined circumstances surrounding the four impact sites visited it is highly likely that they were subject to attack by a heavy cased high explosive ammunition item and this was most likely a 120mm mortar system variant',[89] although under the blanket caveat that 'when viewed in isolation, each of the visited subject areas remains inconclusive of the root cause of the event'.[90] It should have been obvious that, in light of the circumstances, and irrespective of whether the material made available by the Prosecutor might or might not have influenced this conclusion,[91] such report would indeed remain 'inconclusive' both as to the identification of the author(s) of the shot and as the underlying motives.

30. Expert Witnesses P-0564 and P-0585, forensic pathologists, were jointly tasked with undertaking and reporting on forensic examinations of 8 victims, allegedly of the 17 March market shelling, on the basis of their respective medical reports and to '*expliquer leur décès*', as well as to '*faire toute remarque utile à la manifestation de la vérité*'.[92] They noted that 'each of the bodies was very badly decomposed and either fully or partially reduced to a skeleton', and tentatively concluded that this 'would fit with death having occurred in 2011 i.e. almost 4 years previously, although equally it could have been substantially before or after this'; also in light of the time elapsed since the alleged events, and the ensuing state of the corpses, however, they clarified that 'assessment of injuries was based entirely on examination of the skeleton, with any injuries to the skin, soft tissues and internal organs clearly no longer visible' and 'it was sometimes not possible to be certain

[89] Report, CIV-OTP-0049-0048 at 0050.

[90] Report, CIV-OTP-0049-0048 at 0049.

[91] *See* transcript of the hearing, 30 June 2017, ICC-02/11-01/15-T-169-Red2-ENG, p. 97 lines 16 to 22: PRESIDING JUDGE TARFUSSER: [15:55:18] I would have, following this, I would have asked you at the end, but I do it now, if you had not--I know it's difficult to think in these terms, but I try nevertheless. If you had not read the witness statements, and if you wouldn't have had the other information on paper which was given to you by the Office of the Prosecutor, would you have come to the same conclusions?

THE WITNESS: [15:55:53] Yes, sir, I believe that I would have done'.

[92] Letter of mission, CIV-OTP-0077-0049.

whether particular fractures were the result of missile damage or blunt force […] or even to be sure that they had not occurred after death, a possibility which had to be considered given the known previous handling of the remains'.[93] Most significantly, in quite a blow to the results likely to be expected from the Prosecutor, they noted the following: 'Given that these were said to have been victims of a shelling attack, it was anticipated that most or all might have blast injuries from an explosive device, and that residual shrapnel might be found in their remains'; however, 'no shrapnel was found in any of them'; only two, maybe three, out of them had what 'appeared to be blast injuries', in one case not necessarily fatal, but 'there was no convincing evidence in any of the others', who showed injuries rather likely to result from a variety of traumas other than shelling, such as 'typical high velocity gunshot injuries'; 'blows from a heavy weapon' or 'from a sharp weapon such as a machete'[94].

31. As many as six letters of mission[95] were necessary to have Witness P-0583, an OTP forensic expert, examine a number of locations alleged as having been the theatre of some of the alleged crimes (in particular, the mosque in connection with the 25-28 February 2011 incident; the Carrefour Djeni Kobenan, the Carrefour de la Vie, the RTI building, the Carrefour Banco) and to '*recueillir des éléments de preuve susceptibles de confirmer ou infirmer des informations*' relating to the respective incidents, as well as analysing some pictures and videos of relevant locations authored by other witnesses, in particular with a view to determining whether they might have been tampered with. The activity carried out by this expert resulted in a series of reports[96] consisting of little more than '*vues panoramiques*' of the relevant locations at the time of the site visit in 2015, as well as in a 52-page report on the forensic analysis of the video related to the 3 March incident[97], noting the lack of 'obvious

[93] Report, CIV-OTP-0077-0002 at 0005, 0006.

[94] Report, CIV-OTP-0077-0002 at 0006.

[95] Report, CIV-OTP-0076-1952 at 2083; Report, CIV-OTP-0084-4253 at 4294; Report, CIV-OTP-0084-4305 at 4350; Report, CIV-OTP-0084-4361 at 4404; Report, CIV-OTP-0083-1419 at 1467; Report, CIV-OTP-0089-1030 at 1088.

[96] *See* in particular a 123-page report on the Sicogi-Lem mosque in Yopougon, Abidjan, containing the 'conclusion' that, among all the items gathered, there was one 'chemise de projectile' which was 'compatible' with a 7,62x39 calibre (Report, CIV-OTP-0076-1952 at 2074); a 35-page report on the Carrefour Djeni Kobenan (Report, CIV-OTP-0084-4253); a 39-page report on the Carrefour de la Vie and the RTI building (Report, CIV-OTP-0084-4305); a 37-page report on the Carrefour Banco in Abobo (Report, CIV-OTP-0084-4361); a 20-page report (Report, CIV-OTP-0083-1419) addressing locations appearing in picture CIV-OTP-0051-2106 and video CIV-OTP-0083-1394.

[97] Video, CIV-OTP-0077-0411.

visual and/or audible signs of editing/manipulation/tampering of the video file'[98]. This result was also reached by Witness P-0606, a digital forensic technical manager whose report[99] detailed the methodology used in addressing the Prosecutor's request to produce an enhanced copy of the video[100] and concluded that the original video footage was 'authentic' as a necessary step to comply with his main task[101].

32. Witness P-0584, an 'OTP scientific response unit' staff member, was mainly[102] tasked with determining whether material relating to the death of an alleged victim of the 17 March 2011 incident would assist in the identification of the identity of said victim and of the circumstances of his death; his conclusion was that there was no element suitable to cast doubt on the hypothesis of the Prosecutor[103].

33. Witness P-0601, a forensic expert DNA scientist, was tasked with analysing samples of human remains provided by the Prosecutor and with 'conduct[ing] DNA kinship analysis with other previously established DNA profiles from reference samples from twelve persons who miss their relatives'.[104] His report – in a revised and corrected version containing 'adjustments' aimed at remedying 'a number of errors' identified in the first version[105] – notes that only the remains from three bodies (out of sixteen) showed a familial match with the relatives' reference samples; the other victims 'could not be matched to any of the biological relatives of missing persons';[106] from the remains of one body was not possible to obtain a DNA profile[107]; in one case, the human remains belonged to a male[108]; the relatives of three of the alleged victims 'could not be linked to any of the fifteen profiled human remains'[109].

[98] Report, CIV-OTP-0089-1030 at 1080.

[99] Report, CIV-OTP-0082-0341, dated 29 April 2015.

[100] Letter of mission, CIV-OTP-0082-0347.

[101] P-0606, transcript of the hearing, ICC-02/11-01/15-T-163-ENG, p. 23 line 5 to p. 24 line 12.

[102] He also liaised with Witness P-0601 in connection with some mistakes he would have identified in the latter's report: *see* Report, CIV-OTP-0084-3939 at 3941.

[103] Report, CIV-OTP-0084-4416 at 4424.

[104] Report, CIV-OTP-0084-3930 at 3932; Report, CIV-OTP-0083-1482 at 1484; Report, CIV-OTP-0086-1261 at 1264.

[105] Report, CIV-OTP-0084-3930 at 3931.

[106] Report, CIV-OTP-0084-3930 at 3936.

[107] Report, CIV-OTP-0086-1261 at 1267.

[108] Report, CIV-OTP-0084-3930 at 3935.

[109] Report, CIV-OTP-0084-3930, at 3936.

Additional analyses on some of the remains were requested by the Prosecutor in light of 'the possibility of commingling of remains'[110] yielded similarly inconclusive results.[111]

34. Witness P-0601 was also requested to analyse biological samples and a T-shirt allegedly worn by a victim having died in the context of the 3 March incident[112]. After noting the 'remarkably good condition [of the T-shirt] given the information received, i.e., that it had been buried for a number of years'[113], the report indicated that (i) no trace of blood was detected on the garment; (ii) no conclusion could be advanced as to the identity of the person that might have worn the T-shirt; (iii) the damage observed was caused by tearing of the fabric and (iv) no indication existed to the effect that a sharp item might have been involved, or that it might be the result 'of proximity to an explosion'.[114]

35. I decided to discuss the 'expert witnesses' to this level of detail with a view to allowing the reader to realise that a significant part of this trial was wasted in debating matters or documents of little, if any, significance to the charges, in spite of them having been tendered into evidence in great quantities (on the basis of which it has been constantly said – including by the defence teams for the purposes of obtaining extension of delays[115] – that this was a trial of 'exceptional breadth and complexity'). A mass of papers, pictures, videos and other documentary items, or a legion of witnesses, does not make a trial complex, any more than the number of pages or the type of graphics make a book a good or a bad one; what matters is obviously the content and the quality of the material, as well as its relevance to the issue at stake.

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[110] Report, CIV-OTP-0083-1482 at 1484,. *See* also P-0584, Report, CIV-OTP-0084-3939 at 3941.

[111] Report, CIV-OTP-0083-1482 at1486; Report, CIV-OTP-0086-1261 at 1264.

[112] Report, CIV-OTP-0086-0568.

[113] Report, CIV-OTP-0086-0568 at 0572.

[114] Report, CIV-OTP-0086-0568 at 0574-0576.

[115] Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande aux fins de clarification de la 'Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters' rendue par la Chambre de première instance I le 11 mars 2015 (ICC-02/11-01/11-810), 27 March 2015, ICC-02/11-01/15-14; Defence for Mr Blé Goudé, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Defence Request for an extension of time for its response to the "Prosecution's application for the introduction of video evidence under paragraphs 43-44 of the directions on the conduct of the proceedings and notice that it will not call Witness P-0541 to testify", 4 August 2017, ICC-02/11-01/15-1000; transcript of the hearing, 14 June 2016, ICC-02/11-01/15-T-50-Conf-FRA, p. 91 line 15 to p. 92 line 17; E-mails received on TCI Communications on 6 March 2017; 8 May 2017, 10 January 2018 and 28 March 2018.

36. The defence teams have challenged the experts and their reports in respect of an ample spectre of issues, ranging from the adequacy of the expert qualifications[116] (including by means of the *voir dire* procedure, which is extraneous to the ICC statutory framework) to the feasibility and plausibility of the time span allowed for the expertise, and the length (or the absence)[117] of notice given by the Prosecutor *vis-à-vis* its implementation; their questioning of the experts bore on topics ranging from elementary notions of DNA,[118] to best scientific practices and technology in the area of DNA profiling, to the importance of ISO certification standards for forensic laboratories, to procedures in report-drafting. While I do have some sympathy for some of those challenges, I should observe that the primary reason for objecting to having these experts on the record (and testify in the courtroom) consists in their irredeemable unsuitability to meaningful contribute to the trial by way of compelling conclusions which would be of any use to the Chamber. The time elapsed between the alleged events and the time of the expertise, in the absence of any measure of preservation on the relevant objects and notwithstanding the efforts of the experts and irrespective of their professionalism, made it *per se* inconceivable that anything suitable to be defined as 'evidence' might result from their activities; at best, their contribution would consist in 'confirming', by way of a non-committal formula of 'compatibility', that yes, some people had indeed suffered from violent death or injuries and that yes, sites in Abidjan might well have been targeted by weapons of the type evoked by the Prosecutor in the context of the post-electoral crisis. They would, however, leave the Chamber as in the dark about the details of the incidents as it would have been in the absence of such expertise; at worst, should the answer to the

[116] P-0606, transcript of the hearing, 30 May 2017, ICC-02/11-01/15-T-163-ENG, p. 15 line 23 to p. 21 line 18, p. 27 line 17 to p. 40 line 19; P-0411, transcript of the hearing, 29 June 2017, ICC-02/11-01/15-T-168-Red2-ENG, p. 60 line 17 to p. 61 line 21; transcript of the hearing, 30 June 2017, ICC-02/11-01/15-T-169-Red2-ENG, p. 27 line 10 to p. 37 line 13; p. 88 line 12 to p. 95 line 1; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Requête aux fins que le témoin P-0583 ne soit pas considéré comme témoin expert, 31 August 2017, ICC-02/11-01/15-1016; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Requête afin que le témoin P-0584 ne soit pas considéré comme témoin expert, 5 October 2017, ICC-02/11-01/15-1048.

[117] Witness P-0411's letter of mission bears a date subsequent to the beginning of the mission: *see* Letter of mission, CIV-OTP-0049-0051 and P-0411, transcript of the hearing, 30 June 2017, ICC-02/11-01/15-T-169-Red2-ENG, p. 45 line 7 to p. 46 line 17.

[118] P-0601, transcript of the hearing, 29 May 2017, ICC-02/11-01/15-T-162-ENG, p. 55 line 7 ff.

queries be in the negative (as it indeed happened)[119], they would only have contributed to further undermine the overall credibility and plausibility of the Prosecutor's case.

37. In my view, the very wording, subject matter and overall circumstances of the missions made this situation entirely foreseeable and, accordingly, suitable to be prevented from materialising by way of adopting appropriate measures in the context of the preparation of the trial. It is certainly the responsibility of the Prosecutor to have chosen to proceed with this kind of expertise; the fact of having not only 'admitted' such reports, but even allowed their respective authors to come and take the stand, as if what they could say in the courtroom might have somehow make their reports more useful or insightful, constitutes the result of inadequate preparation of the trial.

38. Based on the above, it is my belief that, had serious preparatory work of this kind been conducted before the opening, the trial could have certainly been more expeditious.

C. The charge as the core of criminal proceedings: irrelevance of the 'other episodes'

39. I will start by addressing the core of any criminal trial: the charge. This consists of (i) the description of the alleged criminal conducts in such level of detail as to allow the accused to defend him- or herself; (ii) the timeframe in which such conducts have occurred; (iii) and their legal characterisation. In line with the statutory provisions, it is the role of the Prosecutor to formulate the charges as resulting from the investigation and of the Pre-Trial Chamber to draw the boundaries of each case sent to trial by way of the decision confirming the charges in whole or in part. Accordingly, my unique term of reference have always been the charges as confirmed by the confirmation decisions, for Mr Gbagbo[120] and for Mr Blé Goudé,[121] and, more

[119] *See* Witness P-0601's reports CIV-OTP-0084-3930, CIV-OTP-0083-1482 and CIV-OTP-0086-1261; Witnesses P-0564 and P-0585's report on forensic examination of eight alleged victims of the 17 March incident (CIV-OTP-0077-0002).

[120] Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Conf (a public redacted version was filed on the same day).

[121] Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186.

specifically, their respective Section 4 (paragraphs 266-278 for Mr Gbagbo; paragraphs 182-194 for Mr Blé Goudé).

40. The need to firmly keep hold of these paragraphs as the sole reference is not only mandated by the relevant texts, but also made all the more acute by the fact that the confirmation decision as a whole, whilst far from perfect, remains to this day by far the only document from which one may evince with some degree of precision the substance of what the Prosecutor charged Laurent Gbagbo and Charles Blé Goudé with. It would indeed be very difficult to carve out this substance from any other of the documents subsequently filed by the Prosecutor throughout the trial: all of these (in particular, the pre-trial brief,[122] the Trial Brief[123] and the response to the defences motions for termination of the proceedings and acquittal[124]) strike for the degree to which they are lacking in structure, organisation and clarity, a lack compounded by their overall repetitiousness, circularity and redundancy. Needless to say, none of these flaws is papered over by the staggering size of the submissions or of the number of footnotes; quite the contrary. Time and time again, to the eyes of those who bother to take a close look and to double-check, many apparently substantive footnotes emerge as significantly flawed. I will limit myself to the following examples:

i. some are a mere compilation and stacking of references: for example, footnotes 382 and 439 of the (confidential version of the) Pre-Trial Brief contain multiple references to different sections of the transcripts of interview of one and the same witness, which are scattered in the footnote instead of being grouped;

ii. some references overlap with and are duplicative of others appearing within the same footnote: for example, in footnote 49 of the Pre-Trial Brief the same

[122] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's Pre-Trial Brief, 16 July 2015, ICC-02/11-01/15-148-Conf-Anx2-Corr *annexed to* Prosecution Pre-Trial-Brief (a public version without footnotes was filed on the same day; a public corrected version of both the public and confidential versions was filed on 28 July 2015).

[123] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 of Prosecution's Mid-Trial Brief, 19 March 2018, ICC-02/11-01/15-1136-Conf-Anx1-Corr3, *annexed to* Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124) (three confidential corrected versions were filed respectively on 29 March, 8 and 13 June 2018; a public corrected version was filed on 29 March 2018).

[124] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, *annexed to* Prosecution's Response to Defence No Case to Answer Motions (a first and a second public redacted versions were filed respectively on 28 September and 8 November 2018).

reference appears two times for Witnesses P-0009 and P-0226; three times for Witnesses P-0238, P-0239; in footnote 435, the same reference appears seven times for Witness P-0238, four times for Witnesses P-0239 and P-0226, three times for Witnesses P-0009, two times for Witnesses P-0316; P-0045; P-0321, P-0010, P-0330[125];

iii. some footnotes are neutral in respect of the matter addressed in the paragraph to which they are appended: paragraph 102 of the Trial Brief states that there was 'no real need to requisition the armed forces: according to Witness P-0010, CECOS Commander General Georges Guiai Bi Poin, the security situation during the first round of the election was calm, and despite some frictions after the first round, the situation did not deteriorate to the point of requiring a requisition'. However, no link between the requisition of the armed forces and Witness P-0010's personal appreciation of the security situation at the relevant time can be found in the referenced section of the testimony: on page 47 of the relevant transcript, Witness P-0010, asked whether the requisitioning had taken him by surprise, states as follows: '*Le chef d'état-major des armées de Côte d'Ivoire est un très haut responsable— un très haut responsable, j'insiste dessus—, qui apprécie la situation. Et par rapport à ça, lui aussi, à son niveau, il fait des propositions à ses chefs ... si la situation qu'il analysait, il estimait que les effectifs de la gendarmerie et la police ne pouvaient pas permettre au CCI d'assurer une couverture convenable des élections, du processus électoral, il lui était tout à fait loisible de faire des propositions à ses chefs*'[126]; as noted in the Reasons, 'such a statement is not in and of itself determinative of whether the requisition was necessary or not'[127]. Similarly, paragraph 155 of the Pre-Trial brief takes Witness P-0010's testimony in support of the statement affirming an attack by BAE and CECOS: at that juncture, however, Witness P-0010 was not only tentative as to the identification of the mission referred to by the questioner,

[125] *See* also footnotes 44, 47, 309, 327, 416, 436, 552, 635 in the Pre-Trial Brief, where similar overlapping and duplicating references appear.

[126] P-0010, transcript of the hearing, 28 March 2017, ICC-02/01-01/15-T-138-Red2-FRA, p. 47 line 21 to p. 48 line 1.

[127] Reasons, para. 277.

but certainly adamant in stating that, starting from 4 December 2010, Abobo had become '*très, très hostile*'[128];

iv. a disturbing number of footnotes refers to a statement, transcript or other item which goes into the opposite direction than the point the footnote is meant to support: paragraph 68 of the Trial Brief states inter alia that, on 24 February 2011, during a meeting held at the Presidential palace, 'a proposal to declare Abobo a war zone was raised and not adopted, and […] GBAGBO instructed the FDS to do everything to hold on to Abobo and liberate the N'Dotré roundabout'; the testimony of Witness P-0010 is referenced twice in support of this statement. However, in the referenced section, Witness P-0010 states '*Moi, je ne me rappelle pas, de ce que le Président a dit dans… sur le carrefour N'Dotré*',[129] as well as the following: '*Ensuite, le Président nous a donné des…des instructions en disant: «Renforcez, continuez à tenir, renforcez vos dispositifs, continuez à tenir Abobo. Tenez Abobo ». Donc, ce sont les instructions de nature défensive que nous avons reçues, parce qu'il«faut-il» préciser que, dans cette phase, nous avons toujours été en position défensive. Jamais, nous n'étions pas ceux qui prenaient l'initiative d'attaquer. Nous étions toujours en train de défendre nos positions. Et donc, ce sont ces… ces instructions de tenir que le Président nous a données*';[130] no reference here to the President having instructed the FDS 'to do everything to hold on to Abobo'. Similarly, paragraph 358 of the Trial Brief states that 'demonstrators saw pro-GBAGBO elements opening fire and throwing fragmentation grenades at demonstrators who refused to leave, killing and wounding many'; in the testimony referenced to, Witness P-0010 answered the question as to whether he had received instructions on how to deal with the marchers by saying '*[…] j'ai reçu des instructions du chef d'état-major: le lieu, la mission. Donc, j'appelle le commissaire qui devait diriger le petit détachement, et j'ai pas pris au hasard, j'ai pris quelqu'un de très expérimenté pour conduire ce détachement, et il sait parfaitement «que» le*

[128] P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 65 line 12 to 16.

[129] P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 83 line 25 to 26.

[130] P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 83 lines 15 to 21.

type de consignes que nous avons l'habitude de donner à nos hommes en pareilles circonstances. Les armes qui ont été utilisées, les armes létales, je veux dire, doivent être utilisées dans le cadre de la légitime défense. L'objectif, c'est de faire en sorte que les manifestants n'atteignent pas le carrefour de la Vie, c'est ça, l'objectif, en les repoussant, en les repoussant à l'aide de grenades qui étaient à leur disposition et en se protégeant avec leurs boucliers, ce qu'ils ont fait'.[131] Again, paragraph 472 of the Trial Brief refers to Witness P-0010's testimony in support of the statement to the effect that the FDS 'had evidence implicating the FDS in the [3 March] incident': at the referenced point, Witness P-0010 said is that the only information available to them were press reports ('*Nous nous sommes…nous nous sommes retrouvés à l'état-major pour parler, mais la marche était terminée, et c'est les conséquences qui étaient dans toute la presse nationale et même internationale. C'est donc cette conséquence-là que le CEMA, c'est-à-dire les informations qui étaient dans la presse nationale et la presse internationale, comme quoi les femmes avaient été tuées, c'est cette conséquence-là que le CEMA était en train de nous expliquer, qu'il n'avait pas encore d'informations précises, mais qu'il faisait des pieds et des mains pour qu'il y ait des investigations. Mais comme la zone était hostile, personne ne pouvait accéder facilement à la zone, donc il avait des difficultés pour avoir des informations beaucoup plus fiables par rapport à ce que nous avions appris dans la presse*'[132] and '*[le CEMA] n'avait pas suffisamment d'éléments sur les événements*'[133]);

v. in some cases, the very same paragraph appears more than once[134] and mistakes continue to appear notwithstanding the filing of corrected

[131] P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 21 line 2 to 11.

[132] P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 104 line 15 to 24.

[133] P-0010, transcript of the hearing, 30 March 2017, ICC-02/11-01/15-T-140-FRA, p. 4 line 19 to 20)

[134] *See*, for example, the following paragraphs of the 'Response to the Defence No Case to Answer': paras 487, 536 and 589; paras 1109(iii) and 1212; paras 1126(xi), 1315, 1337 and 1342; para. 1160, whose content partially appears in paras 1598 and 1600; paras 1178 and 1483; paras 1185 and 1724; paras 1283, 1286 and 1289; and para. 1310, whose content partially appears in paras 1191(i) and 1161. Even when the Prosecutor expresses the same concept with different words in the text, footnotes appear more than once, for example footnote 1461, whose content is the same of footnotes 3415, 5681 and

versions;[135] in some others, the corrected versions contain mistakes that do not appear in the original.[136]

41. The approach taken by both the Prosecutor and the Pre-Trial Chamber in the matter of the 'other incidents'– and its evolution as the case progressed from one stage to the other – represents a good example of the level of legal and conceptual confusion which has blurred this case from the beginning, with particular reference to the notions of essential facts, material facts and evidence, also highlighted by the Defence for Mr Gbagbo[137].

42. First, it was the Prosecutor's original choice to leave those incidents outside the scope of the charges. The role attributed to the 'other incidents' in the context of the Document containing the charges[138] was so unclear that the issue became relevant in the context of interlocutory appeals proceedings certified on the issue as to the evidentiary threshold to be met in respect of the incidents alleged as constituting an attack against the civilian population[139]. The Appeals Chamber, in confirming the Pre-trial Chamber's finding to the effect that, for the purposes of confirmation of the charges, all the incidents relied upon in order to establish an attack against a civilian population must be proven to the standard of proof set forth in article 61(7) of the Statute, noted that since the other 41 incidents were set forth 'in a chronological narrative that include[d] the four Charged Incidents, without making a distinction between them and the other 41 Incidents in terms of their relevance in establishing the 'attack'', and, accordingly, confirmed that those 41 incidents were to be considered

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5690; or footnote 1877, whose content appears other fifteen times in footnotes 2163, 2171, 2193, 2502, 2504, 3079, 3192, 4408, 4503, 4839, 5308, 5367, 5702, 5827 and 2989.

[135] *See*, for example, para. 195, footnote 572 of the Trial Brief, linking Witness P-0010 with a transcript containing the testimony of Witness P-0046.

[136] *See*, for example, footnotes 357, 358, 359, 360, 361, 362 and 363 of the Trial Brief, from where references initially appearing were deleted in the third and last 'corrected' version.

[137] Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo*, Réponse de la défense au "Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges' (ICC-02/11-01/11-474)", 20 September 2013, ICC-02/11-01/11-509, paras 57-59.

[138] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo*, Document amendé de notification des charges, 17 January 2013, ICC-02/11-01/15-357-Conf-Anx1, *annex to* Soumission de l'Accusation du Document amendé de notification des charges, de l'Inventaire amendé des éléments de preuve à charge et des Tableaux amendés des éléments constitutifs des crimes, paras 20-29.

[139] Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 16 December 2013, ICC-02/11-01/11-572; *see*, in particular, paras 42 and following where the Appeals Chamber exposes the contradictions and inconsistencies of the document containing the charges.

as part of the factual allegations relied upon by the Prosecutor to prove the attack against the civilian population.

43. Second, there is no trace of the 'other incidents' in the section of the decision on the confirmation of the charges entitled 'Facts and circumstances described in the charges confirmed by the Chamber', either for Mr Gbagbo or for Mr Blé Goudé. The Pre-Trial Chamber, however, unfortunately retained a significant margin of ambiguity by stating, in the context of its analysis of the evidence and in a section entitled 'other acts'[140], that 'numerous violent acts were committed against the civilian population within the context of a number of incidents which occurred in Abidjan during the post-election crisis'; in the Gbagbo confirmation decision (recalled by the Blé Goudé confirmation decision)[141], it identified those incidents, which, in its view, were 'substantiated by evidence with a sufficient level of specificity'[142].

44. Third, at various stages of the proceedings, the Prosecutor reiterated that the 'four charged incidents alone, in and of themselves, are sufficient to establish the existence of a widespread and systematic attack against the civilian population' in light of their characteristics[143]. She did so in her submissions following the Confirmation hearing[144], and then in the Pre-Trial Brief[145], the Trial Brief[146] and in the

[140] Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Conf (a public redacted version was filed on the same day), paras 73-77.

[141] Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186, paras 52-55.

[142] Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Red, para.73.

[143] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo*, Prosecution's submission on issues discussed during the Confirmation Hearing, 14 March 2013, ICC-02/11-01/11-420-Conf (a public redacted version was filed on 21 March 2013), para. 30.

[144] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo*, Prosecution's submission on issues discussed during the Confirmation Hearing, 14 March 2013, ICC-02/11-01/11-420-Conf (a public redacted version was filed on 21 March 2013), para. 30.

[145] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's Pre-Trial Brief, 16 July 2015, ICC-02/11-01/15-148-Conf-Anx2-Corr *annexed to* Prosecution Pre-Trial-Brief (a public version without footnotes was filed on the same day; a public corrected version of both the public and confidential versions was filed on 28 July 2015), para. 359.

[146] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 of Prosecution's Mid-Trial Brief, 19 March 2018, ICC-02/11-01/15-1136-Conf-Anx1-Corr3, *annexed to* Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124) (three confidential corrected versions were filed respectively on 29 March, 8 and 13 June 2018; a public corrected version was filed on 29 March 2018), para. 152.

written response to the Defence motions.[147] And yet, on January 2016, when opening her case before the Trial Chamber, the Prosecutor chose to address as many as '45 incidents […] [in order to] give a picture of the reality on the field by the repetitive nature of the attacks, the modus operandi, including identity checks at roadblocks and other such incidents as immolations'.[148]

45. Against this background, the fact that the Pre-trial brief, the Trial brief and the Prosecutor's written and oral response to the Defence's motions devote respectively 17, 20 and 56 pages to the 'other incidents' does not come as a surprise. It is extremely unfortunate that the opportunity to dispel the fog blurring the contours of the case because of lack of clarity as to the role of the other incidents was missed in the context of the preparation of the trial. The Chamber could, and should, have clarified at that stage that, in light of the extraneousness of those incidents to the charges – and hence to the core of the trial - they should not become the subject matter of either the evidence tendered by the Prosecutor or of the forthcoming testimonies. Instead, the ambiguity continued to hover above the trial; as a consequence, I always hesitated before and often refrained from cutting short lines of questioning deviating from the four charged incidents, as I would otherwise have felt necessary to do. One example will suffice to illustrate the point: the 1-2 December 2010 incident at the RDR headquarters in Wassakara was addressed in no less than

[147] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, *annexed to* Prosecution's Response to Defence No Case to Answer Motions (two public redacted versions were filed respectively on 28 September and 8 November 2018), para. 234.

[148] Transcript of the hearing, 20 February 2013, ICC-02/11/01/11-T-15-Red-ENG, p. 38 line 7 to 13.

four testimonies (P-0046[149], P-0011[150], P-0440[151] and P-0009[152]), and even featured in the Prosecutor's oral response to the defence motions for acquittal.[153]

46. In light of their extraneousness to the subject matter of the trial, it is unnecessary for me to discuss in detail the Prosecutor's contention that, while the contextual elements are established to the requisite standard,[154] 'it is the course of conduct involving the multiple commission of article 7(1) acts […] that needs to be established to the required standard. The individual acts themselves, do not need to be established to this standard, and indeed less so the incidents within which they were committed.'[155] This contention has already been exposed as a mistake, both by the Pre-trial Chamber when adjourning the hearing[156], and by the Appeals Chamber in the appeals brought against that decision[157]: at the time, the PTC had clarified that that there is 'no reason to apply a more lenient standard in relation to the incidents purportedly constituting the contextual element of an 'attack' for the purposes of establishing the existence of crimes against humanity […] each incident underlying

[149] P-0046, transcript of the hearing, 16 February 2017, ICC-02/11-01/15-T-124-Conf-FRA, p. 78 line 15 to p. 86 line 9.

[150] P-0011, transcript of the hearing, 10 March 2017, ICC-02/11-01/15-T-132-FRA, p. 78 line 25 to p. 87 line 6; transcript of the hearing, 14 March 2017, ICC-02/11-01/15-T-135-Red2-FRA, p. 85 line 4 to 17.

[151] P-0440, transcript of the hearing, 11 May 2017, ICC-02/11-01/15-T-157-Red2-FRA, p. 3 line 6 to p. 15 line 18; transcript of the hearing 12 May 2017, ICC-02/11-01/15-T-158-Red2-FRA, p. 10 line 16 to p. 21 line 7; p. 25 line 16 to p. 46 line 10; p. 75 line 15 to p. 82 line 27; p. 88 line 10 to p. 92 line 26.

[152] P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 85 line 22 to p. 88 line 8.

[153] Transcript of the hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red2-ENG, p. 31 line 4 to 20; p. 70 line 12 to 15.

[154] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, para. 229, *annexed to* Prosecution's Response to Defence No Case to Answer Motions (a first and a second public redacted versions were filed respectively on 28 September and 8 November 2018).

[155] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, para. 233, *annexed to* Prosecution's Response to Defence No Case to Answer Motions (a first and a second public redacted versions were filed respectively on 28 September and 8 November 2018)

[156] Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, paras 19-23.

[157] Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 16 December 2013, ICC-02/11-01/11-572, paras 36-48.

the contextual elements must be proved to the same threshold that is applicable to all other facts'; the difference between crimes that underlie a suspect's individual criminal responsibility and crimes being committed as part of incidents which only establish the relevant context consists in the need that the former only 'must be linked to the suspect personally, whereas incidents proving the contextual circumstances do not require such an individualised link'[158].

47. The contextual elements of the crimes falling within the jurisdiction of the Court are not accessory elements, or items one can include or disregard at whim, with no impact on the charge; they are constitutive elements of the crimes, enjoying the same dignity and status as each of the elements specific to each of the individual crimes included in the categories of war crimes and crimes against humanity. As such, they need to be proven to the same standard as any other constitutive element: at trial, this must mean that they must be proven beyond reasonable doubt. In the case of crimes against humanity, the existence of an attack against a civilian population consisting of 'a course of conduct involving the multiple commission of acts […] pursuant to or in furtherance of a State or organisational policy to commit such attack' is the very essence and heart of the crime; the one element singling out the acts listed in article 7 from the corresponding ordinary crimes and bringing them within the boundaries of the Court's jurisdiction. It cannot be that this very element is made up of events not clearly singled out in the charges, or that a weaker standard of evidence is applicable in determining whether the Prosecutor has or not satisfied her burden of proof in respect of such element.

48. I agree that the evidence brought in support of all of the incidents featuring in the Response is weak and flawed, be it because of the unreliability of the sources they are based upon, the lack of precision in their description, the arbitrariness of ascribing the responsibility for them to a specific faction in the absence of reliable information to do so, and sometimes of all of these ills together. I also agree that, as stated in the Reasons, '[i]t is not entirely clear how the evidence for the 20 uncharged incidents is capable of corroborating the evidence for the five charged incidents. They are all discrete events that took place at different times and place and involved different

[158] Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, para. 22.

alleged perpetrators and victims'[159]. However, I believe that the first, fundamental and decisive reason making it impossible to rely on any of these incidents – and the ensuing absence of the need to look at them and at the evidence tendered in their support in any detail – is that they all fall outside the scope of the charges.

49. In the same perspective, it should have been clarified at the outset that the charges would also have shaped the temporal scope of the trial, namely by restricting it to the post-electoral crisis, or its imminence: facts falling outside of this window, as well as evidentiary items purportedly in support, would have been considered irrelevant. In all likelihood, this would have resulted in more focussed debates in the courtroom, as well as in avoiding the submission of hundreds of documents showing a link to the charged events which, at best, was tenuous.

D. The need for a link between the charged facts and the accused

50. In line with what said when writing separately in the *Abu Garda* case,[160] it is imperative for a criminal conviction to establish a link between the charged facts and the person accused of being responsible for them. If no such link can be established, it is a waste of time and resources and an unnecessary exercise of the judicial function to proceed and analyse all the other constitutive elements of the charged crimes: irrespective of the outcome of this exercise, this would and could never result in convicting the specific person accused. Moreover, making unnecessary determinations would create a risk of undue pre-judgement in the event that charges relating to or connected with the same set of events were brought against a different individual. This point seems to me of particular significance in a scenario such as the situation in Ivory Coast, where the Prosecution has repeatedly stated – including throughout the trial – that it has opened a separate investigation, the territorial and temporal scope of which coincides to a large extent with the one of this case and where it cannot therefore be excluded that proceedings bearing on the same set of facts, whether in whole or in part, might be brought against a different set of individuals in the future.

[159] Reasons, para. 1388.

[160] Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, Separate opinion of Judge Cuno Tarfusser to the Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red.

51. It is certainly true, as pointed out in the Reasons, that the Prosecutor, not being able to rely to 'almost any direct evidence for her version of events […] has advanced an elaborate and multi-facetted evidentiary argument that is built almost entirely upon circumstantial evidence',[161] where her central factual proposition – the existence of a common plan and/or a policy – 'must be inferred from the totality of the available evidence on record',[162] in a vortex of circularity, self-reference and repetition that has not made the Chamber's task any easier; indeed, it has made it an extraordinarily 'cumbersome and time-consuming task'[163]. However, I am not ready to conclude that, when it came to encapsulating the Chamber's reasoning in a text, this had necessarily to translate in a text of such length as the Reasons; indeed, I wonder to what extent a text of this magnitude can either 'avoid […] repetitiveness' or remain 'easy to follow'[164].

52. Accordingly, I would only have focussed on the acts and conducts imputed by the Prosecutor to the accused and discussed the evidence which, in the Prosecutor's submission, would prove those acts and conducts; more specifically, I would have singled out the elements relied upon by the Prosecutor in alleging the existence of a common plan 'to stay in power at all costs', and pointed out the evidence which either negated those conducts (or at least raised serious doubts on them, whether as regards their occurrence or as their meaning), or rather pointed to a very different reading. Simply stated, there is no support in the evidence that Laurent Gbagbo would have 'refused to step down' because his plan was 'to stay in power at all costs', that this plan included the commission of crimes against the civilian population and that the FDS and other armed groups would be instrumental to carry out such plan; conversely, many elements surfaced from the Prosecutor's own evidence, be it testimonial or documentary, which simply suggested a narrative drastically other than her own. Among many (comprehensively addressed in the Reasons), few examples will suffice.

[161] Reasons, para. 78.

[162] Reasons, para. 85.

[163] Reasons, para. 89.

[164] Reasons, para. 89.

53. In the Trial Brief,[165] the testimony of Witness P-0010 is referenced as supporting the statement 'before and during the election campaign of 2010, speeches by GBAGBO emphasised his intention to stay in power by all means', in particular Mr Gbagbo's use of the expression '*Si je tombe, vous tombez*'.[166] When asked about his understanding of this statement Witness P-0010 stated the following: '*Pour moi, un soldat a un devoir de loyauté vis-à-vis des autorités. Et pour moi, c'est une incitation adressée à nous, soldats, et continuer à être des soldats loyaux vis-à-vis de l'autorité*'.

54. Laurent Gbagbo's use of the slogan '*On gagne ou on gagne*' during the electoral campaign is likewise used as a sign of his purported 'intention' not to step down in spite of the results of the vote. This element, noted since the confirmation stage, still features in the Prosecutor's Trial Brief[167] as 'mean[ing] that GBAGBO and his supporters would not accept defeat or the election of any other candidate'. However, witnesses in the courtroom (i) clarified that it was a simple electoral slogan, based on a popular song (so popular that also Madame Dominique Ouattara, the current First lady, also happened to dance to its tune[168]) aimed at infusing confidence and optimism in the electorate as to the chances that their side could ultimately prevail and (ii) expressly excluded that it would mean '*qu'on doit forcément rester ou on doit forcément gagner; ce sont des slogans de campagne, ça se fait partout dans le monde*'; in the very same way as other slogans, it was aimed at '*ambiancer*' the campaign, and had nothing to do with violence, prevarication, political or ethnical discrimination or other form of untoward behaviour, but rather aimed to convey the wish, shared by any candidate to anything all over the world as a matter of course, to win; as also explained by Witness P-0625, '*Monsieur le Procureur, quand vous allez*

[165] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 of Prosecution's Mid-Trial Brief, 19 March 2018, ICC-02/11-01/15-1136-Conf-Anx1-Corr3, para. 85, *annexed to* Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124) (three confidential corrected versions were filed respectively on 29 March, 8 and 13 June 2018; a public corrected version was filed on 29 March 2018).

[166] Witness P-0010, transcript of the hearing, 28 March 2017, ICC-02/11-01/15-T-138-Red2-FRA, p. 34 line 13 to 24.

[167] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 of Prosecution's Mid-Trial Brief, 19 March 2018, ICC-02/11-01/15-1136-Conf-Anx1-Corr3, para. 646, *annexed to* Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124) (three confidential corrected versions were filed respectively on 29 March, 8 and 13 June 2018; a public corrected version was filed on 29 March 2018).

[168] P-0625, transcript of the hearing, 15 March 2016, ICC-02/11-01/15-T-30-FRA, p. 61 line 8 to 25.

en campagne, ce n'est pas pour aller faire une defaite… c'est pour gagner la présidentielle'.[169] More broadly, speeches brought forward as inciting or condoning violence towards political opponents (first and foremost, the Divo speech)[170] sounded, when properly read in the context, rather as vigorous calls in favour of Mr Gbagbo's political project in a particularly volatile and divided political atmosphere, aggravated by the presence of criminality in the specific location where the speech was delivered;[171] as noted in the Reasons, the speech concerned 'the placement of a CRS unit in Divo to tackle public disorder resulting from petty criminality'.[172] Furthermore, Laurent Gbagbo gave speeches where he advocated for mediation by the African Union, welcoming the idea of a committee tasked with looking into the situation; in his own words, '*d'analyser objectivement les faits et le processus electoral pour un reglement pacifique de la crise*'[173].

55. The Prosecutor alleges that Mr Gbagbo's intent to stay in power can be inferred by the adoption, in the context of the post-electoral crisis, of measures such as the requisition of the armed forces and the curfews. However, the evidence showed that both measures were adopted in compliance with the relevant Ivorian statutory texts, some of which preceding the crisis; the decree on the requisition, in particular, dates back to 1967[174]. It is also a matter of common knowledge that curfews are measures typically (and routinely) used as a way to alleviate tensions and to facilitate the exercise of control by the authorities. Witness P-0009 specifically clarified that the curfew had been recommended to the President by the military authorities, in particular in light of the fact that, between the first and the second tour of the elections, the HQ of the RHDP had been pillaged and a '*bagarre de rue*' had ensued. In this context, the curfew would have been instrumental to facilitating the orderly work of those in charge of the logistics and other organisational matters in connection

[169] P-0625, transcript of the hearing, 7 March 2016, ICC-02/11-01/15-T-25-Red2-FRA, p. 77 line 9 to 13.

[170] Video, CIV-OTP-0018-0005.

[171] P-0046, transcript of the hearing, 20 February 2017, ICC-02/11-01/15-T-126-Red-FRA, p. 74 line 28 to p. 75 line 14.

[172] Reasons, para. 964.

[173] Video, CIV-OTP-0026-0016, transcript, CIV-OTP-0052-0653 at 0659.

[174] Legislation, CIV-D15-0001-6219.

with the scrutiny[175]; a measure aimed at making it easier and more effective for the FDS to honour their statutory mission to defend and protect the population and their assets; a mission unflinchingly reaffirmed by several insider witnesses,[176] also at the heart of both patrols and searches carried out by police officers in the context of the security operation set up by the armed forces around the relevant locations,[177] as such shared not only by all FDS units (including the BASA[178]), but even by self-defence groups[179]. Otherwise stated, Laurent Gbagbo was aware of his generals' assessment that both the requisition and the curfew would be desirable; however, there is no evidence supporting the inference that his decision to sign the relevant decrees, by exercising his presidential prerogatives in accordance with the relevant texts, was aimed at anything else other than assisting the FDS in carrying out their mission in the days surrounding the elections. As stated in the Reasons, 'even assuming that Mr Gbagbo was the initiator of requisition, such a fact is not per se demonstrative of a nefarious motive on his part'.[180]

56. The Prosecutor's submission as to there being more to the FDS action than a mission of public security appeared indeed increasingly shaky, as one after the other of the elements relied upon to advance such submission were put into context: no witness came anywhere close to even suggest, if only as a doubt or hypothesis, that the FDS statutory mission would have been twisted, suspended or otherwise interfered with during, in the context or because of the crisis. FDS documents (including videos showing high representatives of the Army reading official communiques with a view to informing the population) contain many references to *leit-motivs* hardly

[175] P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 6 line 10 to 24.

[176] P-0046, transcript of the hearing, 15 February 2017, ICC-02/11-01/15-T-123-Red2-FRA, p. 11 line 9 to 26; transcript of the hearing, 17 February 2017, ICC-02/11-01/15-T-125-Red-FRA, p. 102 line 15 to 23; P-0011, transcript of the hearing, 10 March 2017, ICC-02/11-01/15-T-132-FRA, p. 35 line 18 to 19; p. 36 line 3 to 7; transcript of the hearing, 14 March 2017, ICC-02/11-01/15-T-135-Red2-FRA, p. 84 line 10 to 11; P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 24 line 26 to p. 25 line 3; P-0047, transcript of the hearing, 7 November 2017, ICC-02/11-01/15-T-203-FRA, page 35 line 2 to 3.

[177] P-0009, transcript of the hearing, 27 September 2017. ICC-02/11-01/15-T-195-Red2-FRA, p. 25 line 9 to p. 28 line 21.

[178] P-0238, transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T-82-Red2-FRA, p. 95 line 7 to 10.

[179] P-0435, transcript of the hearing, 18 October 2016, ICC-02/11-01/15-T-87-Red2-FRA, p. 25 line 9 to 12.

[180] Reasons, para. 280.

reconcilable with a plan to attack or otherwise harm the civilian population: calls to the population to keep their calm and reminders of the institutional missions of the FDS;[181] specific instructions to respond in case of attack[182] (and, more broadly, reminders of the general principles of legitimate defence[183]) and of the need to preserve the constitutional legality and the sovereignty of Ivory Coast; appeals to the FDS to comply with human rights and international humanitarian law; specific instructions to refrain, in the context of operations of public order, from 'exactions' and 'pillages' and to facilitate the intervention of the CICR, the national Red Cross and medical personnel[184]; the *Communiqué* read by General Philippe Mangou on 12 January 2011, as well as the FRAGO dated 18 January 2011[185], are particularly instructive cases in point[186]. The alleged 'special relationship' between Mr Gbagbo and Colonel Dadi, who – in the Prosecutor's narrative – would epitomise the loyalist to Laurent Gbagbo: and Mr Gbagbo, purportedly based on their shared ethnic ties, was revealed as based on little more than Dadi's own perception of the relationship. Witness P-238 clarified that, whilst Dadi would indeed often visit the Presidential Palace, this was to meet (not the President, but) his own hierarchical superior, General Dogbo Blé, Commander of the Republican Guard whose offices were close to, but not the same as, the Presidential palace[187] and that he 'loved' President Gbagbo, whom he might have met once or twice[188].

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[181] *See* for example video, CIV-OTP-0074-0076; transcript CIV-OTP-0087-0607 at 0608; and video, CIV-OTP-0064-0086, transcript CIV-OTP-0044-2534 at 2550.

[182] P-0009, transcript of the hearing, 3 October 2017, ICC-02/11-01/15-T-198-FRA, p. 11 line 27 to p. 13 line 20. *See* also Correspondence, CIV-OTP-0043-0441.

[183] P-0046, transcript of the hearing, 21 February 2017, ICC-02/11-01/15-T-127-FRA, p. 14 line 25 to p. 15 line 1; P-0011, transcript of the hearing, 13 March 2017, ICC-02/11-01/15-T-134-Red-FRA, p. 48 line 18 to 22; transcript of the hearing, 14 March 2017, ICC-02/11-01/15-T-135-Red2-FRA, p. 80 line 3 to 12; p. 83 line 18 to 23; P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 21 line 6 to 13; P-0047, transcript of the hearing, 7 November 2017, ICC-02/11-01/15-T-203-FRA, p. 56 line 14 to 22.

[184] *See*, for example, Correspondence, CIV-OTP-0071-0667.

[185] Correspondence, CIV-OTP-0071-0407, at 0414; P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 53 line 7 to 18.

[186] *See* Video, CIV-OTP-0074-0063, 03:14:16 to 11:38.21; transcript CIV-OTP-0087-0485.

[187] P-0238, transcript of the hearing, 27 September 2016, ICC-02/11-01/15-T-80-Red2-FRA, p. 60 line 16 to p. 61 line 18; transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T-82-Red2-FRA, p. 30 line 27 to p. 31 line 28.

[188] P-0238, transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T- 82-Red2-FRA, p. 32 line 1 to 11.

57. As to the instructions given by Dadi, P-0238 also clarified that, 'like every good chief', the colonel did not want them to fall victim to ambushes[189]; as it is commonplace in the engagement rules of the army, every time they found themselves under attack, they would therefore be allowed to '*riposter*', as well as to use explosive grenades in an attempt to dissuade[190]. When reference was made to the alleged practice of shooting in the air, Witness P-0238 stated that this was sometime done with a dissuasive purpose, also because sometimes the relevant unit would only dispose of a type of weapon which would be disproportionate as a way to react to the attack[191]. The Prosecutor's attempt at having P-0238 confirm that reports were either twisted or omitted with a view to covering untoward illegal behaviours in support of her case-theory only resulted in him clarifying that indeed these type of practices were indeed routinely used – and blessed by Colonel Dadi –, but with a view to avoiding responsibility and consequences in matters such as damage or loss of vehicles[192], to get a higher *per diem* than entitled to on the occasion of presidential visits and missions[193] or to fraud the State by creating fake needs and subsequent invoices[194]; matters which, while serious, are a far cry from a conspiracy to perpetrate, or hide or otherwise condone crimes against humanity. A similar attempt to get the same witness provide incriminatory substance to the use of the term '*inconditionnel*' to designate people supporting Mr Gbagbo ended in the witness explaining he only meant that such people would remain 'loyal' to the President, as every military man is bound to be[195]. More broadly, allegations about the military's purported preferential treatment for individuals sharing Laurent Gbagbo's ethnical background were reduced to nothing by explanations given by various witnesses as to the promotions granted on

[189] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Red2-FRA, p. 56 line 12 to 24.

[190] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Red2-FRA, p. 57 line 2 to 22.

[191] P-0238, transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T-82-Red2-FRA, p. 28 line 3 to 8 and p. 98 line 22 to 26.

[192] P-0238, transcript of the hearing, 27 September 2016, ICC-02/11-01/15-T-80-Red2-FRA, p. 80 line 18 to 23.

[193] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Red2-FRA, p. 16 line 20 to p. 17 line 2: '[…] *on gonflait les effectifs* […] *à des fins pécuniers*'.

[194] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Red2-FRA, p. 18 line 11 to p. 19 line 10.

[195] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Red2-FRA, p. 45 line 16 to p. 46 line 20.

the eve of the elections being fully in line with the rules governing advancement in the Army.[196]

58. Similarly, meetings regularly convened and held in institutional locations throughout the crisis with those responsible for the conduct of operations in the field came across as dictated by concern about the gravity of the situation and the desire to remain constantly apprised of it;[197] instructions allegedly imparted through and in the context of such meetings, when confirmed, were revealed as consisting in little more than encouragement and appreciation from a political leader genuinely trusting the military competence of his General Staff, respectful of its professionalism and aware of the seriousness of the challenges it was facing.[198]

59. No firm conclusions could be reached as to the purpose of the operation ordered around the area of the Golf Hotel[199], where Alassane Ouattara and his entourage were stationed during the crisis, designated by the Prosecutor as 'blockade' (a term to be used 'with caution'[200], as detailed in the Reasons). If anything, it seemed to come across in the courtroom[201] and in relevant documents[202] as a mechanism

[196] P-0009, transcript of the hearing, 3 October 2017, ICC-02/11-01/15-T-198-FRA, p. 93 line 16 to 23; P-0047, transcript of the hearing, 8 November 2017, ICC-02/11-01/15-T-204-Red2-FRA, p. 63 line 24 to 25.

[197] P-00011, transcript of the hearing, 13 March 2017, ICC-02/11-01/15-T-134-Red-FRA, p. 47 line 26 to p. 48 line 2; p. 85 line 21 to p. 86 line 11; P-0010, transcript of the hearing, 28 March 2017, ICC-02/11-01/15-T-138-Red2-FRA, p. 20 line 1 to 9; transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 78 line 4 to p. 81 line 11; p. 102 line 4 to 8; transcript of the hearing, 31 March 2017, ICC-02/11-01/15-T-141-Red2-FRA, p. 18 line 16 to p. 19 line 6; P-0009, transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 23 line 23 to p. 24 line 13; p. 26 line 17 to 26; transcript of the hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 58 line 21 to p. 59 line 12; transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 50 line 24 to p. 51 line 16; transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 9 line 15 to 18; P-0047, transcript of the hearing, 7 November 2017, ICC-02/11-01/15-T-203-FRA, p. 52 line 2 to p. 53 line 11.

[198] P-0010, transcript of the hearing, 28 March 2017, ICC-02/11-01/15-T-138-Red2-FRA, p. 13 line 12 to 21; transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 83 line 7 to 28; transcript of the hearing, 31 March 2017, ICC-02/11-01/15-T-141-Red2-FRA, p. 21 line 15 to 25; P-0009, transcript of the hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 18 line 19 to 25; p. 60 line 2 to 7; transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 5 line 13 to 28; p. 32 line 14 to 20; p. 36 line 5 to 8; P-0047, transcript of the hearing, 7 November 2017, ICC-02/11-01/15-T-203-FRA, p. 53 line 25 to p. 54 line 9.

[199] Transcript of the hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red-ENG, p. 24 line 8 to 10.

[200] Reasons, footnote 2465.

[201] P-0046, transcript of the hearing, 17 February 2017, ICC-02/11-01/15-T-125-Red-FRA, p. 21 line 4 to 25; P-0010, transcript of the hearing, 3 April 2017, ICC-02/11-01/15-T-142-Red2-FRA, p. 42 line 28 to p. 43 line 8.

[202] *See* Correspondence, CIV-OTP-0071-0152.

aimed rather at preventing individuals with weapons, who were stationed at the Golf Hotel, from coming into town and attacking[203], and hence a measure of protection and control as opposed to one expression of, or otherwise linked or instrumental to, a policy to attack or otherwise harm supporters of Alassane Ouattara or other civilians. Mr Gbagbo is also on record having invited '*toutes les personnalités qui se trouvent encore à l'hôtel du Golf de regagner leur domicile. Personne ne les a contraintes à se réfugier dans cet hôtel. Personne ne les empêchera d'en sortir. Elles sont libres de leurs mouvements*'[204].

60. There is also evidence that the FDS – in line with their oath to defend the country, its authorities and its laws[205] – chose to respect the determination adopted by the *Conseil Constitutionnel* and to acknowledge Laurent Gbagbo as the president, [206] albeit one who had requested the intervention of the international community for a mediation procedure allowing the country to overcome the institutional and constitutional impasse in which it had fallen because of the contrasting determinations adopted by State organs, officially vested with powers and prerogatives in respect of the outcome of the elections;[207] as clearly stated, in the perspective of the FDS, the interest to be protected was the Presidency of the Republic as a constitutional organ, as opposed to the incumbent of the time[208].

61. The Prosecutor also chose to ignore those witnesses contributing to provide the Chamber with a broader assessment of the general atmosphere at the relevant time. Witness P-0625, for example, categorically stated that '*il est arrivé un moment où les choses n'étaient plus contrôlées. On n'arrivait plus à contrôler certaines personnes. Certaines personnes faisaient les choses de leur propre volonté et de leur manière de voir les choses*' and that acts of violence were not done pursuant to a

[203] P-0238, transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Red2-FRA, p. 5 line 16 to 18; P-0009, transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 69 line 25 to p. 70 line 11.

[204] Video, CIV-OTP-0026-0016, transcript, CIV-OTP-0052-0653 at 0659.

[205] P-0010, transcript of the hearing, 28 March 2017, ICC-02/11-01/15-T-138-Red2-FRA, p. 34 line 22 to 24.

[206] P-0321, transcript of the hearing, 13 July 2016, ICC-02/11-01/15-T-64-Conf-FRA, p. 60 line 8 to 15 and 18 to 22.

[207] P-0009, transcript of the hearing, 5 October 2017, ICC-02/11-01/15-T-200-Red2-FRA, p. 50 line 9 to p. 51 line 1.

[208] P-0321, transcript of the hearing, 13 July 2016, ICC-02/11-01/15-T-64-Conf-FRA, p. 61 line 27 to p. 62 line 6.

plan (‘*c’était pas planifié … c’était dans une crise*’);[209] ‘*[o]n pouvait pas contrôler les gens […] [j]e parle de tous les camps[…] [i]l n’y a pas de contrôle […] c’était dans un désordre total […] [c]hacun réglait ses comptes […] à son prochain […] [c]hacun faisait ce qu’il veut*’[210]; the instructions to be vigilant, with a view to preserve the security of one’s own’s neighbourhood had been ‘*mal compris*’, so that everybody started acting of his or her own motion and volition[211]. The idea of a community prey to individual, anarchic and spontaneous ‘*règlements de comptes*’ has also been echoed by the GPP witness[212]. The various incidents referred to by the Prosecutor, albeit numerous, appear more likely to constitute spontaneous acts of violence than the result of a coordinated effort or initiative.

62. The purported favouritism *vis-à-vis* the BASA also found a perfectly plausible explanation: first, it is in the very nature of the artillery – to which BASA belonged – to be able to rely on heavier weaponry[213]; second, such heavy weaponry was a necessity in time of war[214], as was the need not to be entirely transparent as to its dimensions and strength with a view not to disclosing sensitive information to the enemy[215].

63. The treatment by the Prosecutor of the evidence on the BASA is indeed to a great extent emblematic of the ‘circular and inverse’ logic underlying so many parts of the case theory. As stated in the Reasons, ‘had the Prosecutor managed to prove that certain units were well-armed and/or better armed than others, she would still need to provide evidence indicating that this was due to the common plan’;[216] ‘[i]n fact, there is insufficient evidence even to confirm that the so-called Parallel Structure

[209] P-0625, transcript of the hearing, 9 March 2016, ICC-02/11-01/15-T-27-FRA, p. 8, line 19 to 22; p. 77 line 5 to 6.

[210] P-0625, transcript of the hearing, 15 March 2016, ICC-02/11-01/15-T-30-FRA, p. 91 line 23 to p. 92 line 11.

[211] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Conf-FRA, p. 72 line 21 to 26.

[212] P-0435, transcript of the hearing, 21 October 2016, ICC-02/11-01/15-T-90-Red2-FRA, p. 68 line 20 to p. 69 line 6.

[213] P-0238, transcript of the hearing, 27 September 2016, ICC-02/11-01/15-T-80-Red2-FRA, p. 72 line 20 to p. 73 line 2.

[214] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Red2-FRA, p. 7 line 18 to 19.

[215] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T- 81-Red2-FRA, p. 8 line 8 to 13.

[216] Reasons, para. 930.

units were well-equipped or better equipped than others'[217]. Many inferences made by the Prosecutor were thus turned on their head and exposed as arbitrary by developments in the courtroom. Similar observations can be made as to allegations made against Charles Blé Goudé: those which are proved (his role in bringing about and organising the *Jeunes Patriotes* and the *Galaxie Patriotique*, or his speeches in support of Laurent Gbagbo's political manifesto and presidential bid) are neutral at best, when not exculpatory. As stated in the Reasons, 'it cannot be concluded that Mr Blé Goudé was at the top of this hierarchy in the sense that the leaders of its constitutive youth groups were under his command and control'[218]. No witness was in a position to say that he had personally attended a speech by Charles Blé Goudé, where he would have incited or encouraged or otherwise condoned violence against political opponents, or otherwise; nor can this be inferred from the video recordings submitted. Furthermore, as noted and detailed in the Reasons, the Prosecutor, relying on excerpts as opposed to integral versions of the speeches, 'seems to have formulated a number of propositions and then searched for excerpts from the speeches that conform to them. Often, these excerpts are completely taken out of context, thereby misrepresenting what the speaker probably really intended to say'[219]. Far more frequent are the instances where either Mr Gbagbo or Mr Blé Goudé, as well as members of their alleged 'Inner Circle', are on record as explicitly advocating peace or denouncing violence[220]. Indeed, it was upon instruction of the Chamber – as mirrored in the amended directives[221] – that the principle that the submission of an excerpt would entail the submission of the entire item was adopted: according to direction 47, 'documentary evidence other than testimonial shall be considered as being before the Chamber in its entirety, irrespective of the fact that the parties intended only to rely on portion(s) thereof' and 'the Chamber will consider the entirety of the item in order to ascertain the correct meaning of the portions used by the parties and to determine their evidentiary weight'.

[217] Reasons, para. 931.

[218] Reasons, para. 504.

[219] Reasons, para. 959.

[220] *See* Reasons, Section F.

[221] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex A to the Decision adopting amended and supplemented directions on the conduct of the proceedings, 4 May 2016, ICC-02/11-01/15-498-AnxA.

64. Those few who stated knowing or having met Mr Blé Goudé could only mention pacific activities, such as organising rallies and protest marches[222] and even playing football[223]. Witness P-0441 was a very poignant witness, very likely to have indeed suffered violent criminal acts, which make the few discrepancies in his testimony as to sequences and duration of the events perfectly understandable. Even he, however, could not follow the Prosecutor in her design to ascribe this violence to either accused: he confirmed that clashes among the youth of the rival neighbourhoods of Yao Sehi and Doukoure were constant and both preceded and followed the Baron Bar speech[224]. Similarly, the purported financing of the Young Patriots movement or other self-defence groups by the Presidency, on the basis of documents as neutral in content as doubtful in genuineness,[225] was clearly exposed in the courtroom as being the result of '*supputations*'[226]; this even before considering that, as stated in the Reasons, 'it is not known whether these amounts were in fact granted and distributed'[227] to the individuals and groups they mentioned and their signatures were never identified or authenticated.[228]

E. The evidence on the record and the 'applicable standard'

65. The Reasons of Judge Henderson discuss in detail the 'applicable standard' of relevance for the purposes of reaching the Majority's conclusion enshrined in the operative part, as first read in the context of the oral decision issued on 15 January 2019. The nature of this standard also became – quite unnecessarily and unfortunately, in my view – the subject of speculative discussion in the context of Judge Herrera Carbuccia's dissenting opinion to the Oral Decision. My views on the

[222] P-0321, transcript of the hearing, 13 July 2016, ICC-02/11-01/15-T-64-Conf-FRA, p. 64 line 13 to p. 65 line 19.

[223] P-0441, transcript of the hearing, 9 May 2016, ICC-02/11-01/15-T-35-Red2-FRA, p. 40 line 13 to p. 41 line 1.

[224] P-0441, transcript of the hearing, 12 May 2016, ICC-02/11-01/15-T-38-Red2-FRA, p. 28 line 13 to 16.

[225] *See* Reasons, para. 543: the content of these 'receipts' of payments 'offers little to no indication as to the purpose of these payments'.

[226] P-0097, transcript of the hearing, 8 June 2016, ICC-02/11-01/15-T-48-Red2-FRA, p. 48 line 10 to p. 50 line 7.

[227] Reasons, para. 557.

[228] Reasons, para. 563.

'no case to answer' proceedings are well-known at this stage: they have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve. There is only one evidentiary standard and there is only one way to terminate trial proceedings. The evidentiary standard is set forth in article 66, paragraph 3: '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused *beyond reasonable doubt*' (emphasis added). Trial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81. Both concepts, acquittal and beyond reasonable doubt, are indeed mentioned in the oral decision issued on 15 January 2019.

66. Indeed, this conclusion was indirectly confirmed by the Deputy Prosecutor himself during the hearing held on 1 October 2018[229]. After having extensively discussed 'what test or standard the Chamber will apply to the assessment of the evidence at this stage', given that 'this Court has little experience with no case to answer motions', he told the Chamber that the Prosecutor's 'role is confined to submitting to the Chamber what the test should be in keeping with the purpose of a no case to answer motion and how the test should be applied' and submitted 'that the test is not whether any Trial Chamber would convict. That puts the test too high at this stage. The question is whether any Trial Chamber could convict'. He continued by submitting that, 'at this mid-way point in the trial proceedings, the Chamber is not called upon to determine issues of reliability or credibility with respect to the evidence' and lectured the Chamber as follows: 'in deciding whether any Trial Chamber could reasonably convict, this Chamber will also refrain from engaging in a sort of evaluation of the credibility and reliability of the evidence, testimonial or documentary, that is would at the end of the trial when assessing the weight of the evidence to determine guilt or innocence. This is because […] the trial proceedings have not yet reached the stage of deliberations envisaged by article 74 of the Statute. Were the Chamber to weigh credibility or reliability at this stage of the process, then we would no longer be dealing with no case to answer motions, but something else, for which there is no precedence and no jurisprudence and that in our submission would not fit within the procedural structure of the Statute'. In the end, however,

[229] Transcript of the hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red2-ENG, p. 6 line 4 to p. 18 line 18.

when asked by the Presiding Judge, 'Where do you find in the structure of the Statute the procedure for a no case to answer?', the Deputy Prosecutor could not but answer: 'Well, you don't'.

67. What matters, more and beyond labels and theoretical approaches, is that the Majority's view is soundly and strongly rooted in an in-depth analysis of the evidence (and of its exceptional weakness) on which my fellow Judge Geoffrey Henderson and I could not be more in agreement. In spite of the parties'[230] and especially the Prosecutor's[231] attempts to drag the trial down the route of the classic no-case-to-answer proceedings, the exercise entertained by the Chamber (starting with the first order on the conduct of the proceedings, down to the oral decision deferring the issuance of the reasoning), at least in my understanding, was never meant to replicate the so-called 'Ruto and Sang model', in spite of the sometime neutral if not ambiguous procedural formulas which were necessary *en route* to make the trial progress towards its right conclusion.

68. Furthermore, the very features of the present case and of the submitted evidence – as exhaustively addressed in the Reasons and highlighted here in those parts which I found particularly significant – do not require engaging in further discussions as to either the theoretical foundation or the practical application of the notion. First, as stated by Judge Henderson, even in the context of the 'Ruto and Sang model' 'it makes little sense to completely prevent trial judges from assessing the quality of the evidence at the no case to answer stage', if anything because '[i]ndeed, such an artificial prohibition sits uncomfortably in the ICC's procedural

[230] Defence for Charles Blé Goudé, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 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), 23 April 2018, ICC-02/11-01/15-1158-Conf-Corr (a corrected version was filed on 24 April 2018 and a corrected public redacted version was filed on 25 April 2018); Defence for Charles Blé Goudé, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Blé Goudé Defence No Case to Answer Motion, 23 July 2018, ICC-02/11-01/15-1198-Conf-Corr (a corrected version was filed on 3 August 2018 and a corrected public redacted version was filed on 28 September 2018).

[231] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion, 8 June 2018, ICC-02/11-01/15-1179; Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's Response to Defence No Case to Answer Motions, 10 September 2018, ICC-02/11-01/15-1207; Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's Response to Defence Request concerning the continuation of the no case to answer proceedings, 14 September 2018, ICC-02/11-01/15-1209; transcript of the hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red2-ENG, p. 6 line 4 to p. 18 line 18.

framework'.[232] Second, an issue of standard, and the importance to have clarity on it, only arises when there is material tendered in evidence which, 'taken at its highest' (ie, because of its pertinence and relevance to the charges and leaving aside any and all doubts as regards its authenticity, reliability or both, no matter how significant), would be capable of supporting a conviction of the accused. We are not, and never have been, in this scenario; if we had, it would have been necessary to proceed with the presentation of the evidence by the defence. Simply put, there is no evidence in respect of which the Majority's determination as to the need for a defence case would have changed depending on the standard applied. Otherwise stated, it is not that the Prosecutor's evidence would only support the Prosecution's case if it were taken 'at its highest', which scenario would indeed make it necessary to debate about the standard; it is, rather, that the Prosecutor's evidence, whether taken individually or as a whole, does not support any of the charges levelled against the accused. The Prosecutor himself says it: 'There is no statement or document explicitly stating Mr Gbagbo's will (or that of members of his Inner Circle) to stay in power – even if this required the use of violence against civilians'[233]. Similarly, there is no evidence confirming in the slightest an order, instruction or other form of coordination of violence in the field by either accused. As to the possibility to infer the existence of Common Plan 'from circumstantial evidence', this circumstantial evidence still has to be found in conducts susceptible to be referred to the accused; while the Prosecutor seems persuaded to this day that 'the actions and words of Mr Gbagbo, and members of the Inner Circle, including Mr Blé Goudé' were of such nature and content as suitable to constitute such circumstantial evidence, it is my considered view – as extensively explained in the Reasons and in this opinion – that they were not.

69. In this scenario, I still find it difficult to understand why it would have been necessary, or even preferable, for the Chamber to assess and take a decision on the admissibility of the various items of evidence on a rolling basis. In the Reasons, my fellow Judge Geoffrey Henderson insists that 'the Chamber should have exercised [its] discretion and rendered rulings on the items of evidence that it considers 'not-

[232] Reasons, para. 3.

[233] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, para. 1109, *annexed to* Prosecution's Response to Defence No Case to Answer Motions (a first and a second public redacted versions were filed respectively on 28 September and 8 November 2018).

irrelevant'and/or'not-inadmissible"'[234]. My objection to the so-called admissibility ruling system, and my preference for a system whereby the evidence as a whole is considered within the context of the final determinations of the trial, is clearly set forth in the Majority decision on the submission of evidence[235]. By stating that '[i]t makes little difference whether one considers authenticity for the purpose of assessing admissibility or whether it is considered at the end of the trial when the weight of the evidence is assessed' and that '[i]f a document cannot be authenticated for the purpose of admissibility, it can also not be authenticated for the purpose of assessing evidentiary weight', Judge Henderson seems to some extent acknowledge that the two systems may be less far apart than they might *prima facie* appear.[236] The point seems further supported by his statement to the effect that, had he 'systematically assessed the credibility and reliability of the Prosecutor's testimonial evidence, there would be even less of a basis to continue the proceedings in this case'[237].

70. I will only add that this discussion might have been necessary and relevant if the items tendered into evidence by the Prosecutor had included either a witness or any other item of evidence univocally indicating the existence of a policy, orders and the like directly pointing to the deliberate harming of civilians. It would have then indeed been necessary to determine whether such items possessed enough indicia of authenticity, relevance and probative value so as to require the defence to respond to them; in the absence of any such items, however, I find it supererogatory, even conceptually difficult, if not impossible, to discuss the matter.

71. Furthermore, the Prosecutor's own attitude *vis-à-vis* the 'standard' purportedly to be applied to the evidence is exposed in all his hollowness and fundamentally hypocritical nature when considered against the fact that the same Prosecutor seems to recommend that the very same standard should be ditched as regards those items of evidence which would run counter to her own 'case-theory'; ie those items of evidence which, in the current terminology at the Court (which I already had the

[234] Reasons, para. 23.

[235] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405.

[236] Reasons, para. 37.

[237] Reasons, para. 51.

occasion to denounce as ambiguous and debatable),[238] would be labelled as 'exculpatory'. Indeed, the Prosecutor seems almost to contend that, while no assessment of credibility, reliability or probative value should be made as regards the items of evidence which – in her view – support the charges, the Chamber should instead engage in weighing the probative value of the evidence which appears to run counter to the Prosecutor's theory, and more specifically exercise caution in taking such evidence 'at face value' (one may say, 'at its highest'); or, at least, this is what one may infer from some of the statements contained in her written and oral responses to the defence's motions for acquittal. There, the Prosecutor (having missed the opportunity to try and reconcile the insiders' testimonies with her case-theory in the context of the Trial Brief – and thus the ultimate goal of the exercise) cautioned the Chamber that '[w]hile the Generals' testimony can be accepted as credible on a number of issues, it must be treated with caution when it touches upon their own individual criminal responsibility. This is particularly the case when they are asked to testify on evidence which indicates their own complicity with or, at minimum, tacit acquiescence as of the commission of crimes'[239]; in the view of the Prosecutor, 'the Chamber will have to take into consideration the loyal[i]ty the Generals may have had when [g]iving their evidence'; this also because – as regards the insiders having been appointed to the grade of General, '[a]s Commander in Chief, Mr Gbagbo had played a significant role in determining the paths of their careers'[240].

72. One may wonder how it is possible that the Prosecutor only became alert to the contradictions between her case-theory and 'the Generals' testimony' as a consequence of the defence's submissions. Furthermore, the Prosecutor's concern with the risk that critical insiders might have been prompted to lie or omit for fear of consequences in terms of personal incrimination, is indeed surprising, notably in light

[238] Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, Separate opinion of Judge Cuno Tarfusser to the Decision on the Confirmation of Charges, 8 February 2008, ICC-02/05-02/09-243, pp. 99-103.

[239] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, para. 65, *annexed to* Prosecution's Response to Defence No Case to Answer Motions (a first and a second public redacted versions were filed respectively on 28 September and 8 November 2018).

[240] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, para. 71, *annexed to* Prosecution's Response to Defence No Case to Answer Motions (a first and a second public redacted versions were filed respectively on 28 September and 8 November 2018).

of the Prosecutor's recommendations that each of them be provided with the legal assistance for the purposes of rule 74, a step having totalled an expense of several tens of thousands of euros for the Court.

73. More fundamentally, that the Prosecutor (albeit tardily) came to acknowledge that there is indeed evidence in the record that, taken 'at its highest', would seriously undermine the case, is commendable; however, such a proposition appears flawed as a matter of methodology and serves as an additional revealing element of the overall exceptional weakness of the Prosecutor's case. I have certainly scrupulously followed the Prosecutor's suggestion in approaching the evidence on the record: I have looked at the evidence in its entirety, taking it all 'at its highest' and 'holistically'; however, I have done so in respect of the evidence tendered as a whole, irrespective of whether such evidence would or should fall under the heading and label of incriminating as opposed to exculpatory; accordingly, I have not excluded the exculpatory evidence and looked at it for what it is, refraining from engaging in twisting and turning it with a view to making it suit the Prosecutor's theory, or preventing it from puncturing its very substance.

74. It is my considered opinion, after almost three years of listening to the witnesses and sifting through the submissions and the evidence at trial, that no evidence has been tendered by the Prosecutor which would allow a Chamber to establish a link between either Laurent Gbagbo or Charles Blé Goudé and any of the charged facts.

F. Considerations on the five charged incidents

75. I believe that these considerations, coupled with the findings contained in the Reasons, provide abundant justification to the Chamber's decision to acquit the accused. As stated above, one should be careful in making determinations beyond what is strictly needed for the purposes of providing adequate reasoning to the judgement, in particular in a context where investigations into the same context are said to be ongoing. However, I find it necessary to add – especially in light of the failure of the Chamber to reach a unanimous conclusion – that the evidence on the record not only fails to convince me that any of the charged incidents did indeed occur pursuant to the Prosecutor's narrative, but is rather suitable to point to one or more alternative readings which are equally, if not more, plausible. This, it should be added,

while bearing in mind that the Majority 'assumed that the alleged facts about victimisation are established', irrespective of whether the evidence for each alleged victim can be considered as sufficient to meet the relevant threshold.[241]

76. Even leaving aside the absence of proof of a link between the charged incidents and the accused, the charged incidents themselves can hardly qualify as crimes against humanity within the meaning of article 7 of the Statute and of its chapeau. The very features of each of these episodes make it very hard to identify either of them as part of an attack against a civilian population suitable to be considered as either 'widespread' or 'systematic'. The differences separating them in terms of context, individuals and factions involved, type of weapons used, respective affiliations of alleged perpetrators and victims are stark; the numbers involved, whilst not decisive *per se*, are such as to recommend caution. Indeed, the Reasons indicate that, as regards the twenty uncharged incidents, '[t]hey are all discrete events that took place at different times and place and involved different alleged perpetrators and victims';[242] the same comment applies to the five charged incidents. While, as stated in the Reasons, 'it can be concluded that violence took place in the context of political demonstrations' during the post-electoral crisis, 'having regard to the number, the nature of crimes as well as identification of direct perpetrators, it cannot be concluded that there is sufficient evidence to conclude that there was a pattern of crimes from which the alleged Policy can be inferred'[243].

77. As regards the individual incidents, serious doubts emerge from the evidence as to the overall plausibility of the Prosecutor's narrative in respect of each of them.

a. 16-19 December 2011 - RTI March

78. As to the incidents having happened in the context of the March on the RTI planned by the RHDP on 16 December 2010, the Prosecutor states that 'Mr Gbagbo himself instructed the generals on 7 December that the march was prohibited' and concludes that 'indeed his instructions were followed because the evidence demonstrates that the FDS violently repressed the march'. The hollowness and

[241] Reasons, para. 1392.

[242] Reasons, para. 1388.

[243] Reasons, para. 1876.

arbitrariness of the conclusion are there for everybody to see: it is one thing to give instructions to prohibit a march – something which is clearly in the prerogatives of the highest political authority and of the forces responsible for the maintenance of public order; an entirely different thing to give instructions to 'violently repress' a march. There is indeed evidence showing the high command of the FDS was informed that a march had been planned by the opposition[244]; that the decision was to prohibit the march[245] and that Laurent Gbagbo was aware of and did not object to this decision; even, that meetings between Laurent Gbagbo and his high political and military command might have taken place[246] at the presidential residence in the imminence and in the aftermath of the march. One may certainly question – as Witness P-0009 did[247] – the extent to which a document such as the 'logbook'[248] might be regarded as reliable and adequate evidence for the occurrence of such meetings, consisting as it is of the lumpy remains of a handwritten notebook retrieved by the Prosecutor on a site which had been bombed, one year after the facts, on the basis of a direction from the Ivorian authorities[249], certainly marking – in its total lack of formality and structure – a stark contrast in a state as organised as Ivory Coast was and continued to be during the crisis. First, as also detailed in the Reasons, that a person registered into the logbook as intending to meet the President would actually meet him is far from a foregone conclusion. Second, and more fundamentally, the consideration remains that meeting is *per se* a perfectly legitimate conduct; moreover, in the context of the

[244] P-0046, transcript of the hearing, 17 February 2017, ICC-02/11-01/15-T-125-Red-FRA, p. 31 line 8 to 16; P-0011, transcript of the hearing, 13 March 2017, ICC-02/11-01/15-T-134-Red-FRA, p. 11 line 6 to 14; P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 11 line 3 to 7; P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 3 line 1 to 6.

[245] P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 11 line 27 to p. 12 line 3; P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 3 line 8 to 10; p. 5 line 18 to 24.

[246] The caution in the wording mirrors some uncertainties voiced by several attendees to this meeting as to its specific date and timing; however, there is enough evidence suggesting that Laurent Gbagbo and the generals did indeed meet in the imminence and in the aftermath of the march. P-0046, transcript of the hearing, 17 February 2017, ICC-02/11-01/15-T-125-Conf-FRA, p. 49 line 1 to p. 56 line 17; P-0011, transcript of the hearing, 13 March 2017, ICC-02/11-01/15-T-134-Conf-FRA, p. 20 line 6 to 15; P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 13 line 4 to 7.

[247] P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, page 9 line 24 to 25.

[248] Logbook, CIV-OTP-0088-0863.

[249] According to the Prosecutor's report CIV-OTP-0024-0641 and addendum CIV-OTP-0098-0005, the logbook was found during a search mission conducted between 14 February and 1 March 2012.

ongoing crisis, holding numerous meetings at any time of the day with those politically and military responsible for the State security should rather be seen, in the absence of any element to the contrary, as signalling a President who cares, wants to be informed, and takes responsibility, rather than one conspiring against his people. What indeed is entirely missing is evidence as to the subject and content of the discussions held during those meetings: rather, when minutes of meetings are available, only matters such as 'routine governmental functions and allocation of portfolios'[250] appear to have been the subject matter of the discussions. As regards the meetings allegedly held in advance of the RTI march, there is no evidence showing or at least suggesting that instructions given would include repressing the march 'by all means' and that these means may include unnecessarily harming civilians protesters beyond the boundaries set by the rule of self-defence.

79. It is also certainly established that casualties occurred during the march, both on the side of the marchers and of the FDS and that security measures were taken with a view to protecting the RTI[251]; that the '*sécurisation*' of the march, in light of its insurrectional nature, might involve dispersing the marchers[252] through the use of conventional means of public order[253]. There is likewise evidence, however, that those facing the FDS in the context of the march were not only peaceful demonstrators. The Chamber had before it, *inter alia*, a video showing an appeal to take part in the march '*avec tous vos équipements militaires et de combat*'[254]; a testimony to the effect that individuals holding kalashnikovs were seen heading to one of the gathering places[255], and FDS (who were in a minority) were instructed to refrain from chasing or facing them directly, with a view to avoiding pointless injuries or losses[256]; other testimonies

[250] Reasons, para. 326.

[251] P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, page 14 line 7; Document, CIV-OTP-0043-0336.

[252] P-0238, transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Red2-FRA, p. 79 line 20 to 27.

[253] P-0321, transcript of the hearing, 13 July 2016, ICC-02/11-01/15-T-64-Red2-FRA, p. 21 line 6 to 21.

[254] Video, CIV-OTP-0064-0101 at 32:39:20; transcript CIV-D15-0004-1199 at 1200.

[255] P-0330, transcript of the hearing, 1 September 2016, ICC-02/11-01/15-T-68-Red2-FRA, p. 71 line 25 to 28.

[256] P-0330, transcript of the hearing, 1 September 2016, ICC-02/11-01/15-T-68-Red2-FRA, p. 70 line 27 to p. 71 line 18.

indicated that protesters had left for the march carrying lemons[257] or *beurre de karité*[258].

80. It is hard, looking into evidence of this content, not to join Witness P-0330 in concluding that the march was an armed manifestation in disguise, and hence a trap for the FDS[259]; a more than plausible assumption seems to conclude, with Witness P-0107, that the reason for the FDS shooting was that 'they panicked'. [260]

81. In light of this evidence, it is not certainly on the basis of statements such as the fact that Witness P-0009 confirmed that a teargas grenade – which FDS units had in their possession[261] – can be lethal if it hits you[262] (anything can, if used inappropriately) that one can legitimately infer that the availability and use of such grenades was aimed at unlawfully attacking a pacific civilian population. The evidence, if anything, it rather demonstrates that, whenever the FDS used teargas when facing a crowd, they did so 'in order to disperse the crowd'[263] and while 'engag[ing] in law enforcement operations'[264]. Here, as elsewhere, the 'cherry-picking' act[265] of her own evidence by the Prosecutor for the purpose of composing and supporting her narrative is apparent.

82. I also found it particularly instructive that, when one of her witnesses made it clear that the only instructions imparted to the FDS in connection with the march were that it was forbidden, had to be secured and marchers dispersed as necessary, the Prosecutor found it necessary to revert to the witness's previous statement, where the French word '*mater*' had been used to describe the actions to be taken by the FDS in respect of the marchers; the witness had no difficulty in clarifying that '*mater*' means

[257] P-0107, transcript of the hearing, 30 November 2016, ICC-02/11-01/15-T-108-FRA, p. 37 line 7 to 10; p. 43 line 8 to p. 44 line 7.

[258] P-0442, transcript of the hearing, 11 February 2016, ICC-02/11-01/15-T-21-Red2-FRA, p. 34 line 22 to 27

[259] P-0330, transcript of the hearing, 1 September 2016, ICC-02/11-01/15-T-68-Red2-FRA, p. 71 line 27.

[260] ICC Statement, CIV-OTP-0020-0064 at 0075, para. 75.

[261] P-0046, transcript of the hearing, 15 February 2017, ICC-02/11-01/15-T-123-Red2-FRA, p. 30 line 4 to 5.

[262] P-0009, transcript of the hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 43 line 18 to 24.

[263] Reasons, para. 1426.

[264] Reasons, para. 1426.

[265] Reasons, paras 81 and 1888.

'to disperse'[266]. One must wonder to what extent the accurate meaning of the French word '*mater*' (which also appears in the confirmation decision[267]) was grasped in the context of the preliminary assessment of the evidence: it could be roughly translated into English as 'tame', in the sense of bringing under control. It is certainly a far cry from the far more drastic meaning words based on the same root have in other languages, for example in Spanish; as tragic as it may sound, whether and to what extent gross misunderstandings of this nature might have contributed to bring about the case against Mr Gbagbo and Mr Blé Goudé in the first place remains an open question.

b. 25-28 February 2011 - Yopougon I

83. The Reasons explain in detail the contradictions and omissions flawing the Prosecutor's narrative as to the genesis and developments of the clashes erupted in Yopougon between 25 and 28 February 2011. The episode, with which only Mr Blé Goudé is charged, is indeed emblematic both of many features of the post-electoral crisis as a whole and of the flaws of the Prosecutor's approach to it. The Prosecutor chose to build her narrative on and around the speech held by Mr Blé Goudé at the Baron Bar, and to present the violent events of the day in the neighbourhood as ensuing from it, and in particular from the 'inflammatory rhetoric' which it would have contained. A balanced, objective narrative would have required bearing in mind and acknowledging a number of elements suitable to cast more than one doubt on the Prosecutor's take of the facts, including, in particular, the evidence that the eruption of violent clashes in the neighbourhood preceded, rather than followed, Mr Blé Goudé's speech, and was unrelated to it[268]. As stated in the Reasons, 'there is evidence to suggest that the wave of violence might have been triggered on 25 February by the skirmishes provoked by the burning of buses by pro-Ouattara youth

[266] P-0238, transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Red2-FRA, p. 79 line 15 to 27.

[267] Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Conf (a public redacted version was filed on the same day), para. 111 and footnote 340.

[268] P-0433, transcript of the hearing, 26 April 2017, ICC-02/11-01/15-T-147-Red2-FRA, p. 16 line 21 to p. 17 line 1; P-0438, transcript of the hearing, 3 May 2017, ICC-02/11-01/15-T-150-Red2-FRA, p. 5 line 7 to 11; P-0459, transcript of the hearing, 5 May 2017, ICC-02/11-01/15-T-152-Red2-FRA, p. 67 line 5 to 18; P-0109, transcript of the hearing, 9 May 2017, ICC-02/11-01/15-T-154-Red2-FRA, p. 32 line 27 to p. 33 line 12.

followed by the burning of *gbakas* by the pro-Gbagbo youth in retaliation. According to the evidence, the buses were associated with the pro-Gbagbo camp, while gbakas were vehicles associated with Ouattara supporters'[269]. Furthermore, the evidence confirming that the opposite neighbourhoods of Doukoure and Yao Sehi had a history of violent clashes which pre-dated the post-electoral crisis.[270] As illustrated in the Reasons, '[t]here is no evidence to warrant an inference that the Police specifically targeted the part of the population that was perceived to be pro-Ouattara'.[271]

c. 3 March 2011 – Abobo I

84. As regards the 3 March incident in connection with the march of women, the Reasons explain in detail the evidentiary elements making it impossible for the Chamber to conclude that the convoy deliberately attacked the demonstrators. Apart from this, what most strikes, is the Prosecutor choice to ignore the evidence to the effect that women taking part in the march had been used as human shields by snipers hidden among them and aiming first at the FDS convoy[272]; a point made all the more important in light of his consistency with other evidence to the effect that the nature, frequency and type of attacks against them made the FDS fear being sent or having to travel through Abobo: '*quand vous revenez, vous dites merci au Seigneur*'[273]. Furthermore, the Prosecutor never attempted to explain why this particular march (and this one only) would have been chosen as a deliberate target; the evidence shows that marches by RHDP political supporters were held throughout the post-electoral crisis, with the FDS intent in ensuring that they would be authorised and to prevent that they may lead to disturbances of the public order[274]. Against this background, as

[269] Reasons, para. 1631.

[270] P-0441, transcript of the hearing, 10 May 2016, ICC-02/11-01/15-T-36-Red2-FRA, p. 68 line 19 to 20; P-0436, transcript of the hearing, 2 May 2017, ICC-02/11-01/15-T-149-Red2-FRA, p. 4 line 12 to 17; P-0433, transcript of the hearing, 26 April 2017, ICC-02/11-01/15-T-147-Red2-FRA, p. 82 line 19 to 24.

[271] Reasons, para. 1673.

[272] P-0330, transcript of the hearing, 02 September 2016, ICC-02/11-01/15-T-69-Red2-FRA, p. 32 line 15 to 22.

[273] P-0238, transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T-82-Red2-FRA, p. 99 line 24 to 25.

[274] *See*, for example: BQI, CIV-OTP-0045-0188; BQI, CIV-OTP-0045-0199; BQI, CIV-OTP-0045-0389; BQI, CIV-OTP-0045-0170.

illustrated in the Reasons, it does not appear that the convoy 'deliberately targeted the female demonstrators because they were supporters of Mr Ouattara'[275]. Accordingly, it becomes superfluous 'to determine whether there is any merit in Mr Gbagbo's claim that the evidence for this incident is unreliable and that, in particular, the video footage has been doctored' or 'whether the march was organised by or at the behest of Mr Ouattara's supporters in the Golf Hotel'[276].

d. 17 March 2011 – Abobo II

85. As regards the 17 March incident, as stated in the Reasons, the Chamber did see 'a lot of evidence of human and material devastation'[277]. However, this evidence was completely inadequate in pointing to a coherent narrative, even less so as regards the determination of the individual authorship of the events causing such devastation and the legal responsibilities. Suffice it to mention that two crucial insider witnesses, Witnesses P-0009[278] and P-0047[279], both stated, on the basis of technical considerations of a military nature, the nature and technical features of the weapon allegedly used for the shelling (more specifically, their range of action and their projected impact), on the one hand, and the geographical respective locations of Camp Commando and the targeted site, on the other hand, would make it impossible to adhere to the narrative according to which the shelling would have originated from Camp Commando in Abobo. All the Prosecutor did to challenge those testimonies was (i) to refer to the expert report of Witness P-0411, whose intrinsic inconclusiveness was referred to earlier; (ii) to caution that P-0009 and P-0047 could not be relied upon as credible in this particular matter since they 'have an interest in minimising their involvement (and that of their subordinates) due to possible criminal responsibility for their conduct in failing to prevent or punish these acts'[280]; and (iii)

[275] Reasons, para. 1778.

[276] Reasons, para. 1774.

[277] Reasons, para. 1839.

[278] P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 58 line 3 to 13; p. 61 line 8 to 13.

[279] P-0047, transcript of the hearing, 8 November 2017, ICC-02/11-01/15-T-204-Red2-FRA, p. 15 line 1 to 27.

[280] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, para.808, *annexed to* Prosecution's Response to Defence No Case to

to downplay Witness P-0009's expertise by stating that he 'did not perform any measurements at the scene, nor has he been qualified as an expert in mortars or military engineering'[281].

e. 12 April 2011 – Yopougon II

86. As regards the 12 April incidents, detailed considerations highlighting why the evidence is far from allowing any meaningful inference as to the attribution of the alleged crimes in the context of this incident are to be found in the Reasons. It should be added that the timing of the events underlying this incident expose it to doubts similar to those arising in connection with the charges brought against Mr Gbagbo under article 28 of the Statute: on 12 April 2011 Mr Gbagbo had fallen into the hands of opposing forces, following a period of siege at the Presidential Residence, and Mr Blé Goudé, as stated in the Reasons, 'had already gone into hiding for several days'[282]. Nowhere is the evidence near demonstrating that, in spite of these circumstances, it can be said that either Mr Gbagbo or Mr Blé Goudé remained somehow in control of those who, self-styling themselves as 'pro-Gbagbo', might have engaged in violent and hideous acts against the population. Rather than an act allegedly furthering the alleged policy 'to stay in power at all costs', or aimed at 'reinstating Mr Gbagbo's power'[283], (a scenario hardly realistic at the time), these acts are more reasonably ascribed to the general climate of chaos and anarchy; as a matter of common experience, this climate is suitable to create an expectation of impunity particularly suitable to fuel the eruption of uncontrolled violence. This has made it unnecessary to focus on the weakness of the identification of the alleged perpetrators

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Answer Motions (a first and a second public redacted versions were filed respectively on 28 September and 8 November 2018).

[281] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 – Prosecution's Consolidated Response to the Defence No Case to Answer, 10 September 2018, ICC-02/11-01/15-1207-Conf-Anx1, para.945, *annexed to* Prosecution's Response to Defence No Case to Answer Motions (a first and a second public redacted versions were filed respectively on 28 September and 8 November 2018).

[282] Reasons, para. 1914.

[283] Reasons, para. 92, referencing *inter alia* the Prosecutor's Response.

as "pro-Gbagbo', in a neighbourhood where – according to the evidence – groups of various allegiances were present[284].

G. The overall performance of the Defence

87. This being the nature and content of the evidence, the approach and strategy followed by the Defence throughout the trial proceedings have been increasingly puzzling. Very seldom did either Defence team adopt the approach of stating that under no circumstances could most of the evidence on the record be adequate to meet the relevant threshold for conviction. Countless courtroom hours and hundreds of pages were devoted to pointing out trivial inconsistencies in testimonies, or between the testimonies and the statements, or to discuss the qualifications of an expert witness, or to challenge the 'authenticity' of a document, before (when not instead of[285]) highlighting that, no matter how authentic or truthful, under no circumstances would a particular testimony, an expert report, or a documentary item be suitable to contribute to the attribution of the charged crimes to either accused. At times, one would be forgiven for having the impression that, in the view of the Defence, the Prosecutor's case would stand or fall depending on whether one particular witness should be considered credible or not, whether in light of his or her political affiliation or otherwise, when one would expect that the most straightforward and effective line of defence would have been to directly aim at the neutrality – at best – of all the witnesses were saying *vis-à-vis* the charges.

88. Overall, the vacuity of the charges was so extreme – and so obvious - that they should have triggered a much greater sense of urgency on the side of the Defence, notably in light of the protracted custody of the defendants: suffice it to mention, as to the Defence for Mr Gbagbo, that, against the background of a more than a dozen of

[284] P-0238, transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Conf-FRA, p. 67 line 12 to 19.

[285] *See*, among many, the following examples: P-0433, transcript of the hearing, 26 April 2017, ICC-02/11-01/15-T-147-Red2-FRA, p. 110 line 25 to p. 111 line 17; P-0438, transcript of the hearing, 4 May 2017, ICC-02/11-01/15-T-151-Red2-ENG, p. 15 line 10 to 24; p. 29 line 3 to p. 31 line 10; P-0435, transcript of the hearing, 31 October 2016, ICC-02/11-01/15-T-94-ENG, p. 49 line 21 to p. 51 line 8; P-0567, transcript of the hearing, 15 November 2017, ICC-02/11-01/15-T-209-Red-FRA, p. 11 line 13 to 17; p. 12 line 15 to p. 14 line 16; p. 22 line 22 to p. 23 line 14; p. 23 line 22 to 27; P-0568 transcript of the hearing, 15 November 2017, ICC-02/11-01/15-T-209-Red-FRA, p. 51 line 23 to p. 52 line 6; p. 76 line 12 to 25; p. 79 line 16 to p. 80 line 16.

applications for leave to appeal against interlocutory decisions,[286] no appeal was lodged against the latest decision rejecting his request for provisional release,[287] and

[286] Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la « Decision on the fitness of Laurent Gbagbo to stand trial » (ICC-02/11-01/15-349), 7 December 2015, ICC-02/11-01/15-358-Conf; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la décision orale du 12 février 2016 de la Chambre de première instance, 22 February 2016, ICC-02/11-01/15-450; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la «Decision adopting amended and supplemented directions on the conduct of the proceedings» (ICC-02/11-01/15-498), 11 May 2016, ICC-02/11-01/15-521; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la décision orale de la Chambre du 24 mai 2016 octroyant des mesures de protection pour le témoin P-0321 et autorisant son témoignage par lien audio-vidéo, 30 May 2016, ICC-02/11-01/15-561-Conf ; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la décision orale de la Chambre du 16 juin 2016 par laquelle les Juges ont mis un terme au système actuel de retransmission continue en léger différé et sans censure *a posteriori* des audiences, 22 June 2016, ICC-02/11-01/15-597-Conf (a public redacted version was filed on the same day); Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la décision orale du 6 juillet 2016 rejetant la demande de la Défense de Laurent Gbagbo visant à exclure le témoignage de P-0321 ou subsidiairement visant à permettre que le témoignage soit donné au siège de la Cour., 19 July 2016, ICC-02/11-01/15-630-Conf ; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la «Decision on the "Prosecution's application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550"» (ICC-02/11-01/15-629-Conf), 25 July 2016, ICC-02/11-01/15-635-Conf ; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la «Decision on the mode of testimony of Rule 68(3) witnesses» (ICC-02/11-01/15-721), 18 October 2016, ICC-02/11-01/15-733; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la décision de la Chambre rendue oralement le 29 Novembre 2016 refusant à la Défense la levée d'une expurgation apposée par l'Accusation au point 24 de la demande de participation de P-0350, 5 December 2016, ICC-02/11-01/15-768-Conf ; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la «Decision on the "Prosecution's application to conditionally admit the prior recorded statements and related documents of Witnesses P-0108, P-0433, P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 68(3) and for testimony by means of video-link technology for Witnesses P-0436, P-0402, P-0438, P-0459 and P-0109 under rule 67(1)"» (ICC-02/11-01/15-870), 24 April 2017, ICC-02/11-01/15-879-Conf (a public redacted version was filed on 4 May 2017); Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel des deux décisions de la Chambre rendues oralement le 3 mai 2017, l'une rejetant la demande de la Défense visant à interdire au Procureur d'utiliser la déclaration antérieure de P-0438 lors de son interrogatoire, l'autre refusant à la Défense la levée de l'expurgation apposée par l'Accusation sur le nom de l'interprète ayant officié lors de la prise de la déclaration antérieure de P-0438, 9 May 2017, ICC-02/11-01/15-908; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la décision de la Chambre rendue oralement le 10 mai 2017 refusant à la Défense que la pièce d'identité de P-0109 soit versée au dossier de l'affaire, 16 May 2017, ICC-02/11-01/15-923; Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la « Decision on the "Prosecution's consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution's application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088"» (ICC-02/11-01/15-950-Conf), 27 June 2017, ICC-02/11-01/15-969-Conf (a public redacted version was filed on 19 September 2017); Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande d'autorisation d'interjeter appel de la « Decision on the resumption of action applications » (ICC-02/11-01/15-1052), 17 October 2017, ICC-02/11-01/15-1053; *See* also transcript of the hearing, 9 March 2016, ICC-02/11-01/15-T-27-ENG, p. 26 line 1 to 23.

that their appeal against the previous one was dismissed *in limine* due to a procedural mistake[288]; as to the Defence for Mr Blé Goudé, no request for interim release was ever lodged (despite his Counsel announcing that they were 'still working on such an application' back in January 2016)[289] and leave to appeal was not requested against the Chamber's decision, by majority, to deny Mr Blé Goudé's right to make a statement in his defence[290]. Otherwise stated, while I certainly did increasingly feel that urgency as the case wore on (and partially conveyed this through those decisions aimed at streamlining the proceedings, as well as in the dissenting opinions over the interim release of Laurent Gbagbo), I was never under the impression that the same sense of urgency was shared by either defence team.

H. The overall performance of the OTP

89. This said as regards the merits of the case, I could certainly draw a line. However, I feel it is my duty to add here that I found the investigative and prosecutorial work in this case, and the overall performance of the Office of the Prosecutor, far from satisfactory, be it in terms of methodology, form or substance. The Reasons spell out extensively and convincingly the deficiencies in the documents and items tendered as 'evidence' by the Prosecutor on which the Majority could agree: in particular, those flaws which were determinative of the Majority's view that material tendered as 'evidence' was inadmissible, irrelevant, both inadmissible and irrelevant, or otherwise too inadequate and inconclusive for it to prove the various points made by the Prosecutor. There are many of those, and not of small importance.

90. The reasons for my concern, however, go beyond the content, nature and quality of the evidence. They are rooted in the shortcomings affecting the performance of the Office of the Prosecutor, both at the investigative and at the prosecutorial stage.

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[287] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Mr Gbagbo's request for interim release, 20 April 2018, ICC-02/11-01/15-1156-Conf (a public redacted version was filed on the same day).

[288] Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Mr Laurent Gbagbo's Notice of Appeal, 5 October 2017, ICC-02/11-01/15-1047 OA13.

[289] Transcript of the hearing, 14 January 2016, ICC-02/11-01/15-T-8-Red-ENG, p. 63, line 15 to 20.

[290] Transcript of the hearing, 22 November 2018, ICC-02/11-01/15-T-230-ENG, p. 19 line 19 to p. 23 line 7.

a. The OTP performance in the context of the investigation

91. As I noted in the courtroom,[291] I saw with disbelief that, instead of formally seizing original items, the Prosecutor and her investigators had simply photocopied them[292]; Witness P-0045 confirmed that OTP investigators had made copies of notes they had received from the witness and selected as relevant[293]. As a result, the record contains copies of documents (such as P-0045's notes)[294] which no longer exist in original form, due to events leading to their disappearance, misplacement or destruction. Also, sections and sentences ended up being cut away in the process of photocopying;[295] the quality of these copies is sometimes bad and makes them virtually illegible[296], as pointed out by witnesses during the interviews[297]. The Prosecutor also envisaged, during the course of the trial, conducting a handwriting expertise on photocopies: failure to submit the resulting expert reports (the existence of which is only known to the Chamber because of their disclosure to the Defence

[291] Transcript of the hearing, 16 November 2016, ICC-02/11-01/15-T-100-Red-ENG, p. 37 lines 15 to 16; Transcript of the hearing, 9 March 2017, ICC-02/11-01/15-T-131-Red2-ENG, p. 46 line 16 to p. 47 line 3.

[292] *See* investigator's report CIV-OTP-0049-2986, at 2988: the request for assistance sent to the Ivorian authorities 'in order to get access to archives of various institutions […] also considered the possibility of seizing the documents (*originals or copies*) considered relevant by the representatives of the Office of the Prosecutor (OTP) for the purpose of the on-going investigation into the 2011 post-electoral crisis' (*emphasis added*). The report also indicates that permission was requested from the *Gendarmerie* 'to make copies of the documents identified as relevant'.

[293] P-0045, transcript of the hearing, 9 February 2017, ICC-02/11-01/15-T-119-Red2-FRA, p. 4 line 9 to p. 5 line 11.

[294] P-0045, transcript of the hearing, 9 February 2017, ICC-02/11-01/15-T-119-Red2-FRA, p. 5 line 12 to 28.

[295] For example the Prosecutor showed Witness P-0440 document CIV-OTP-0046-0029 and asked him to read the fax line at the top of the page that was only partially readable. The Prosecutor herself apologised and admitted that it was 'a little bit unclear' (P-0440, transcript of the hearing, 11 May 2017, ICC-02/11-01/15-T-157-Red2-ENG, p. 17 line 16 to 18).

[296] CIV-OTP-0043-0298 is a good example: the top half of the page shows waves making it impossible to decipher the content, as if somebody had been too quick in taking the original item from the copying machine. *See* also CIV-OTP-0043-0220 (whose bad quality was highlighted in Courtroom – Transcript of the hearing, 9 March 2017, ICC-02/11-01/15-T-131-Conf-ENG, p. 78 line 23 to p. 79 line 10 and p. 81 line 22 to 23), CIV-OTP-0018-0067, CIV-OTP-0044-0008, CIV-OTP-0044-0009 and CIV-OTP-0044-0010.

[297] P-0009, ICC Statement, CIV-OTP-0051-0935 at 0944 ('*celle-là, elle est illisible parce que vous l'avez photocopiée*').

under rule 77 of the Rules)[298] is likely due to the foreseeable inconclusiveness (if not unfeasibility) of the expertise. When authorising the experts' access to the relevant exhibits, the Chamber had indeed clarified that this 'should not be interpreted as implying that the Chamber approves of the Prosecutor's selection of documents or the proposed methodology' and 'expressly reserve[d] its opinion on these matters as well as the potential utility of the proposed exercise'[299]. The development remains an illustrative example of the kind of difficulties which may arise when photocopied as opposed to original material is relied upon as evidence, as well as of the level of waste of time and resources that this may entail: the exercise involved time spent in the courtroom to discuss the matter;[300] instructions to and involvement of the VWU for the purposes of collecting specimen of Witness P-0011's signature during his stay;[301] two decisions of the Chamber,[302] exchange of filings and responses among the parties;[303] Registry officials flying to France with the selected exhibits.[304]

92. Similarly, an additional source for concern was the extent to which OTP investigators had relied on the witnesses' own interpretation or reading of certain documents, or on Ivorian authorities in the context of the search and collection of

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[298] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex E and Annex F to the Prosecution's Communication of Evidence Disclosed to the Defence on 1, 7, 13 and 29 June 2018, 3 July 2018, ICC-02/11-01/15-1193-Conf-AnxE and ICC-02/11-01/15-1193-Conf-AnxF.

[299] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Prosecution request to obtain documents in the Registry's possession for forensic examination, 14 December 2017, ICC-02/11-01/15-1087, para. 8.

[300] P-0011, transcript of the hearing, 9 March 2017, ICC-02/11-01/15-T-131-Red2-ENG, p. 46 line 6 to p. 48 line 21; *see* also p. 74 line 6 to p. 80 line 2.

[301] Witness P-0011, Transcript of the hearing, 9 March 2017, ICC-02/11-01/15-T-131-Red2-ENG, p. 48 line 3 to 9.

[302] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Prosecution request to obtain documents in the Registry's possession for forensic examination, 14 December 2017, ICC-02/11-01/15-1087; E-mail decision granting the Prosecutor's request for authorisation to submit five additional documents, TCI Communications, 15 January 2018.

[303] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecutor request to obtain documents in the Registry's possession for forensic examination, 15 November 2017, ICC-02/11-01/15-1067-Conf; Defence of Laurent Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Réponse de la Défence à la "Prosecution request to obtain documents in the Registry's possession for forensic examination" (ICC-02/11-01/15-1067-Conf), 22 November 2017, ICC-02/11-01/15-1076-Conf; Defence of Charles Blé Goudé, Defence Response to the "Prosecution request to obtain documents in the Registry's possession for forensic examination"(ICC-02/11-01/15-1067-Conf), 24 November 2017, ICC-02/11-01/15-1078-Conf.

[304] *See* Registry, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, *Procès verbal* of transmission of evidence to Experts by Registry pursuant to Trial Chamber I's decision (ICC-02/11-01/15-1087), 23 July 2018, ICC-02/11-01/15-1200-Conf-Anx, *annexed to* Registry's Report related to the Handover and Collection of Items from External Experts.

relevant documents: as pointed out in the Reasons, 'much of the evidence was essentially provided by the current [Ivorian] government, which is headed by political opponents of the accused'[305]. Witness P-0045 revealed that he had explicitly cautioned the investigators to make checks on some leads he had provided regarding the code names allegedly used by members of the FDS in some radio conversations which he would have intercepted, some of which during the crisis, since those leads were only meant as '*pistes*' for them to follow through; it does not seem to have been done.[306] It also appears that 'the general purpose of the document review project' was explained to Ivorian officers[307] and that they were relied upon 'to identify the potentially relevant documents and bring them to the review location'[308] for them to be seized – *rectius*, photocopied; that officers from the Ivorian national archives were in charge of gathering documents from the relevant period, after they had explained that documents might have been kept at different locations depending on their origin and content[309]. Measures adopted – in order *inter alia* 'to prevent any furtive disappearance of relevant documents' and, more broadly, to preserve 'the confidentiality and the integrity of the OTP activities'[310] – were quite limited: they consisted for example in '1) ke[eping] a faithful record of every folder reviewed in order to identify any potential missing one; and 2) visit[ing] the offices where the folders were stored to make sure that no potentially relevant folder was left behind'[311] (some documents were identified as existing but 'not available'[312]); and included explaining to the relevant officer 'the importance of keeping the relevant originals separate and saved'[313]. The Ivorian authorities' narrative as to the fate of these items both during the duration of the post-electoral crisis[314] and in the hours, weeks and

[305] Reasons, para. 36.

[306] P-0045, transcript of the hearing, 9 February 2017, ICC-02/11-01/15-T-119-Red2-FRA, p. 47 line 5 to 13; p. 89 line 28 to p. 90 line 14.

[307] To whom the OTP investigators had explained 'the general purpose of the document review project': Report, CIV-OTP-0049-2986, at 2991.

[308] Report, CIV-OTP-0049-2986, at 3002.

[309] Report, CIV-OTP-0049-2986, at 2988 ff.

[310] Report, CIV-OTP-0049-2986, at 2997.

[311] Report, CIV-OTP-0049-2986, at 2997.

[312] Report, CIV-OTP-0049-2986, at 3003.

[313] Report, CIV-OTP-0049-2986, at 2998.

[314] Report, CIV-OTP-0049-2986, at 2992.

months following the 'battle of Abidjan', was seemingly taken at face value: it is worth reminding that the events affecting some of the venues where such items were purportedly stored during and in the aftermath of the post-electoral crisis (such as the Presidential Palace; or Camp Agban[315] – which 'remained intact during the post-electoral crisis', although 'some of the offices, such as that of the former Commander of the *Groupe d'engins blindés* (GEB) were emptied by his subordinates when he fled'; or some *Gendarmerie* offices[316]) included their bombing, pillaging or raiding: the absence of documents identified by the OTP as missing was explained by the Ivorian officers as 'probably due to the chaotic situation that was lived during the crisis and the lack of a well-organized storage system'[317]. The collection included items 'kept in bundles in old cardboard boxes and plastic buckets', in the absence of 'a clear archive system' and in places which were 'humid and full of dust'.[318] In addition to selecting the items to seize (*rectius*, photocopy) 'primarily' on the basis of their relevance to the 'case hypothesis'[319], the investigators seem also to have entered into discussions with Ivorian officers responsible for the custody of the documents as to the merits and contents of documents: some of them voiced their views as to the likelihood that 'sensitive orders' (none of which was found by the investigative team)[320] be given over the radio 'to avoid leaving any records'[321].

93. Even more troubling, it seems that staff with limited mastery of French was selected as responsible for carrying out interviews of critical importance for the case. The interview of Witness P-0009 is particularly instructive: it soon becomes apparent that he suffers the attitude of the interviewer, who seems to stumble on French words and expressions slightly less than ordinary[322]. Another interviewer uses words which

[315] Report, CIV-OTP-0049-2986, at 2989.

[316] Report, CIV-OTP-0049-2986, at 2992 to 2995.

[317] Report, CIV-OTP-0049-2986, at 3000.

[318] Report, CIV-OTP-0049-2986, at 2995.

[319] Report, CIV-OTP-0049-2986, at 2999.

[320] Report, CIV-OTP-0049-2986, at 3000.

[321] Report, CIV-OTP-0049-2986, at 2992 and 3000.

[322] Interview, CIV-OTP-0011-0572 corr at 0592; Interview, CIV-OTP-0341 at 0355; Interview, CIV-OTP-0011-0376 corr at 0386; Interview, CIV-OTP-0011-0430 corr at 0445; Interview, CIV-OTP-0011-0395 corr at 0413; CIV-OTP-0011-0529 corr at 0545; Interview, CIV-OTP-0011-0482 corr at 0490.

prompt the witness to note '*je ne comprends pas le terme*'[323]. Witness P-0009 commented that '*c'est difficile de savoir l'origine des rumeurs*'[324] and was categorical in refusing to follow the invitation to take a position on the basis of facts he had known from TV reports[325]. Similar instances recur in other high-level interviews: when Witness P-0156 (a FDS military commander) uses the word '*accrochés*' in order to describe the background to a specific operation he has to illustrate its meaning[326]; when asked whether the population had been warned about a forthcoming police operation, he feels compelled to explain that '*le bouclage, il ne se dit pas. C'est une opération de police. C'est pour surprendre, donc, on n'informe pas*'[327].

94. Similarly troubling elements surfaced during the courtroom questioning. It emerged, for instance, that Witness P-0164, questioned on the type of mortars used by BASA, suggested the investigator should search for pictures of mortars on the computer[328]; this computer-search resulted in retrieving pictures[329] of a 120-mortar 'more or less' similar to the ones in dotation to BASA, apart from the colour; this picture was then submitted as 'evidence'.

95. It is or should be obvious that the investigation constitutes the bedrock of any criminal case; as a consequence, flaws and shortcomings at the investigative stage are not suitable to be remedied in the courtroom and will inevitably compromise the chances of success of any resulting case.

b. The OTP performance in the context of the prosecution

96. The flaws and shortcomings affecting the conduct of the questioning in the courtroom are no less serious. More than ten trial lawyers, assisted by several colleagues in various supporting roles, took the floor and questioned witnesses in front of the Chamber, a token of a degree of fragmentation far too high to be

[323] Interview, CIV-OTP-0051-0830 at 0861.

[324] Interview, CIV-OTP-0051-0770 at 0776.

[325] Interview, CIV-OTP-0011-0556 corr at 0568.

[326] Interview, CIV-OTP-0083-1044, at 1055.

[327] Interview, CIV-OTP-0083-1022, at 1035.

[328] P-0164, transcript of the hearing, 19 June 2017, ICC-02/11-01/15-T-164-Red2-FRA, p. 35 line 5 to p. 36 line 22.

[329] Photograph, CIV-OTP-0028-0513-R01; Photograph, CIV-OTP-0028-0514-R01.

compatible with a unified strategy; when tasks are compartmentalised to such a degree it makes it very hard to preserve the coherence of the overall conduct and strategy of the case.

97. One may observe – with some accuracy – that such degree of compartmentalisation of tasks is an ill which plagues the work of the Court as a whole and that Chambers are not immune from it either; however, no place as a courtroom makes such ills so obvious and apparent. The questioning of each witness seemed seldom to be led in awareness of what had been going on in the courtroom prior to that moment; rather, the persisting impression from the bench was that each witness (even every question, in some of the most extreme cases) was treated like an indivisible monad, and had been 'prepared' in an isolated manner, according to a mechanical script. One would have a hard time, for example, in understanding why, having heard from Witness P-0009 that the CECOS had been used for 'certain missions', without further qualifications, the questioner moved on to address the issue of the relationship between Witness P-0010 and the President[330], instead of trying to obtain additional details on the nature and purpose of such 'certain missions', especially in light of the fact that, in the Prosecutor's narrative, the CECOS would have played a significant role in the implementation of the alleged common plan. Sometimes, apparently taken by surprise by developments in their own line of questioning, counsel for the OTP seemed unable to identify the portion of documents which would be relevant[331]; some other times I had to notice that 'the organisation is not at its top'.[332]

98. Not only did the Prosecutor's lawyers omit to have, where appropriate, witnesses appearing at a later stage to comment statements previously made in the courtroom by other witnesses; the Prosecution went sometimes so far as to submit that such confrontation – one of the tools available to a questioner to challenge a witness –

[330] P-0009, transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 43 line 12 to 14. *See* also P-0435, transcript of the hearing 18 October 2016, ICC-02/11-01/15-T-87-Red2-ENG, p. 53 line 14 to 21, where I had to notice that the Prosecutor was going to change topic even if the Witness had not answered his question; and P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-ENG, p. 54 line 9 to 16.

[331] P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 41 line 10 to 18.

[332] P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-ENG, p. 68 line 8 to 9. *See* also P-0321, transcript of the hearing, 7 July 2016, ICC-02/11-01/15-T-60-Conf-ENG, p. 60 line 18 to 25, where the Prosecutor confronted the witness with the wrong statement.

should be prohibited[333]. Some of the witnesses appeared to be perfectly appraised and abreast of previous developments in the trial, to the point of raising the issue of the consistency of their own recollection with the statements of previous witnesses.[334]

99. Many opportunities for meaningful confrontation were thus irreparably missed. On document CIV-OTP-0043-0226, referring to the use of the camp in Akouedo as a shooting base, Witness P-0009 stated that the Akouedo camp had – and could - not have been used for these purposes since his appointment as Chief of staff, since houses had been built in the area[335]. Witness P-0010, instead, confirmed it had been signed in his name and that these exercises were necessary for the purposes of testing the repairs carried out on some of the weapons which regularly fell out of order[336]. Neither in the Trial Brief, nor in the Response did the Prosecutor raise the issue of the inconsistency between the two testimonies, or otherwise address Witness P-0009's specific challenges to the document.

100. When some documents were exposed as suspicious, the Prosecutor did not make any specific effort to challenge them. Among the most significant, also in light of its repeated use in the courtroom,[337] I will recall CIV-OTP-0045-0359,[338] a document allegedly attesting the declaration of the neighbourhood of Abobo as war zone; as detailed in the Reasons, this is an element to which the Prosecutor seems to attach a significant weight, although 'a cogent legal argument as to why Mr Gbagbo should have declared Abobo a war zone'[339] was never properly articulated. Witness P-

[333] Transcript of the hearing, 28 November 2016, ICC-02/11-01/15-T-106-Red2-ENG, p. 67 line 16 to p. 68 line 6.

[334] For example P-0009, transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 15 line 15 to 20; transcript of the hearing, 4 October 2017, ICC-02/11-01/15-T-199-FRA, p. 37 line 5 to 28; transcript of the hearing, 5 October 2017, ICC-02/11-01/15-T-200-Red2-FRA, p. 57 line 25 to p. 58 line 12.

[335] P-0009, transcript of the hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 45 line 27 to p. 46 line 18.

[336] P-0010, transcript of the hearing, 27 March 2017, ICC-02/11-01/15-T-137-Red2-FRA, p. 66 line 6 to 22.

[337] P-0046, transcript of the hearing, 17 February 2017, ICC-02/11-01/15-T-125-Red-FRA, p. 102 line 12 to 13; P-0010, transcript of the hearing, 29 March 2017, ICC-02/11-01/15-T-139-Red2-FRA, p. 93 line 6 to 7; P-0156, transcript of the hearing, 4 July 2017, ICC-02/11-01/15-T-171-Red2-FRA, p. 42 line 24; P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 30 line 5 to 6; P-0047, transcript of the hearing, 7 November 2017, ICC-02/11-01/15-T-203-FRA, p. 54 line 11.

[338] Document, CIV-OTP-0045-0359.

[339] Reasons, para. 1364.

0009, after excluding having seen the document, pointed out many elements in its form and content making it suspicious and leading him to conclude that '*ce n'est pas un document sérieux*'[340], a document '*nul et non avenue*'[341] and '*faux*'[342].

101. To this day, one struggles to understand the criteria underlying the calling order of the witnesses as initially devised by the Prosecutor. More specifically, one is unable to guess what might have led the Prosecutor to choose to have crucial insiders appearing at different and distant stages of the proceedings[343], or not to assign the questioning of witnesses expected to testify on the same or related topic to one and the same lawyer. Witnesses P-0088 and P-0087, testifying one after the other on their journalistic reportage on the post-electoral crisis, were questioned by two different lawyers[344].

102. Overall, the technique of questioning was such that time and time again I resolved to step in to reformulate the questions, with a view not only to making them comprehensible to the witness[345], but also to resolve the *impasse* due to the multiple defence objections (no matter how genuine, critical or even useful) triggered by the lack of clarity of the original questioning[346].

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[340] P-0009, transcript of the hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 82 line 26 to 27.

[341] P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 30 line 19 to 20.

[342] P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 32 line 23.

[343] *See* Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Chalres Blé Goudé*, Annex A to the Prosecution's submission of information pursuant to Chamber's order ICC-02/11-01/15-787, 31 January 2017, ICC-02/11-01/15-788-Conf-AnxA.

[344] P-0088, transcript of the hearing, 11 July 2017, ICC-02/11-01/15-T-176-ENG; P-0087, transcript of the hearing, 12 July 2017, ICC-02/11-01/15-T-177-ENG.

[345] P-0321, transcript of the hearing, 8 July 2016, ICC-02/11-01/15-T-61-Conf-ENG, p. 24 line 20 to 24; P-0347, transcript of the hearing, ICC-02/11-01/15-78-Red2-ENG, p. 6 line 11 to 22; P-0435, transcript of the hearing, 21 October 2016, ICC-02/11-01/15-T-90-Red2-ENG, p. 6 line 8 to 10; p. 38 line 1 to 2; P-0010, transcript of the hearing, 28 March 2017, ICC-02/11-01/15-T-138-Red2-ENG, p. 47 line 12 to 18; P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-ENG, p. 57 line 20 to 25; P-0047, transcript of the hearing, 8 November 2017, ICC-02/11-01/15-T-204-Red2-ENG, p. 13 line 9 to 21.

[346] P-0625, transcript of the hearing, 10 March 2016, ICC-02/11-01/15-T-28-Red2-ENG, p. 51 line 3 to 17; P-0321, transcript of the hearing, 7 July 2016, ICC-02/11-01/15-T-60-Red-ENG, p. 23 line 15 to p. 24 line 4; transcript of the hearing, 11 July 2016, ICC-02/11-01/15-T-62-Red2-ENG, p. 8 line 4 to 9; p. 9 line 22 to p. 10 line 10; transcript of the hearing, 14 July 2016, ICC-02/11-01/15-T-65-Red2-ENG, p. 26 line 6 to p. 28 line 24; P-0330, transcript of the hearing, 8 September 2016, ICC-02/11-01/15-T-73-Red2-ENG, p. 31 line 13 to 18; P-0347, transcript of the hearing, 23 September 2016, ICC-02/11-01/15-78-Red2-ENG, p. 4 line 25 to p. 5 line 23; P-0435, transcript of the hearing, 20 October 2016,

103. I also had to intervene more than once to remind the questioner to remain respectful and courteous at all times *vis-à-vis* the witnesses;[347] sometimes it was the Witness to point out the questionable manners: '*vous m'avez coupé la parole*'[348]. The degree of fragmentation was also probably the reason behind the numerous requests for amendment of the list of evidence[349].

104. If one were to single out one shortcoming above all, however, one would have to select the Prosecutor's choice, to this day a reason for the utmost concern, not to adjust and progressively amend her narrative, taking stock of things said or revealed in the courtroom: instead, this narrative has remained the same as in the early days of the pre-trial stage, and to this very day. It is in the inherent nature of a trial, and of the dialectic process triggered by the questioning, that the witnesses' testimonies shift the focus on some elements and it is each party's specific responsibility to be alert and adjust their line as required. If, for any Prosecutor as a public and independent party to criminal proceedings, there is an obligation to genuinely search for the truth and to

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ICC-02/11-01/15-T-89-Red2-ENG, p. 26 line 3 to 9; p. 30 line 10 to 16; P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-ENG, p. 71 line 11 to 19.

[347] *See* P-0010, transcript of the hearing, 28 March 2017, ICC-02/11-01/15-T-138-Red2-ENG, p. 47 line 22 to p. 23 line 3; P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-ENG, p. 51 line 2 to 14.

[348] P-0009, transcript of the hearing, 27 September 2017, ICC-02/11-01/15-T-195-Red2-FRA, p. 7 line 23 to 24.

[349] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's request pursuant to Regulation 35 in relation to a limited number of documents, 30 June 2015, ICC-02/11-01/15-115-Conf (a public redacted version was filed on 2 July 2015); Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's request pursuant to regulation 35 for an extension of time to re-disclose three documents as incriminatory material, 7 September 2015, ICC-02/11-01/15-207-Conf (a public redacted version was filed on 30 October 2015); Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's Request for an extension of time to disclose and add to its list of evidence two expert reports and to disclose a related report under rule 77, 22 September 2015, ICC-02/11-01/15-234-Conf (a public redacted version was filed on 30 October 2015); Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's omnibus request for an extension of time pursuant to regulation 35 of the Regulations of the Court, 1 October 20151, ICC-02/11-01/15-262-Conf-Corr (a corrected version was filed on 8 October 2015; a public redacted version was filed on 6 November 2015); Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's Request for an extension of time to disclose Witness P-0114's second statement and Witness P-0360's second statement and annexes, 23 October 2015, ICC-02/11-01/15-312-Conf (a public redacted version was filed on 2 December 2015); Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's Request for an extension of time to disclose a video interview with Laurent Gbagbo, 22 February 2016, ICC-02/11-01/15-448; Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's request for an extension of time to re-disclose and use at trial a Forensic Expert Report and related material pursuant to regulation 35 of the Regulations of the Court, 22 February 2016, ICC-02/11-01/15-449-Conf (a public redacted version was filed on the same day). *See* also Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution's request to add expert witness P-0606 to its list of witnesses, 15 September 2015, ICC-02/11-01/15-220.

request the acquittal when the evidence at trial turns out not being sufficient for a conviction, these obligations are even more crucial for the ICC Prosecutor, in light of the statutory obligation to 'investigate incriminating and exonerating circumstances equally' pursuant to article 54(1)(a) of the Statute. Throughout the trial and until her closing statements, the Prosecutor's failure to meaningfully address facts and circumstances coming on the record through her own witnesses which were not consistent with her own 'case-theory' was striking. There have been, as signalled in the Reasons, instances of attempts at adapting the narrative to developments, in particular in the transition from the Pre-Trial Brief to the Trial Brief; however, those instances were few and limited in scope if compared to the magnitude of the discrepancies between the facts as originally alleged by the Prosecutor and those facts as having surfaced in the courtroom.

105. Among many, one example stands out: the choice to virtually ignore and substantially remain silent on the role of the *Commando invisible*: as defined in the Reasons, 'the main armed group operating in opposition to the FDS in Abobo'[350]. Ever since the very early testimonies,[351] it became gradually apparent that throughout the crisis Abidjan saw the operation of heavily armed groups[352] (including Dozo warriors in their thousands[353]) not only opposing, but actively attacking[354] the FDS (including with tanks[355] and other heavy weaponry[356]), systematically resorting to techniques including mixing with the civilian population and disappearing

[350] Reasons, para. 1221.

[351] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Conf-FRA, p. 42 line 3 to 18, stating that rebel troops were stationed in Abidjan as early as just after the second tour of the elections and attacked, thereby starting a war; p. 60 line 25 to p. 61 line 18, stating that, in March 2011, the FDS were under attack of the Commando invisibles and of the '*armées de Soro*' and '*se défendaient, faisaient… des patrouilles… ripostaient comme ils pouvaient*'.

[352] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Red-FRA, p. 33 line 16 to 21; P-0321, transcript of the hearing, 11 July 2016, ICC-02/11-01/15-T-62-Red2-FRA, p. 39 line 18 to 20, explicitly saying that the CI also relied on '*armes lourdes*'.

[353] P-0625, transcript of the hearing, 14 March 2016, ICC-02/11-01/15-T-29-Red2-FRA, p. 48 line 5 to p. 49 line 9.

[354] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Conf-FRA, p. 32 line 13 to 16; p. 61 line 4 to 9.

[355] P-0501, transcript of the hearing, 7 September 2016, ICC-02/11-01/15-T-72-Conf-FRA, p. 54 line 25 to p. 55 line 1.

[356] P-0501, transcript of the hearing, 7 September 2016, ICC-02/11-01/15-T-72-Conf-FRA, p. 55 line 5 to 6.

immediately after the attack[357] (a technique that one witness described as 'terroristic'[358] and another as 'non-conventional'[359]: a first, in terms of challenges faced by the Ivorian army[360]) or attacking FDS convoys not only in the context of specific operations aimed at neutralising their threat[361] but on a regular basis,[362] with different kinds of weapons[363] (including *obus de mortiers*[364]), also thanks to the presence of people infiltrating the FDS and passing on information,[365] in particular in Abobo and starting as early as just after the second tour of the elections[366]; all these elements were *per se* suitable to cast at least a doubt on the very narrative of the FDS engaged in an aggressive, as opposed to a defensive[367], campaign in Abidjan. Some also indicated that tanks of the French army also shot at the FDS.[368] When stating that the presence of civilians, and the need to ensure their protection to the maximum extent, was the very reason why the FDS, who came under siege and progressively

[357] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Red-FRA, p. 33 line 23: '*Ils tiraient, ils attaquaient et puis ils disparaissaient*'.

[358] P-0321, transcript of the hearing, 14 July 2016, ICC-02/11-01/15-T-65-Red2-FRA, p. 30 line 28.

[359] P-0238, transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T-82-Red2-FRA, p. 95 line 18 to 23; transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Conf-FRA, p. 42 line 6 to 7 ('*Ils ne combattent pas comme nous. Ils viennent, ils tirent, ils décrochent*').

[360] P-0238, transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Conf-FRA, p. 62 line 2 to 21.

[361] Document, CIV-OTP-0043-0330; P-0321, transcript of the hearing, 14 July 2016, ICC-02/11-01/15-T-65-Red2-FRA, p. 10 line 6 to 9; P-0011, transcript of the hearing, 13 March 2017, ICC-02/11-01/15-T-134-Red-FRA, p. 71 line 24 to 26; p. 72 line 23 to 25; P-0009, transcript of the hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 63 line 8 to 14.

[362] P-0321, transcript of the hearing, 11 July 2016, ICC-02/11-01/15-T-62-Red2-FRA, p. 35 line 2 to 9, who, in light of this recurrent practice, also questions the plausibility of a FDS convoy proceeding on the streets of Abobo as slowly as the one depicted in the Prosecutor's evidence in support of the 3 March incident. P-0238, transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T-82-Conf-FRA, p. 48 line 19.

[363] P-0238, transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T-82-Conf-FRA, p. 49 line 21 to 23.

[364] P-0501, transcript of the hearing, 7 September 2016, ICC-02/11-01/15-T- 72-Conf-FRA, p. 55 line 2 to 6.

[365] P-0321, transcript of the hearing, 11 July 2016, ICC-02/11-01/15-T-62-Conf-FRA, p. 51 line 12 to 14; P-0238, transcript of the hearing, 29 September 2016, ICC-02/11-01/15-T-82-Red2-FRA, p. 90 line 6 to 26.

[366] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Conf-FRA, p. 42 line 7 to 10.

[367] P-0321, transcript of the hearing, 11 July 2016, ICC-02/11-01/15-T-62-Red2-FRA, p. 40 ff., in particular p. 43.

[368] P-501, Transcript of the hearing, 7 September 2016, ICC-02/11-01/15-T- 72-Conf-FRA, p. 55 line 7 to 8.

retreated into Camp Commando[369], failed in their mission to defeat the *Commando Invisible*[370], Witness P-0009 provided specific information as to the relevant context allowing to appropriately read and interpret all these elements; as stated by another military witness, '*on n'arrivait pas à pouvoir les vaincre, parce qu'ils utilisaient des méthodes... on n'avait pas la solution à ces... à ces... à ces méthodes-là*'[371].

106. As stated in the Reasons, 'the situation in Abidjan during the post-electoral crisis was far from being under Mr Gbagbo's control. Especially in Abobo, Mr Gbagbo's forces faced one or more potent and violent opponent(s), who expelled the regular law enforcement units and waged urban guerrilla warfare against the FDS. FDS units came under frequent attack and a significant number of FDS members were killed or injured. At the same time, it appears that military forces loyal to Mr Ouattara were approaching Abidjan and were at the verge of starting an assault to conquer the city.'[372] Furthermore, 'Côte d'Ivoire's regular military forces appear to have been relatively weak and there seems to have been a steady and increasing flow of desertions and acts of sabotage. This combination of enduring insecurity and structural inability of the State forces to recover control over the situation seems to have played a significant role in the creation of the so-called self-defence groups/militias'[373]. As to the role of the UN and French troops, as highlighted in the Reasons, '[a]lthough formally neutral, they were certainly not perceived in that way by Mr Gbagbo and his regime. It may well be that this perception was incorrect or disingenuous. However, it would be equally incorrect and disingenuous to pretend that the presence and role of the ONUCI and French military forces was irrelevant to how Mr Gbagbo and his supporters viewed the situation'.[374]

[369] As explained by P-0321, transcript of the hearing, 14 July 2016, ICC-02/11-01/15-T-65-Red2-FRA, p. 10 line 7 to 9: '*la route était donc donnée au Commando invisible de s'installer un peu partout à Abobo, à l'exception de l'escadron où se tenaient les Forces de défense et de sécurité*'.

[370] P-0009, transcript of the hearing, 4 October 2017, ICC-02/11-01/15-T-199-FRA, p. 62 line 22 to p. 63 line 23.

[371] P-0238, transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Conf-FRA, p. 64 line 6 to 8.

[372] Reasons, para. 68.

[373] Reasons, para. 71.

[374] Reasons, para. 69.

107. The role of the *Commando invisible* in destroying the Prosecutor's narrative has been extensively addressed in the Reasons; what matters to me here is that it amounts to a mistake to decide to downplay or ignore this factor.

108. Another example can be found in having substantially ignored the testimonies from her own witnesses and documents to the effect that roadblocks were being erected by both sides of the political divide[375] (and even that they had been the first method of choice adopted by the *Commando Invisible* itself, together with the burning of tyres, and before starting attacking the *commissariats*, also using common taxis as points from which they would shoot on police troops[376]), as opposed to being allegedly exclusively triggered by Mr Blé Goudé's rhetoric, and could be explained as an effect of the psychosis triggered in the whole town of Abidjan by the many deaths[377]. The Chamber heard testimonies to the effect that '[t]here was no apparent standard behaviour adopted by the *Jeunes Patriotes* manning the roadblocks'[378]; that roadblocks were not exclusive of the 'pro-Gbagbo' camp and that they became increasingly adopted as a method of opposing and hindering the progression of FDS convoys[379]. Witnesses also indicated that those manning the roadblocks did not have any weapons[380], or just pieces of wood,[381] and were mainly interested in checking identities[382] and whether vehicles transported any weapons[383] or in obtaining money; Witness P-0435 went so far as to say that the ultimate objective of the roadblocks was to ensure that no weapons or other dangerous material would be hidden in vehicles,

[375] Document, CIV-OTP-0043-0336.

[376] P-0321, transcript of the hearing, 12 July 2016, ICC-02/11-01/15-T-63-Red2-FRA, p. 32 line 5 to p. 35 line 14.

[377] P-0238, transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Conf-FRA, p. 43 line 5 to 19.

[378] Reasons, para. 1714.

[379] P-0321, transcript of the hearing, 12 July 2016, ICC-02/11-01/15-T-63-Red2-FRA, p. 32 line 5 to 6; P-0330, transcript of the hearing, 5 September 2016, ICC-02/11-01/15-T-70-Red2-FRA, p. 18 line 5 to 7.

[380] P-0097, transcript of the hearing, 9 June 2016, ICC-02/11-01/15-T-49-Red2-FRA, p. 16 line 22.

[381] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Conf-FRA, p. 73 line 17 to 18.

[382] P-0238, transcript of the hearing, 28 September 2016, ICC-02/11-01/15-T-81-Conf-FRA, p.73 line 20 to p. 74 line 1; P-0369, transcript of the hearing, 18 May 2016, ICC-02/11-01/15-T-41-Red2-ENG, p. 41 line 10 to 17.

[383] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Conf-FRA, p. 87 line 20 to 22.

with a view to assisting the FDS in better safeguard the security and safety of people and assets[384], as opposed to harassing or otherwise harming those who had to cross them.[385] Moreover, documents have been submitted showing that relevant sections of the FDS did take measures to have unauthorised roadblocks removed[386].

109. I could also recall the instances where the very existence of an Inner Circle, as something in competition with or in alternative to the institutional chain of command as set forth in the relevant texts, was denied,[387] or where the role of some purported members of the Inner Circle was downplayed or excluded[388].

110. Witness P-0009's statements were particularly illustrative: he indicated that Mr Blé Goudé never attended the meetings with Mr Gbagbo and the generals; that some questionable attitudes by *Garde Republicaine* chief general Dogbo Blé simply mirrored his personality, as opposed to being dictated by or the result of orders given by the President[389]; that Ms Simone Gbagbo would only exchange civilities with the generals but never be in attendance at meetings[390]; a point in line with other testimonies to the effect that she carried out humanitarian work, also in her capacity as MP for Abobo[391].

111. The Prosecutor similarly ignored the statements to the effect that, far from being trapped into a mechanism of predetermined instructions, the FDS high

[384] P-0435, transcript of the hearing, 31 October 2016, ICC-02/11-01/15-T-94-FRA, p. 11 line 11 to 15.

[385] P-0442, transcript of the hearing, 11 February 2016, ICC-02/11-01/15-T-21-Red2-FRA, p. 9 line 18 to p. 10 line 2; P-0097, transcript of the hearing, 9 June 2016, ICC-02/11-01/15-T-49-Red2-FRA, p. 15 line 15 to p. 16 line 4.

[386] Document, CIV-OTP-0043-0298 (Gendarmerie Divo orders removing barricades erected in the context of the second tour of the elections with a view to preventing people from voting); Document, CIV-OTP-0043-0302 (reporting an attack against a gendarmerie officer '*à la machette*' in the context of a patrol to reduce roadblocks).

[387] P-0321, transcript of the hearing, 6 July 2016, ICC-02/11-01/15-T-59-Conf-FRA, p. 36 line 23 to 25.

[388] P-0011, transcript of the hearing, 10 March 2017, ICC-02/11-01/15-T-132-FRA, p. 90 line 27 to p. 91 line 5; P-0010, transcript of the hearing, 28 March 2017, ICC-02/11-01/15-T-138-Red2-FRA, p. 3 line 28 to p. 4 line 25.

[389] P-0009, transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 47 line 12 to 16.

[390] P-0009, transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 37 line 22 to 27.

[391] P-0321, transcript of the hearing, 7 July 2016, ICC-02/11-01/15-T-60-Conf-FRA, p. 72 line 21 to 24; transcript of the hearing, 12 July 2016, ICC-02/11-01/15-T-63-Conf-FRA, p. 49 line 11 to 15; P-0009, transcript of the hearing, 3 October 2017, ICC-02/11-01/15-T-198-FRA, p. 70 line 15 to p. 71 line 4.

command took decisions on the basis of developments on the ground, in an atmosphere of mutual respect and openness and always bearing in mind the ultimate responsibilities of the FDS;[392] the explicit denial that the issue of declaring or not Abobo as *zone de guerre* might have to do with anything but the intention and ultimate objective of ensuring the protection of the civilian population[393], as opposed to being something which would have somehow given the FDS a blanket authorisation to act without any boundaries; the fact that the reason why the declaration was not made had to do with Laurent Gbagbo's concern that this might be perceived as in contradiction with his statements to the effect that Ivory Coast was no longer plagued by civil war[394] (a position which might be debatable in terms or political expediency, but hardly suitable to be construed as inciting or otherwise approving of an attack against the civilian population); statement to the effect that Mr Blé Goudé, in spite of his ministerial role, would not receive intelligence[395]; the isolated nature of the episode of the involvement of Seka-Seka in the meetings of the general staff, and the narrative offered by Witness P-0010.

112. Furthermore, no meaningful response was given to many elements in direct contrast to the Prosecutor's theory, including:

i. the explicit denials that Charles Blé Goudé had ever appealed to resort to massacres[396] or to pillage;[397]

ii. the statements as the existence of conflicting 'rumours' as to the purported link between Blé Goudé's speech at the Baron Bar and the violence having taken place on that same day in Doukouré, some of which expressly linked

[392] P-0010, transcript of the hearing, 3 April 2017, ICC-02/11-01/15-T-142-Red2-FRA, p. 26 line 17 to 25.

[393] P-0009, transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 85 line 12 to 26; P-0047, transcript of the hearing, 7 November 2017, ICC-02/11-01/15-T-203-FRA, p. 35 line 2 to 18.

[394] P-0009, transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 86 line 25 to 28.

[395] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Conf-FRA, p. 83 line 10 to 14.

[396] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52- Conf-FRA, p. 87 line 2 to 10.

[397] P-0097, transcript of the hearing, 9 June 2016, ICC-02/11-01/15-T-49-Red2-FRA, p. 54 line 3 to 6.

instead the violence to a reaction against the *mots d'ordre* sent by the Ouattara camp;[398]

iii. the testimony that it was Mr Gbagbo's will to dismantle self-defence groups with a view to enhancing the chances of the peace process, and that he was personally involved in initiatives in support of such dismantling; [399]

iv. the statement to the effect that the *Jeunes Patriotes* emerged as a form of resistance and opposition '*les mains nues*' to the rebellion in 2000[400];

v. the evidence to the effect that the United Nations were not always and only impartial, but in some instances acted in support of rebels[401];

vi. the evidence showing that recruitment of mercenaries was something the *Commando Invisible*[402] also engaged in[403].

113. Likewise ignored remained the following:

i. many caveats to the effect that one should be careful in ascribing any type of conduct to a 'mercenary', since not only militias and mercenaries were being recruited by both camps[404] but also since it would be impossible to distinguish between '*le mercenaire en tenue et un soldat en tenue*'[405]; a conclusion all the more crucial, in light of abundant evidence on the record showing that uniforms, or elements of official uniforms, had been stolen and were thus worn by individuals not entitled to[406], or that rebels wearing uniforms circulated in vehicles marked with CECOS insignia[407];

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[398] P-0097, transcript of the hearing, 9 June 2016, ICC-02/11-01/15-T-49-Red2-FRA, p. 12 line 13 to 26.

[399] P-0520, transcript of the hearing, 14 June 2016, ICC-02/11-01/15-T-50-Red2-FRA, p. 62 line 5 to 28.

[400] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Conf-FRA, p. 27 line 1 to 12.

[401] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Conf-FRA, p. 63 line 7 to 13.

[402] P-0321, transcript of the hearing, 8 July 2016, ICC-02/11-01/15-T-61-Red2-FRA, p. 79 line 10 to 13.

[403] P-0321, transcript of the hearing, 8 July 2016, ICC-02/11-01/15-T-61-Conf-FRA, p. 29 line 1 to 9.

[404] P-0321, transcript of the hearing, 8 July 2016, ICC-02/11-01/15-T-61-Red2-FRA, p. 63 line 28 to p. 64 line 2.

[405] P-0520, transcript of the hearing, 16 June 2016, ICC-02/11-01/15-T-52-Conf-FRA, p. 92 line 8 to 12.

[406] P-0108, transcript of the hearing, 25 April 2017, ICC-02/11-01/15-T-146-Conf-FRA, p. 68 line 21 to 27; P-0048, transcript of the hearing, 30 June 2016, ICC-02/11-01/15-T-56-Red2-FRA, p. 45 line 5 to 15, referring to a member of his personal guard wearing a police armband in spite of his lack of

ii. the denials of any form of integration or even collaboration between the FDS on the one hand, and either the youth or the *groupes d'autodéfense*[408], on the other; as highlighted and detailed in the Reasons, '[t]he evidence presented by the Prosecutor in connection with alleged acts of collaboration of the youth with the FDS does not indicate that any such collaboration was motivated by an organized overall strategy. Instead, there appear to have been a number of instances where ad hoc or last-minute arrangements were put in place'[409];

iii. the role played by sheer panic[410], engendered by the generalised climate of violence and insecurity, in some of the episodes of violence ending in casualties;

iv. the testimony to the effect that (a negligible number of) Liberian mercenaries would have found themselves in Abidjan by chance and the denial that would have received money from Laurent Gbagbo or his government, even less for the purposes of having them fight on their side, and even less during or in connection with the 2011 crisis[411];

v. Witness P-0009's accurate account of the existence of mortars within the Ivorian army, the fact that the authorisation to use them was implicit in the fact of having requisitioned the Army (who '*vient avec ses moyens*'[412]) and the circumstances (limited to two, and with clearly specific and detailed justifications as part of the strategy to dislodge the *Commando Invisible*) he

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connection with either the police or any other segment of the FDS; P-0330, transcript of the hearing, 5 September 2016, ICC-02/11-01/15-T-70-Red2-FRA, p. 9 line 23 to 25: « *des hommes armés qui ne sont pas identifiés par des tenues correctes sont un danger pour les Forces de défense et de sécurité* ». *See* also P-0435, transcript of the hearing, 21 October 2016, ICC-02/11-01/15-T-90-Red2-FRA, p. 63 line 6 to 15.

[407] Document, CIV-OTP-0043-0310.

[408] P-0009, transcript of the hearing, 4 October2017, transcript of the hearing, ICC-02/11-01/15-T-199-FRA, p. 37 line 13 to 24; p. 40 line 8 to 20.

[409] Reasons, para. 788.

[410] P-0238, transcript of the hearing, 30 September 2016, ICC-02/11-01/15-T-83-Conf-FRA, p. 59 line 22 to 24 ('*c'est pas évident. Parce que quand on tire sur vous, très souvent, les gens répliquent dans… dans la panique et autre, vous êtes obligés, quand même, de répliquer, pour se protéger*').

[411] P-0483, transcript of the hearing, 15 November 2016, ICC-02/11-01/15-T-99-Red2-FRA, p. 83 line 3 to 26; transcript of the hearing, 16 November 2016, ICC-02/11-01/15-T-100-Red-FRA, p. 41 line 22 to p. 42 line 2.

[412] P-0009, Transcript of the hearing, 25 September 2017, ICC-02/11-01/15-T-193-FRA, p. 74 line 23.

himself had authorised their use, as well as the cautionary considerations which had led him to order their removal[413];

vi. the perfectly plausible considerations as regards the strict hierarchical principles governing relations in the Army, and the ensuing shadow this would cast on the very credibility of some of the most apparently 'incriminating' testimonies[414];

vii. the fact that, duly informed (*ex post*) about the use of mortars by the Army, the President would simply, and responsibly, have requested more information as to the details[415] (and the absence of any indication to the effect, and in support of a conclusion, that such use would have been done in compliance with orders from the President which would include a determination to attack the population, or even the disregard for the fate of those who may fall victim to such use);

viii. the lapidary statement given by Witness P-0009 as to the impossibility to link the post-electoral crisis to the process started with the events in 2002;[416]

ix. the many testimonies to the effect that the Ivorian Army was as socially and ethnically diverse as the Ivorian society as a whole, simply too overwhelming to be anyhow contradicted by those few testimonies where a witness stated, on the basis of his own 'pure deduction' and in the absence of any objective indication to this effect, having been side-lined by his hierarchy because of his being of *dioula* origin[417];

x. the evidence showing that marches organised, supported by or otherwise linked to the opposition were regularly allowed to take place throughout Abidjan and throughout the period of the crisis[418].

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[413] P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 36 line 19 to p. 41 line 14.

[414] P-0009, transcript of the hearing, 5 October 2017, ICC-02/11-01/15-T-200-Red2-FRA, p. 57, line 2 to line 24.

[415] P-0009, transcript of the hearing, 28 September 2017, ICC-02/11-01/15-T-196-Red2-FRA, p. 44 line 11 to p. 47 line 7.

[416] P-0009, transcript of the hearing, 3 October 2017, ICC-02/11-01/15-T-198-FRA, p. 36 line 13 to 20.

[417] P-0347, transcript of the hearing, 22 September 2016, ICC-02/11-01/15-T-77-Red-FRA, p. 39 line 9 to p. 40 line 6.

[418] *See*, for example: BQI, CIV-OTP-0045-0188; BQI, CIV-OTP-0045-0199; BQI, CIV-OTP-0045-0389; BQI, CIV-OTP-0045-0170.

114. If one were to read the Trial Brief without having followed the hearings, one would have no clue as to the evidence referenced in the preceding paragraph, whether because this evidence is not referred to or because, when it is, it emerges as deprived of its actual meaning, extracted as it is from the relevant context: again, a few examples will suffice to illustrate the point. The section devoted to Simone Gbagbo[419], purportedly a key member of the Inner Circle, only refers to perfectly legitimate acts and conducts of a political nature, to be expected by a representative (meeting people, convening meetings – some of which involving 'more than 150 people', analysing the effectiveness and shortcoming of political actions, expressing one's views on current affairs), as well as to a notebook the Prosecutor styles as 'Simone Gbagbo's agenda'.[420] Even leaving aside the defence's questioning of its authenticity,[421] one should note that, in a 56-plus page document full of neutral and legitimate comments, the Prosecutor can only identify a handful of sentences where one may find a faint echo of the Prosecutor's case-theory. Such echo, however, ceases to be heard the minute one were to look at these same sentences in light of Simone Gbagbo's position not only as the wife of the President of the Republic but also as a representative for the commune of Abobo, as well as of the other evidence on the record. This other evidence, as discussed in detail in the Reasons, would lead to note that the FDS were increasingly under attack by different heavily armed groups, which would make their defence without '*armes réelles*' utterly vain; the fact that the FDS were understaffed and under resourced, which makes it plausible for them to having resorted to the assistance of 'mercenaries' for areas where they felt that their presence on the ground would be particularly weak.

115. In yet another striking example, one would believe that Witness P-0010 would have somehow confirmed the idea that Simone Gbagbo's *aide de camp*, Commandant

[419] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 to Prosecution's Mid Trial Brief, *annexed to* Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124), 19 March 2018, ICC-02/11-01/15-1136-Conf-Anx1-Corr3 (a public redacted version was filed on 29 March 2018; a confidential third corrected version was filed on 13 June 2018), paras 62-64.

[420] Diary, CIV-OTP-0018-0810.

[421] Defence for Mr Gbagbo, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Partie 3. L'absence de responsabilité pénale de Laurent Gbagbo, 23 July 2018, ICC-02/11-01/15-1199-Conf-Anx5-Corr, para. 145, *annexed to* Version corrigée de la «Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée» (a corrected version dated 25 September 2018 was filed on 26 September 2018).

Seka Seka was one of the prominent members of the Inner Circle: this would be, it seems to me, the only reason to link P-0010's testimony to the statement to the effect that Seka Seka was of 'one of the loyal FDS officers who remained by Gbagbo's side up to Gbagbo's arrest on 11 April' and that his 'rank of Commandant made him a high level officer'[422]. When one looks at the referenced testimony, however,[423] the only thing to be found is Witness P-0010's narrative of the episode where Seka-Seka requested to attend and take the floor during a meeting of high generals at the *Etat major*; as explained by Witness P-0010, this request triggered a debate among generals, and the irritation of some of them when the majority decided to give him the floor for ten minutes, namely in light of its inconsistency with the General staff rules, tradition and practice. If anything, this part of the testimony casts a shadow to large swaths of the Prosecution's theory, in particular the idea of an all-powerful 'parallel structure', to which Seka Seka would prominently belong for no other reason than his ethnic and personal links with the presidential couple, capable of side-lining the high echelons of the Ivorian Army as needed: on the one hand, P-0010 makes no secret of his personal irritation with the Chief of staff for this decision (and thus makes it much harder to follow the Prosecutor in her proposed image of the Inner Circle as a monolithic bloc of pro-Gbagbo hard-liners); on the other, and by the same token, P-0010 also hands a blow to the very idea of an Inner Circle entrenched on drastic and extremist position, confirming the *Etat major*'s openness as a matter of principle to listen to anybody might have nurtured ideas which would be helpful in finding a way out of the crisis.

116. I will conclude with a note on the early timeline of this case: on 7 October 2011, four days after PTC I issued a decision authorising the investigation, staff of the OTP was already conducting interviews in Abidjan;[424] investigative acts, including

[422] Office of the Prosecutor, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Annex 1 to Prosecution's Mid Trial Brief, *annexed to* Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124), 19 March 2018, ICC-02/11-01/15-1136-Conf-Anx1-Corr3 (a public redacted version was filed on 29 March 2018; a confidential third corrected version was filed on 13 June 2018), para. 73.

[423] P-0010, transcript of the hearing, 28 March 2017, ICC-02/11-01/15-T-138-Red2-FRA, p. 3 line 28 to p. 4 line 25.

[424] ICC Statement, CIV-OTP-0011-0324.

first contacts with key witnesses, predate the authorisation[425]. The circumstances surrounding the confirmation proceedings, and the changes in the majority which would determine that the case proceed to trial, over a strong (and, read in hindsight, prophetic) dissent, were also, I submit, unusual.

I. The Appeals Chamber's failure to release Mr Gbagbo and Mr Blé Goudé

117. Unusual would also be an appropriate way to describe the developments before and at the hands of the Appeals Chamber following the oral decision of acquittal. As the one having advocated for it for more than two years now in respect of Mr Gbagbo,[426] I had also welcomed the unconditional release of Laurent Gbagbo and Charles Blé Goudé at that time. I could not imagine that such release would be would be turned by the Appeals Chamber into a conditional release under a heavily restrictive regime. For Mr Blé Goudé, this regime, compounded by the Court's inability to secure meaningful cooperation by the Dutch authorities, resulted in him being confined to a closed location, at exorbitant costs for the Court, in a situation of 'house arrest' comparable, if not virtually equivalent, to remaining in detention, which is still ongoing[427]. One cannot fail to notice the intrinsic incoherence of the Appeals Chamber's decision[428] (and I wish to clarify that I only refer to the section between page 21 and page 30, the first 21 pages being unnecessary, lengthy summaries of the parties' submissions). The decision does solemnly declare that continued detention

[425] Investigators met with Witness P-0010 on 9 August 2011 (CIV-OTP-0013-0040) and 23 August 2011 (CIV-OTP-0013-0051), told him that they had information to the effect that he had committed crimes and read him his rights.

[426] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Dissenting opinion of Judge Cuno Tarfusser, 10 March 2017, ICC-02/11-01/15-846-Anx, *annexed to* Decision on Mr Gbagbo's Detention; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Dissenting opinion of Judge Cuno Tarfusser, 25 September 2017, ICC-02/11-01/15-1038-Anx, *annexed to* Decision on Mr Gbagbo's Detention; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Dissenting opinion of Judge Cuno Tarfusser, 20 April 2018, ICC-02/11-01/15-1156-Anx, *annexed to* Decision on Mr Gbagbo's request for interim release.

[427] Registry, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Second Registry's Report pursuant to paragraph 62 of ICC-02/11-01/15-1251-Conf and Regulation 24bis of the Regulations of the Court, 7 June 2019, ICC-02/11-01/15-1258-Conf-Exp and confidential *ex parte* annexes.

[428] Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 1 February 2019, ICC-02/11-01/15-1251-Conf OA14 (a public redacted version was filed on the same day).

pursuant to article 81(3(c)(i) of the Statute 'must be limited to situations which are truly exceptional' and 'can only be the last resort', as it does reiterate the principle whereby detention 'is and must remain exceptional', all the more so *vis-à-vis* an individual acquitted on the merits; it even echoes domestic high court decisions stating the incompatibility of restriction of the liberty of an acquitted person with fundamental human rights. However, all these considerations are swept aside by the subsequent statements to the effect that, in light of the fact that the Prosecutor only requested 'release with conditions', the power of imposing such conditions must be considered as implicit and inherent in the power to impose continued detention. Instead of the requirement of exceptional circumstances, set forth in article 81(3)(c) of the Statute, the benchmark to determine whether the imposition of conditions to the release of an acquitted person would consist in the existence of 'compelling circumstances', a different, additional requirement which, whilst not appearing in the provision, would have to be assessed with particular reference to the existence of 'a flight risk that could be mitigated by conditions'[429].

118. This conclusion is tantamount to turning the exceptionality of the restriction of liberty on its head. Indeed, anybody familiar with the Court's jurisprudence in matters of release will recognise the formulas typically and systematically used in connection with the rejection of requests for interim release of the accused pending trials, such as the gravity of the charges, the potential high sentence, the existence of a network of supporters and of means as incentives for absconding; all of these factors had been indeed referred to by both the Appeals and my fellow Judges constituting the Majority of the Chamber,[430] as justifying persisting detention for Mr Gbagbo in spite of his age, health conditions and overall duration of imprisonment.

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[429] Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 1 February 2019, ICC-02/11-01/15-1251-Conf OA14 (a public redacted version was filed on the same day), para. 54.

[430] Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo", 26 October 2012, ICC-02/11-01/11-278-Conf OA, paras 54, 59 (a public redacted version was filed on the same day); Appeals Chamber, *The Prosecutor v. Laurent Gbagbo*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled "Third Decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute", 29 October 2013, ICC-02/11-01/11-548-Conf OA4, para. 54 (a public redacted version was filed on the same day); Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled 'Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute', 8 September

119. Not a word is spent by the Appeals Chamber to explain why, while the existing power to impose continued detention on an acquitted person is statutorily subject to the existence of exceptional circumstances, this requirement would not apply to the power to impose release with conditions which, in the words of the Appeals Chamber, would be 'incidental' to it and is derived by inference. The Appeals Chamber deems it adequate and sufficient to support its conclusion (which goes to the heart of a provision earlier – and in the key findings – defined as in need of a strict and rigorous interpretation because of its exceptional nature) by simply stating that 'it is not necessary'[431].

120. On several other crucial aspects the Appeals Chamber remains silent:

i. the pertinence of such formulas to the radically different status of an acquitted person;

ii. the way in which failure to take into account a requirement not provided for either in the statutory texts or in previous jurisprudence, either of the Appeals Chamber itself or of other tribunals, could amount to 'an error of law' by the Trial Chamber;

iii. the fact that, whilst full reasoning is pending, the Trial Chamber (in a decision which might well be final, since the Prosecutor has responsibly indicated that a decision as to whether the decision on the merits will be appealed will only be taken when the parties are notified of the Chamber's reasoning in full[432]) has already clarified that the ultimate reason for the acquittal is the fact that the Prosecutor's evidence, taken as a whole and despite its volume, is exceptionally weak;

iv. the reason why protecting the integrity of (potential) appeals proceedings might or should prevail over the right to personal liberty as a fundamental

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2015, ICC-02/11-01/15-208 OA 6, paras 74, 77; Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", 19 July 2017, ICC-02/11-01/15-992-Conf OA10, paras 43, 54, 66-69 (a public redacted version was filed on the same day).

[431] Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 1 February 2019, ICC-02/11-01/15-1251-Conf OA14 (a public redacted version was filed on the same day), para. 54.

[432] 'Statement of the ICC Prosecutor, Fatou Bensouda, following today's decision by Trial Chamber I in the case of Laurent Gbagbo and Charles Blé Goudé', 15 January 2019, available at https://www.icc-cpi.int/Pages/item.aspx?name=190115-otp-stat-gbagbo.

human right, as well as the reason why the solemn commitment[433] to return to the seat of the Court if and when requested signed by both Mr Gbagbo and Mr Blé Goudé and their respective counsel would be irrelevant.

121. In so doing, the Appeals Chamber seems to ignore that, according to well-established human rights jurisprudence (extensively referenced in my three dissenting opinions to the Majority's decisions rejecting Mr Gbagbo's application for interim release adopted during this trial), the distinction between deprivation of and restriction upon liberty is 'merely one of degree or intensity, and not one of nature or substance'[434]; accordingly, any and all restriction to personal liberty, not only the one consisting in detention, is exceptional and requires justification, in particular by showing the existence of 'clear indications of a genuine public interest which outweigh the individual's right to freedom of movement'[435]. It likewise overlooks that, whilst restrictive measures may also be imposed upon an acquitted person, since 'an acquittal does not necessarily deprive such measures of all foundation', there must however be a scenario where 'concrete evidence gathered at trial, though insufficient to secure a conviction, may nonetheless justify reasonable fears that the person concerned may in the future commit criminal offences'[436]. In the same vein, since a reasonable suspicion that the person might indeed have committed the charged offence constitutes the essential safeguard against arbitrariness in all matters concerning personal liberty, there must be 'facts or information which would satisfy an objective observer that the person concerned may have committed an offence'[437]; since changed circumstances may include 'changes to the nature or quality of the

[433] *See* Registry, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transmission of Two Documents received from Mr Gbagbo and Mr Blé Goudé, 17 January 2019, ICC-02/11-01/15-1241 with two annexes.

[434] ECtHR, Grande Chambre, *Guzzardi v. Italy*, 'Judgment', 6 November 1980, Application no. 7367/76, para. 93.

[435] ECtHR, *Hajibeyli v. Azerbaijan*, 'Judgment', 10 July 2008, Application no. 16528/05, para. 63.

[436] ECtHR, *Labita v. Italy*, 'Judgment', 6 April 2000, Application no. 26772/95, paras 189-197.

[437] ECtHR, Fox, Campbell and Hartley v. the United Kingdom, 'Judgment', 30 August 1990, Application no. 12244/86; 12245/86; 12383/86, para. 32; *see* also ECtHR, Murray v. the United Kingdom, 'Judgment', 28 October 1994, Application no. 14310/88, para. 51; ECtHR, Erdagöz v. Turkey, 'Judgment', 22 October 1997, Application no. 127/1996/945/746, para. 51; ECtHR, Ilgar Mammadov v. Azerbaijan, 'Judgment', 22 May 2014, Application no. 15172/13, para. 88, 92.

evidence that come to light',[438] it seems obvious that the progressive emergence of the weakness of the evidence brought against the accused cannot but result in making restrictions to personal liberty less justified.

122. Even more strikingly, the Appeals Chamber seems to ignore its own recent jurisprudence: as recently as in March 2018, when adjudicating Trial Chamber VII's decision to suspend the operation of a term of imprisonment in spite of the absence of a specific provision in the statutory framework to this effect[439], the Appeals Chamber admonished that, in the legal framework of the Court, '"inherent powers" should be invoked in a very restrictive manner and, in principle, only with respect to matters of procedure', and that 'when a matter is regulated in the primary source of law of the Court, there is […] no room for chambers to rely on purported 'inherent powers' to fill in non-existent gaps'.[440] Less than a year later, the Appeals Chamber seems to renegade this stance of its own in a matter as sensitive as the personal right to liberty where, if anything, restrictive interpretation and caution are and should be the norm. It also is, or should be, a matter for concern that the Appeals Chamber, in violation of a basic principle of criminal law, seems to accept and favour recourse to inherent powers only to the detriment (*in malam partem*), and not to the benefit of the accused (*in bonam partem*). Against this background, the fact that the Court has so far been unable to secure the cooperation of any State in respect of the release of Mr Blé Goudé comes as no surprise.

123. This constitutes in my view an unfortunate decision, made all the more serious by the absence of any remedy for the parties to have this rectified, on course as such to become a 'precedent'.

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[438] K. A. A. Khan, 'Article 60: Initial proceedings before the Court', in O. Triffterer and K. Ambos (eds), Commentary to the Rome Statute of the International Criminal Court, Beck et al., 3rd ed., 2016, p.1472, at p. 1479.

[439] Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, ICC-01/05-01/13-2123-Corr.

[440] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgement on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute', 8 March 2018, ICC-01/05-01/13-2276-Red A6 A7 A8 A9, paras 75 and 76.

J. Final considerations

124. All of the above does not detract one jot from the compassion I felt in hearing about terrible sufferance endured by Ivoirians of all political allegiances, ethnical origins or religious faith, both in Abidjan and in other parts of the country in its recent history and during the troubled period of the post-electoral crisis in particular; about the plight of families learning about, and sometimes seeing, their loved ones being killed, raped, wounded or otherwise harmed. Whilst I am sympathetic to their grief and sorrow, as well as conscious of the lasting consequences of these traumas on their ongoing lives, it remains my duty not to let this kind of compassion interfere with my professional and ethical obligations as one of the judges in charge of adjudicating this case. It is not for a criminal trial to judge the history of a country or to challenge the political decisions taken by its leader(s); nor is it to judge on political responsibilities, or to side with one or the other side of parties in conflict. Instead, it is for any criminal trial to ascertain the criminal responsibility of those individuals the Prosecutor has identified as responsible for facts and conducts alleged to be criminal. Such ascertainment must remain exclusively based on the evidence gathered by the Prosecutor during the investigation and submitted to the Chamber. If this evidence is judged as insufficient to reach the conclusion that the accused is criminally responsible, the accused must be acquitted. This, and only this, is what has been done in this case.

Done in both English and French, the English version being authoritative.

Judge Cuno Tarfusser

Dated this 16 July 2019
At The Hague, The Netherlands