International Criminal Court
Trial Chamber I
Situation: Republic of Côte d'Ivoire
In the case of The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé
ICC-02/11-01/15
Presiding Judge Cuno Tarfusser, Judge Olga Herrera Carbuccia and
Judge Geoffrey Henderson
Status Conference - Courtroom 1
Wednesday, 14 November 2018
(The hearing starts in open session at 9.33 a.m.)
THE COURT USHER: [9:33:27] All rise.
The International Criminal Court is now in session.
Please be seated.
PRESIDING JUDGE TARFUSSER: [9:33:42] Good morning. I don't hear myself.
Is it working? Yes.
Good morning. We are here for the last day of the submissions and presentation by the Defence for Mr Gbagbo and then following immediately also, the start of those of Mr Blé Goudé.
I give the floor to you, Maître Altit.
MR ALTIT: [9:34:22] (Interpretation) Thank you, Mr President, your Honours. It is Professor Jacobs who will continue with our presentation.
PRESIDING JUDGE TARFUSSER: [9:34:33] Thank you very much, Maître Altit.
Mr Jacobs.
MR JACOBS: [9:34:42] (Interpretation) Good morning, your Honours.
Yesterday, we saw two examples of the disconnect between the allegations and the

extent of the evidence, the meetings, what was discussed at the meetings. Today, I'd now like to turn to something else, a very striking example of this disconnect, namely, the speeches given by President Gbagbo.

Ever since the very beginning of this trial, the Prosecution has tried to demonstrate some kind of war-like rhetoric from President Gbagbo, but their efforts have been in vain. I'm sure you'll remember that when we made our opening remarks in 2016, we underscored just how ridiculous it was for the Prosecution to attempt to build their case on the fact that a man who, throughout his entire lifetime, argued in favour of democracy and a multiparty system, that a man would all of a sudden change course completely and cling to power by any means possible.

I refer you to T-11, page 65, lines 18 to 27.

Now, I think we can see that the Prosecution is still just as out of touch with reality as at the beginning of the trial. When we looked at the -- the Prosecution has mentioned various speeches given by Laurent Gbagbo, and the Prosecution would have you believe that these speeches, which were about peace and reconciliation, were intended to stir up violence. And yet, when you take time to actually listen to the speeches, it is easy to see and, well, to hear that the Prosecution is still basing their interpretation by twisting President Gbagbo's words, taking a single sentence or a scrap of a sentence or by completely denying the context in which President Gbagbo gave the speech.

In our written submissions, I'm sure you've seen to what extent the Prosecution has acted in bad faith when the Prosecution spoke of President Gbagbo's public statements. I refer you to annex 5 of our filing, paragraph 165 and to paragraphs 505 to 549.

I'm not going to delve into all the details of each and every speech. The Chamber

can certainly read these speeches, listen to them, and the Chamber will see that none of these speeches, none, not a single one, contains any call to engage in violence. In all these speeches, President Gbagbo called upon for cooler heads to prevail, for people to reconcile, to find a peaceful solution to the conflict, to respect the laws of the republic and to respect the sovereignty of Côte d'Ivoire. If one sees some kind of criminal intent in all of this, one is living in a dream world.

I will restrict myself to a few general points. First of all, I think we need to look at what the Prosecution has done and how the Prosecution has disregarded the context in which the speeches were given. And the Prosecution have tried to turn these speeches into some kind of tool for the implementation of the common plan. I'll give the example of the Divo speech that was given on 27 August 2010, when a new company of CRS men were posted to the town and there was an inauguration of this new contingent. They were there to do something, because there was a great deal of danger throughout the region.

And P-46 confirmed this point in cross-examination.

I'd like to quote from his testimony during cross-examination. T-126, page 74, line 25, to page 75, line 14. So the question was this:

"My first question to you is this, and it wasn't entirely clear why, why was it that a republican security company had been sent to Divo and was operating there?"

The witness gave this response:

"Divo was an area where there was a great deal of crime. It was an area where coffee and cocoa were being grown and there were many attacks. There was an intervention unit there, because that would help ensure security."

A few lines further on, the witness clarified one point, namely, the link between cocoa and crime, and he said this:

"Of course there was a link, an area where cocoa and coffee are grown is an area where a lot of money changes hands. Buyers bring cash, unfortunately, to the cocoa and coffee farmers, and then thieves come to collect the money at night. A well-trained team is needed to provide security to the population in this context." End of quote.

So why has the Prosecution not listened to their own witnesses? Of course because the witnesses have confirmed that the CRS company being sent to Divo had nothing to do with the implementation of some kind of common plan. Given this context, the Prosecution's statement is quite astonishing. They said that President Gbagbo used the word "bandits," bandits in French in his speech in Divo, and they think he was making reference to his political opponents.

I refer you to another transcript, T-222, page 13, lines 12 to 18.

P-46 clearly testified that the bandits were those who came to steal money. There is no plot, there is no hidden meaning here when President Gbagbo refers to bandits he is thinking about bandits.

Second point on these speeches. The Prosecutor relies on the fact that Laurent Gbagbo repeatedly stated in his speeches that he was the legitimately elected president of Côte d'Ivoire pursuant to a decision of the constitutional council and, therefore, comes to the deduction that he intended to stay in power at all cost.

But what is the link here? How is it that when Laurent Gbagbo believes that he has the constitutional power to remain in power pursuant to the only -- to the results proclaimed by the only institution with power to do so, which declared that he was the Victor, how could that in any way suddenly connect to him taking things out on civilians? There is no link, no nexus between those two assertions.

And the Prosecutor in the presence of this emptiness of evidence makes a quantum

leap, a real quantum leap.

Third point on these speeches, the Prosecutor claims that Laurent Gbagbo demonised Alassane Ouattara. Example, paragraph 1111 -- 1211 of his response, rather. The Prosecutor uses the example in which Laurent Gbagbo stated that Alassane Ouattara was responsible for the series of coup d'états that had occurred in Côte d'Ivoire since 1999. Transcript T-221, page 67, lines 3 to 13.

However, the Prosecutor never demonstrated how it is that Alassane Ouattara was being demonized, never. This is a statement of fact that is well-known to all Ivorians. So talking about a certain kind of truism or indeed a well-known fact, because in making these links, the Prosecutor, like Ms Baroan said, has demonstrated that he has no full knowledge of the situations in Côte d'Ivoire by so interpreting a very common and well-known phenomenon in Côte d'Ivoire.

Fourth point, the Prosecutor considers that challenging the role of the UN and France during the crisis is the proof of a sinister criminal intent. Once again, we do not understand why. For the Prosecutor, would it be that France and the UN are immune from any criticism regardless of their conduct? This is a rather surprising position to take because we know that there are entire libraries of books and articles that deal with the conduct of France in Africa from the time of independence, its interventions, particularly in its former colonies.

The Prosecutor is so bent on defending France that he is ready to defend the theory of what he refers to as the anti-French propaganda. I want to refer you to filing 998 for this purpose and to annex B2, page 436 as a point in example in which the Prosecutor repeatedly talks about anti-French propaganda when he refers to the fact that the RTI mentioned that there was suspicion that the French president at the time had financed the election of Muammar -- or rather, that the French president's election campaign

had been financed by Muammar Gaddafi.

In that connection, the RTI journalists did much less in that connection than their French colleagues. It is common knowledge, and you are fully aware of it, that there were trials in France specifically on the illegal funding of Nicolas Sarkozy's campaign in France by Gaddafi. The Prosecutor, however, fails in that connection to accuse French journalists and judges of engaging in any kind of anti-French campaign.

Through these illustrations pertaining to orders, meetings and speeches, we have seen how the Prosecutor in the absence of substantive proof has extrapolated to attempt to find means of substantiating the very heart or the very crux of his own case.

Mr President, your Honours, we must address one other question: How is it possible for the Prosecutor to have considered that such poor evidence could have established anything whatsoever?

To answer this question, we need to step back a little bit and see what the Prosecutor believes that he has to establish in his case. If we do that, then we realise that the Prosecutor has built a legal scaffolding which if we hitherto, would lead the Prosecutor not to be able to establish anything in particular, specifically when it comes to establishing the link between President Gbagbo and the alleged crimes.

In our submissions, we have established that the Prosecutor has not established evidence of any of the charges, particularly in terms of modes of liability and the material elements of the crimes. In his written statement and presentations in court, he has not managed to change the situation.

And let me deal with a number of issues in that regard. First, the contextual elements pertaining to crimes against humanity. In court, while answering a question from your Chamber, the Prosecution was of the view that it was not upon him to prove beyond a reasonable doubt incidents relating to the attacks against

civilian populations. I refer you to transcript T-223, page 43, line 9 to 23.
The Prosecutor is very clear in his written response at paragraph 15 -- or rather, at paragraph 195. Let me quote:
"In order to establish the conduct, it is not necessary to show that a Trial Chamber could have come to the conclusion that each or at least one of those events was established pursuant to the required standard."
The Prosecutor goes on to argue that all he needs to do is to prove that there was an attack without ever having to prove how this actually practically occurred. To be very clear, the Prosecutor has made allegations pertaining to a number of incidents, but is of the view that he doesn't have to prove any, not even one of those incidents beyond a reasonable doubt, but that the onus is only to speak to the attack. So the link between the incidents and the attacks is not established. How do you prove the attacks without a reasonable -- beyond a reasonable doubt without proving that there were incidents?
So how can you prove that there was an attack without proving a single incident beyond a reasonable doubt that relates to those attacks?
So the Prosecutor in court theoretically argues on the basis that the two concepts are based on two levels of obstruction, two different levels of obstruction. But that does not make sense. What the Prosecutor is attempting to do is simply that there was no serious evidence relating to any of the incidents he relies on, particularly when it comes to the perpetrators of the incident and the victims of the incident.
Now, when we don't know who the perpetrators of the incident are, we cannot know their motivations and their intent. How then can the Prosecutor claim that all those incidents, even if they had taken place, were somehow linked to the same attack?
This is all speculation. Now, in the same vein, where we cannot establish that there

were victims of the alleged attacks, how then can the Prosecutor assert that the so-called victims were the deliberate target of an alleged attack? Once again, we're in the area of speculation.

Let me summarise this point to clarify it. If we are not able to identify the perpetrators, you cannot link an alleged attack to a plan. If the victims are not identified, then you cannot assert that those victims were the target of an attack.

So if we were to follow the Prosecutor's reasoning along the lines of this abstract distinction that he makes between the attacks and the incidents, then we must come to the conclusion that an accumulation of speculative and hypothetical conclusions, which are based on baseless evidence or poor evidence, given that most of the evidence, the so-called evidence is indirect and is based on hearsay and is not corroborated, how can all that by some miraculous transformation become evidence beyond a reasonable doubt?

Let me point out that Judge Van den Wyngaert and Judge Morrison in their separate opinions in the Bemba case warned, issued a caution in this or regarding this type of approach. Decision 3636 for reference, annex 2, paragraph 66 and 67. I am not going to read the entire excerpt out, but allow me to state simply that at page 66, the judges indicated that each of the essential facts must be proven pursuant to the applicable standard.

"The Prosecutor's approach ..."

To be clear, I was referring to paragraph 66:

"The Prosecutor's approach would lead to the conclusion that it is possible to prove a series of murders without proving that there was at least a single death. That is false, because there is no conduct that can exist independently of each criminal action. It is only -- such conduct can only be the result of all the acts put together." End of quote.

At paragraph 67, the judges continue as follows:

"When the Prosecutor relies on a holistic approach, this cannot compensate for the absence of clear and convincing evidence." End of quote.

And the judges go on to say further on, and I quote:

"It is actually the opposite that holds. The cumulative approach proposed by the Prosecutor bears the risk of pointing the Chamber in the direction of taking into account evidence which are irrelevant and of no probative -- of no genuine probative value and, therefore, to come to conclusions based on an illusion of corroboration." End of quote.

Now let me deal with the mode of liability under 25(3). This mode of liability, indirect co-perpetration, is a mode of liability which is extremely broad, because it allows for a person to be convicted, first, for acts that they did not directly commit and; two, for acts they were not even aware of, given that knowledge and intent of one of the co-perpetrators is enough for the accused person to be so imputed with responsibility. Combining these two criteria has the consequence that the link between the accused persons and the alleged crimes will be very fine. In any event, there needs to be a link.

Now, when dealing with such a broad-based mode of liability, which appears to, at the very extreme, seem to negate the concept of individual criminal liability, which is at the very heart of international criminal law, when dealing with this, it is important for the judges to cross-check the criteria relating to this mode of liability with the stringent of standards. In so doing, they will ensure that this mode of liability doesn't end up creating some kind of responsibility without liability, which will in fact contradict the very letter and the spirit of the Statute.

For this reason, the Chamber must cross-check that the Prosecutor has demonstrated

beyond all reasonable doubt that all criteria attending to that mode of liability have been met. He must demonstrate that there was in fact a plan and demonstrate why that plan was criminal; that there was agreement and why it was criminal; that there were co-perpetrators and demonstrate what the role of each of the co-perpetrators in the alleged plan was in the plan or the agreement and in the commission of the crimes; and determine the concrete scope of the co-perpetrators in such an organisation. All these criteria constitute a chain of demonstration and are subsequent one to the other. If one of the criteria were to be absent, then there cannot be a conviction entered. Let me say that all the criteria must be met and they are cumulative. If one of the criteria were to be absent, then logically the responsibility of the accused cannot logically be established. Yet, the Prosecutor has built in his case his legal argument in such a way that ultimately he doesn't need to establish much or demonstrate much because, as we said yesterday, he's inviting the Chamber to deduce the common plan from circumstantial evidence, which is not convincing. And he asserts that there was a circle, an inner circle, but fails to define the conditions for belonging thereto, yet claims that they implemented such an enigmatic common plan.

Let us note that in order to again justify that he was not able to properly explain the composition of the inner circle, the Prosecutor for the first time in his response makes the following assertion at paragraph 1090, and I quote:

"The evidence is that the accused interacted with third parties, namely, persons who were not part of the common plan, but who acted in its implementation, that such evidence can be properly taken into account by the judges of fact in order to assess the participation of the accused in the common plan in general terms. Therefore, evidence pointing to the involvement of a co-perpetrator using a tool or an accomplice with a view to committing the charged crimes may be relevant when it

comes to establishing the existence of such a common plan." End of quote.

The only source the Prosecutor refers to in relation to that principle is the appeals judgment in the situation of the Central African case in the case on contempt. I'm referring to the case on contempt of court.

Two comments. One, when we rely on this contempt case, this is quite surprising, because it has nothing to do with a trial on crimes against humanity, whether it be in terms of fact or in terms of legal considerations.

By referring to this judgment, the Prosecutor clearly points out that he has no precedence on which to rely to assert in relation to all the genuine criminal cases that are before this Court.

Second, the appeals judgment does not indicate that the Appeals Chamber defines or lays down a general principle as the Prosecutor would have us have it. The Appeals Chamber simply evaluates the reasonable or non-reasonable character of the factual conclusions reached by the Trial Chamber.

These factual conclusions established by the Chamber are strictly limited to the case, to that case.

By the way, the Prosecutor in his answer uses the words "tools" and "accomplice" in brackets as if someone else had used those terms. Maybe the Appeals Chamber in the contempt case, but such is not the case, therefore, there is no general principle that applies.

In any event, we must fully understand the consequence of the Prosecutor's proposition or proposal. If we follow the Prosecution's reasoning, he would therefore never have to actually demonstrate the existence of the inner circle or its exact composition to the extent that he would always tell you that such and such a person was a simple tool in the hands of the common plan. And yet, this is a very

vague notion, if possible at all, in the same manner as the concept of the inner circle. This ambiguity makes it possible for the Prosecutor to determine at will that such and such an event, such and such a meeting, or such and such an alleged incident is linked to a common plan and that such and such a person is linked to the inner circle. This ambiguity particularly makes it possible for the Prosecutor not to have to establish the least link with President Laurent Gbagbo because it would always refer to this undefined magma, which is the inner circle so to speak, given that everybody is responsible for everything by definition regardless of any iota of evidence, of concrete evidence.

In other words, according to the Prosecutor, and I insist again, once the hypothesis of the inner circle has been put forth, everything else hinges on it, including the common plan and on the common plan as well, regardless of these particular circumstances of each allegation, regardless who may be involved. Whoever may be so involved is immediately considered by the Prosecutor to belong to the inner circle. Any action by any member of the so-called inner circle is automatically considered as part of the implementation of the common plan and, therefore, any consequence flowing from any of these actions is automatically linked to all the members of the inner circle.

And to be even easier, the Prosecutor presents a surprising vision. Under Article 30 of the Statute -- let me repeat. The Prosecutor presents a very strange vision of how to establish Laurent Gbagbo's intent. Under Article 30 of the Statute, no one can be held responsible for crimes if the material elements of the crime are not committed with intent and knowledge. Therefore, intent and knowledge must be established in relation to the material elements of the crimes charged, because it is on the basis of those crimes that someone may be convicted. Yet, the Prosecutor at paragraph 1101 asserts as follows, and I quote:

"For the accused to meet the subjective elements relating to the crimes charged, he must not necessarily have been or have had knowledge of the specific crimes that resulted from the implementation of the common plan. Instead, it is only necessary for the accused to have been aware or conscious of the fact that the implementation of the common plan in the ordinary course of events would have led to the commission of the type of offence or crime charged." End of quote.

For the Prosecutor, it is therefore not necessary to establish the slightest direct link between Laurent Gbagbo and the alleged crimes, which is obviously contrary to all the general principles of criminal law.

Let us point out that the Prosecutor in order to justify his position relies on footnotes 2980 and 2981, on three judgments of the ICTY; whereas, obviously the law applicable in the area of modes of liability in the ICTY is radically different from what is happening at the ICC, and it is not transposable.

Furthermore, the Prosecutor equally refers to that same appeals judgment in the contempt case. And yet, when you read the excerpt referred to by the Prosecutor, and that is paragraph 1308 of the appeals judgment, and it is decision 2275 of 10 March 2018, when you look at what the Prosecutor refers to, the relevance is not at all obvious.

In fact, one of the accused used as a grounds of appeal the fact that the Trial Chamber did not establish that the accused was aware of the contents of the false testimonies of two witnesses and, therefore, his responsibility could not be engaged.

The Appeals Chamber responded that it was enough to establish that the accused knew that 14 witnesses were going to give false testimony without having to establish that he knew about the contents of the false testimonies themselves. Contrary to what the Prosecutor states in his response, the Appeals Chamber does not at any

point talk about the types of crimes. The Appeals Chamber on the contrary was specific; it was not vague. It ruled that the Trial Chamber had established the knowledge of the accused person specifically for the acts relating to false testimony charged against him.

In the final analysis, this lack of rigour in the legal arguments reflects the lack of rigour in factual demonstration and explains why, in spite of the 1000 pages of the response, the Prosecutor is incapable to answer the simple questions posed by the Defence, which calls into question the Prosecutor's entire case.

The list is long, but I will look at just a few examples. The first example, how can the Prosecutor state that a person is supposed to have been a member of an inner circle if he was never interested in the intentions or motivations of that circle, that is, the motivations of those persons?

The answer of the Prosecutor can be found in paragraph 1384; that is what he mentions as a response, and I quote:

"There is no requirement under the jurisprudence to prove criminal intent of each person of being a member of the immediate entourage. As previously indicated, it is enough for the Prosecution to show that the persons involved shared a common plan; that the non-prosecuted individuals shared a common plan with the accused person to attribute his conduct, whether essential or not, to the common plan to the accused person." End of quote.

This answer is mind-boggling for several reasons. Firstly, the Prosecutor devoted an entire section of his mid-trial brief by announcing to us that he was going to prove that the alleged members of the inner circle shared the objective to maintain Laurent Gbagbo in power. And what did the Prosecutor do when the Defence showed that he did not do anything to demonstrate it because he was not interested

in the intention of those few members, those members of the so-called inner circle? He tells us that in the final analysis, there is no need for him to be interested in that, and you will note that it's actually a concession or admission that he did not do the work in the MTB.

Secondly, and more specifically, the pseudo response of the Prosecutor does not resolve the problem at all. How can it be logically possible to show that the people sharing a common plan without the Prosecutor paying any attention to the intent of those people?

The second example, how can the Prosecutor state that there were promotions on the basis of ethnicity, whereas the military hierarchy was composed? And this comes out of the testimonies of all the military witnesses. The hierarchy was made up of people from all origins.

The Prosecutor claims to provide an answer to that difficulty in paragraph 1396 of his response. But in fact, that is a non-response, because in that paragraph, the Prosecutor calls on us to simply set aside that question and to look instead at other evidence on other issues and not that issue at all. Confronted with a difficulty, the Prosecutor tells us in all seriousness that it is necessary to simply blank it out.

Beyond the fact that this is not a very satisfactory response, this shows once again that the Prosecutor considered the point made by the Defence, so he did not demonstrate anything at all.

The Prosecutor also comes back to the issue on paragraph 1476 of his response, and I will quote it to you:

"Regarding the argument of Laurent Gbagbo on the sources of the second sentence of paragraph 57 of the motion, the Prosecutor says that the information given do not all support what is given in the preceding sentence, the promotion of a policy of ethnic

favouritism within the FDS." End of quote.

The references given do not all support the allegation as considered by the Prosecutor. I would like to refer you to paragraphs 230 to 241 of our annex 5 to realise that no reference, no reference at all given by the Prosecutor mentions any policy of ethnic favouritism.

Secondly, it is actually unbelievable to realise the astonishing facility with which the Prosecutor admits that he does not demonstrate these allegations in his mid-trial brief.

Finally, the reference does not correspond. He said in the hearing that it is not the right references. The Prosecutor seems to believe that a fault that is admitted is partially forgiven. But here we are in a criminal proceeding, a judicial proceeding that should be subject to the highest standards of rigour. A fault that is admitted will lead to a single thing, that is, the confirmation that the case file is actually empty.

The third example, how can he state, that is, the Prosecutor, that the appointments of certain soldiers had as objective to promote close collaborators of Laurent Gbagbo, whereas he has never made the effort to demonstrate that these appointments did not follow the normal procedure?

I would like to refer you to a paragraph of the 1,000 pages, but the Prosecutor does not respond to this issue, he does not say anything on the shocking absence of the process of appointments and promotions in Côte d'Ivoire. And without that, how can he logically prove that any appointment or promotion was abnormal for the purpose of advancing the so-called common plan?

Lastly, one example, that of the existence of the alleged or so-called parallel structure. The Defence has shown in its written submissions that it was totally baseless. And I refer you to paragraphs 449 to 503 of our filing.

The Defence raised the issue of logic underlying the arguments of the Prosecutor on this issue. And I will quote paragraph 450 of annex 5 of our brief. And I quote: "Regarding the so-called structure or parallel structure, it should be pointed out from the very outset that its hypothetical existence would call into question the entire narrative of the Prosecutor. All throughout the MTB the Prosecutor attempts to convince his reader on the core nature of the so-called inner circle, which is supposed to include amongst its members the highest and most important highest ranking officers of the FDS, including General Mangou and General Detoh Letho. But in order to convince the readers of the existence of a so-called parallel structure, he has to explain that, in reality, nothing was decided in the official structure and that everything was decided in the parallel structure. In other words, that General Mangou and the other military leaders were excluded and they were not aware of anything. This means that he is putting forward two contrary contradictions.

In summary, if one follows the logic of the Prosecutor, the inner circle is supposed to have set up a parallel structure for the purpose of actually going around this same inner circle. So, obviously, there is a problem of logic in the reasoning of the Prosecutor." End of quote.

This is the answer of the Prosecutor, paragraph 1627, and I quote:

"Contrary to what Laurent Gbagbo states, the Prosecutor is not stating that the purpose of the parallel structure was to circumvent the inner circle and its members. The Prosecution is not saying that the parallel structure was parallel to the inner circle, but, rather, to the regular chain of command." End of quote.

It would seem that the Prosecutor is showing that he is not very familiar with his own narrative. In fact, he is alleging that all the high ranking military and police commanders, as well as their line ministers, were part of what he refers to as the

immediate entourage. So this means the entire regular chain of command was part of that immediate entourage, according to the Prosecutor.

Consequently, to say that that parallel structure was parallel to the regular chain of command is equal to saying that it was parallel to the immediate entourage. And as a consequence, as a logical consequence, this would have been inevitable and irrefutable according to the argument of the Prosecutor himself. So the question remains to know why the alleged members of the nebulous immediate entourage would have had any interest in creating a parallel structure to circumvent the regular chain of command of which, according to the Prosecutor himself, they were all members.

One last point, paragraph 25(3). It should be pointed out to the frequency with which the Prosecutor, throughout the section of his response devoted to the arguments of the Defence on 25(3), paragraphs 1349 to 1857, and this is quite a long excerpt. He does not directly answer to what the Defence says on such and such a point, but calls on us not to consider an item of evidence in isolation, but to take into consideration the entire body of evidence as a whole, that is when he does not tell us in an explicit manner, as I mentioned a few seconds ago, to discard his argument. But this is another way of the Prosecutor to say, conceding by isolated argument, that the Defence is correct. He did not prove what he said and he tried to drown this element in his sea of evidence.

And after a while, Mr President, your Honours, after an accumulation of the absence of answers from the Prosecutor, that is following the challenges of the Defence, the analysis of the evidence of the entire body of the Prosecution evidence can only lead to one inevitable conclusion, the case file is totally empty.

Now I'll move on to the modes of liability under 25(3)(b) and 25(3)(d).

Regarding these modes of liability, it is important to note that the Prosecutor develops precisely the same arguments as under 25(3)(a), that he relies on the same evidence to make the same allegations. As a consequence, to show that the Prosecutor did not demonstrate anything under 25(3) logically proves also that he did not demonstrate anything under 25(3)(b) and 25(3)(d).

It is not because the Prosecutor has repainted his wobbly house of cards from one mode of liability to another that that is no longer a wobbly house of cards.

I will say a few brief observations on 25(3)(b).

Firstly, it should be pointed out that as for 25(3)(b), the Prosecutor proposes a framework, a legal framework that makes him not need to prove the least link between Laurent Gbagbo and the alleged crimes.

In his response, for example, paragraph 1872, and I quote:

"For the three modes of liability envisaged in Article 25(3)(b), the accused persons can exercise influence in any form, and an order or act of incitement or encouragement can be exercised directly on the physical perpetrators of the crimes or through the intermediary of a third party." End of quote.

Concretely, by saying that, the Prosecutor is proposing a sort of hybrid mixture between 25(3)(b) and 25(3)(a) by trying to put in a small phrase that is "through the intermediary of another person" which is not actually there. In other words, the Prosecutor is trying to fabricate a new mode of liability which is non-existent in the Statute, a sort of co-indirect solicitation or incitement, or co-indirect encouragement.

We should note that the sole source of the Prosecutor here is still that appeals judgment in the contempt case in the CAR, showing once again the few precedents that the Prosecutor is relying on, or is able to rely on.

The Prosecutor should have abstained from referring to that, because when you

analyse that appeals judgment on this point, it shows that the Appeals Chamber relied, in order to affirm that an order, incitement or encouragement could be done through the intermediary of another person, on a flagrantly incorrect understanding of the appeals judgment in the Akayesu case at the ICTR.

And so the Appeals Chamber in the contempt case refers to paragraph 478 of the Akayesu judgment. And in that paragraph 478, there is a discussion of the question of determining whether incitement must be direct or not. But that is where the confusion arises. It is obvious for anyone who knows international criminal jurisprudence, and particularly the jurisprudence of the ICTR, that the issue of the direct or indirect nature of incitement in that jurisprudence relates to the substance of the utterances: Did someone directly incite others to commit a crime or did he or she simply suggest? It did not absolutely relate to whether the incitement came from the accused person or another person.

It is therefore surprising that the Prosecutor refers to that jurisprudence which quite obviously is not legally sound.

Secondly, still regarding 25(3)(b), it should be pointed out that since the Prosecutor was incapable of demonstrating the existence of any order for the objective of perpetrating crimes under the jurisdiction of this Court, and this is the requirement, the legal requirement of the Statute, the liability or responsibility of Laurent Gbagbo cannot be engaged on this point.

In the same vein, the Prosecutor was incapable of demonstrating the slightest incitement, solicitation or encouragement to commit crimes, and that, once again, is a requirement of the Statute. He did not find any encouragement in the public speeches of Laurent Gbagbo, because those speeches were systematically appeals to calm, to peace and to reconciliation.

Thirdly, the Defence points out that since the Prosecutor does not demonstrate the existence of any order, any incitement or encouragement for a criminal purpose, he is compelled to fall back on the idea that the commission of crimes would have been foreseeable in what he refers to as the ordinary course of events. We can refer, for example, to transcript T-222, page 75, line 18.

Let us note that that criterion of ordinary course of events by itself is already problematic, because it requires an intellectual effort or exercise that is necessarily speculative, and that involves a dangerous risk of reversing the logic. Because that would mean that, since an event happened, it should necessarily have been foreseeable.

Let us specifically note that the manner in which the Prosecutor uses this criterion in his response makes it absolutely irrelevant, because he does not link it, as in the other cases, to the alleged crimes.

So if you listen carefully to the Prosecutor, since he does not link this issue to specific arguments, we realise that what he is telling us is this: The fact that during a period of armed conflict there can be acts that happened that could be, or not, be characterised as crimes. This should mean that the authorities should simply not do anything. This may seem exaggerated, but it is precisely what the Prosecutor is saying.

You may have rumours of an insurrectional movement or march intended at taking over power by force. The security forces should have simply refrained from doing anything, from taking the slightest security measures for the purpose of protecting the institutions of the republic, because there are always risks of excesses in such scenarios. If rebels are carrying out military operations to capture Abobo, then once again the security forces should not have done anything, and so on and so forth.

We will revert to this a bit later, but we can already see here that the crux of the thesis of the Prosecutor is this: He is reproaching President Gbagbo and the republican security forces for not having simply capitulated or surrendered when faced with the rebels. But this is a political position and not a legal demonstration.

I believe after the break I will have about half an hour left, Mr President.

PRESIDING JUDGE TARFUSSER: [11:02:16] Okay. Thank you very much.

We take the break now and we come back at 11.30 for the second session. Thank you.

THE COURT USHER: [11:02:27] All rise.

(Recess taken at 11.02 a.m.)

(Upon resuming in open session at 11.32 a.m.)

THE COURT USHER: [11:32:10] All rise.

Please be seated.

PRESIDING JUDGE TARFUSSER: [11:32:33] Good morning.

Mr Jacobs, the floor is yours.

MR JACOBS: [11:32:38] (Interpretation) Thank you, Mr President.

Right now I will talk about a mode of liability under 25(3)(d). As I mentioned before the break, the Chamber can easily realise that the Prosecutor develops in the section of his response devoted to this mode of liability - that is paragraphs 1942 to 2019 of his response - as I was saying, he develops precisely the same arguments merely using a more condensed format as the mode of liability under 25(3)(a). The group acting in concert or together is the inner circle. The intent of that group is the same as that of the inner circle. The so-called contributions that the Prosecutor reproaches Laurent Gbagbo of are the same as under 25(3)(a).

So this realisation, this state of facts shows that the Prosecutor still has not understood

that these are two totally different modes of liability. The consequence thereof is that the collapse of the thesis of the Prosecutor under 25(3) automatically triggers the collapse of his thesis under 25(3)(d).

Lastly, I will come back to the issue of superior responsibility under Article 28. To begin with, the Prosecutor stated in the courtroom, and that is transcript T-223, page 13, lines 6 to 8, and I quote:

"But in setting aside these three disputed elements, the Prosecution notes that Mr Gbagbo in his motion does not dispute the fact that the FDS, the youth, the militias or the mercenaries were under the effective control of Mr Gbagbo." End of quote.

Now, this statement by the Prosecutor is rather surprising. Maybe this is due to a misunderstanding on the part of the Prosecutor or an excessively hasty analysis on his part. But it is enough to read our submissions to realise that the Defence devoted dozens of pages to explain that the Prosecutor at no moment, at no time established the link between President Gbagbo and these groups.

Secondly, it's quite striking to see that the Prosecution still has not taken into consideration their own evidence. For example, in a hearing, the Prosecution stated, and I quote from T-221, page 30, lines 22 to 26, and I quote:

"As for Mr Gbagbo's argument on the opening of information, information which are mentioned in certain contemporaneous police reports, the Prosecution submits that this does not imply that investigations or criminal proceedings were effectively carried out as Mr Gbagbo suggests." End of quote.

Yet, once again, Mr President, your Honours, the Prosecution have not understood what their role is. It is not Mr Gbagbo who is making an allegation as he is or a suggestion, it is the task of the Prosecution to prove that the normal procedures were

not followed. It is their task to prove that a judicial investigation or a police investigation had begun.

But it's not the Defence's task to prove such a thing. It is their task to prove that, and this is according to the documents they themselves disclosed, police reports, is according to their own witnesses, they explained what investigations had been conducted.

The Prosecution has acted in bad faith. You see, they constantly fail to remind us that the meagre forensic evidence that they have originates with a requisition from the Prosecutor of the republic dated January 2011, that is to say when Mr Laurent Gbagbo was still serving as president.

My third point, the Prosecution still has not provided the slightest legal element having to do specifically with the powers of the president of the republic in areas such as punishment or investigations. The Prosecution has merely provided a list of theoretical measures that President Gbagbo should have taken, according to the Prosecution, without any consideration for the legal realities or what was actually happening in the field.

Let us recall that Côte d'Ivoire is a country governed by the rule of law, and the branches of government are strictly separated, as is the case in all normal countries; and, thus, a president of the republic cannot do anything that would affect the independence of the judiciary. And, yet, the Prosecution seems to believe that President Gbagbo must have on his own initiative, with an NGO report full of hearsay tucked under his arm, gone to a police station and asked, regardless of any official procedure, outside of any normal legal framework, completely non-compliant with the laws of the republic, that he would have gone and asked for someone to be punished.

The Prosecution has provided nothing, no element of information that would demonstrate what judicial, civilian or military proceedings that occurred in Côte d'Ivoire.

In his response and in his mid-trial brief, we see that investigations, prosecutions and punishments should have been done instantaneously, which shows that there is a certain lack of understanding about such procedures.

Judicial or administrative proceedings follow a certain logic. The investigations themselves cannot be done overnight, they require time. Charging President Gbagbo because investigations begun in December 2010, January, February or March 2011 had not been wrapped up at the time of his arrest on 11 April 2011 and that there had been no convictions, this isn't serious. Come on. In what country, particularly in war time, would such investigations be wrapped up, trials held and decisions handed down in barely, in a few weeks?

One last point about Article 28. In their response, the Prosecution attempts, and this has been the case ever since the beginning of this case, they have attempted to suggest that there was no need to show any kind of causal link between the fact that a person did not take the necessary measures and the commission of crimes. I refer you to paragraph 2060 of the Prosecution's reply.

Well, already this requirement for a causal link stems naturally from the very wording of Article 28 as this has been recognised in the jurisprudence of this Court, for instance, the decision in Trial Chamber III in the Bemba case, 3334, paragraph 211, and I quote:

"A fundamental principle of criminal law is that a person is not found criminally responsible on an individual basis for a crime unless there is some kind of personal link between this person and the crime." End of quote.

In particular, an assertion like this shows misunderstanding of the very nature of command responsibility as set out in the Rome Statute. Indeed, the Prosecution would have you believe that a commander is convicted because of an autonomous obligation to prevent or to punish but, rather, to convict the commander for alleged crimes committed by those who report to him.

Under these conditions, alleging that there is no need to prove a causal link with the crimes is nonsense. And as Trial Chamber III in Bemba said, this would be contrary to a fundamental principle of criminal law.

Thus, the Prosecution is trying to rewrite the Rome Statute once again so that they do not have to prove any link whatsoever between President Gbagbo and the alleged crimes, and this is unacceptable.

We have seen that for each mode of liability, 25(3), 25(3)(b), 25(3)(d), 28, we have seen the Prosecution's approach, their way of proceeding at any cost trying to avoid the requirement to show any link between President Gbagbo and the alleged crimes, because there aren't any.

By way of conclusion, Mr President, your Honours, what have we seen in the past few days as we, the Defence, have made our case? That the Prosecution simply has no case.

It has emerged that the Prosecution's case is but an empty shell, because the Prosecution built their narrative along three lines of reasoning, three axes: denial of reality, political bias and then finally the idea that very weak evidence can all the same meet the legal requirement of proving charges beyond all reasonable doubt.

If we take these three lines and put them together, they form a kind of Bermuda triangle, and the Prosecution would have you set sail with him, a triangle where there is no such thing as fact, evidence or reality.

Allow me hark back to these three lines of reasoning. First of all, the denial of reality. First of all, the Prosecution denies the reality, the actual evidence that they themselves adduced, because they systematically attempt to have the evidence say what it has never said. You have heard countless examples of this in the past few days. I'll give you one final example.

The Prosecution harked back several times to the alleged incidents at the RDR headquarters in Wassakara on 1 December 2010 and described them as an attack upon unarmed civilians. Now, the Prosecution provides no direct evidence that allow us to -- that support such an interpretation.

On the contrary, that incident was followed or reported on by the FDS. There was a police report, CIV-OTP-0046-0099 and a report by the BAE, CIV-OTP-0045-0066. In this latter report it is specified, and I quote:

"As part of the operations to ensure compliance with the curfew, a team of national gendarmes patrolling in Yopougon came under heavy fire in the Wassakara neighbourhood." End of quote.

Now, since the documentary evidence does not fit with this, the Prosecution relies on Witness 440, who told us at the hearing that to his mind things did not unfold quite like that.

But what is the evidence, particularly since the witness himself contradicts his own report, namely, the police report drafted by this person, by 440? Why should this witness be believed today?

In the courtroom the Prosecution told us, and I quote from T-221, page 70, lines 12 to 15, in an attempt to make 440 seem a bit more credible, they said:

"You heard the witness, 440, in this regard, he was there." End of quote.

He was there, the Prosecution says. But no, 440 was not there, and that emerges

very clearly from his evidence -- correction, his testimony. He came after the alleged events. And I refer you to T-157, page 4, lines 11 to page 5, line 8, as well as T-158, pages 12 to 14.

So we can see once again the Prosecution would have you believe that a direct witness, that there was a direct witness of an alleged incident, but that was not the case, not at all.

This denial of reality is a denial of reality in relation to the true context of this case, namely, an armed conflict that lasted more than 10 years, endless attacks by the rebels, attacks upon the civilians and the institutions of the republic throughout this entire period; foreign countries such as France and Burkina Faso, who bankrolled, armed and supported the rebels for all those years.

One must realise that this denial of reality, in addition to being a negation of the recent history of Côte d'Ivoire, has obvious factual and legal consequences, for it is only upon the basis of this denial that the Prosecution can allege that a purported common plan existed so as to remain in power, because in the Prosecution's version of reality, there were no rebels who spent 10 years attempting to take power by force.

On the basis of this denial of reality, the Prosecution can turn a normal meeting held during war time, during a time of crisis, into some sort of plot or conspiracy. On the basis of this denial of reality, the Prosecution can attempt to turn any kind of operation conducted by this security forces into an attack upon rebels -- correction, against rebel attacks, and turn such operations into attacks against civilians.

This leads me to the second line of reasoning, political bias. The Prosecution said this last month, transcript 222, page 11, line 26 to page 12, line 1, and I quote:

"If he had withdrawn, Mr Gbagbo would have radically changed the way the events unfolded, the crimes would not have been committed or, at the very least, they would

have been committed differently, much differently." End of quote.

At least this statement is an honest one, it's frank and forward.

In the final analysis the Prosecution reproaches President Gbagbo for not capitulating, for not defending himself against the rebels.

When this trial began, the Prosecution stated that they did not intend to base their case on whether or not one candidate had won the 2010 presidential election. And I refer you to T-9, page 42, lines 2 and 3.

And yet, the Prosecution's entire case is based upon a presupposition, implicit, but it's so obvious, because this presupposition is absolutely necessary for the Prosecution to make their case. To their mind, Laurent Gbagbo lost the election. That's the only thing that the Prosecution has hit upon, the only thing they can use to criticise Laurent Gbagbo for governing, for turning the acts taken or the measures taken by a government into crimes. Because if we remove this presupposition from the Prosecution's response, nothing remains, none of the charges against Laurent Gbagbo remain, because everything mentioned in the response is the normal behaviour of a head of state.

Finally, I will conclude by mentioning this third line of reasoning, this third axis.

The Prosecution claims that evidence, even the weakest, can satisfy the legal requirement to prove the charges beyond all reasonable doubt. What better illustration of this claim than the metaphor of the forest and the trees, which the Prosecution presented to you last month during the hearings, and I quote, transcript 223, page 43, lines 14 to 16, and I quote:

"In our brief, we refer to the analogy between the forest and the trees and, as we say, there is no need to determine or to establish the existence of each tree, each individual tree, to be satisfied that there is a forest." End of quote.

However, there is an obvious problem with this metaphor, it presupposes that there's a forest. All you need is a few trees to prove the existence of the forest. But this presupposition negates the presumption of innocence. It stems from a misunderstanding, namely, that the burden of proof lies upon the shoulders of the Prosecutor.

Let us note that, although the Prosecution used this metaphor in relation to contextual elements relating to crimes against humanity, it appeared throughout the course of their case that their entire narrative, which is founded upon presuppositions, particularly the so-called common plan and the inner circle. Once we dismiss these preconceived notions, what kind of situation do we have? And if the Court officer could kindly give us control over the AV.

THE COURT OFFICER: [12:04:54] The document will be displayed on the evidence 2 channel.

MR JACOBS: [12:05:14] (Interpretation) This is the logical starting point of any criminal case: A desert, not a forest. Since the person who is being prosecuted is presumed to be innocent, there is nothing, nothing, until the Prosecution has provided sufficient evidence to demonstrate the contrary beyond all reasonable doubt.

What have we seen over the past two days? That the Prosecution has failed, because their evidence is so weak they have failed to show the existence of any tree whatsoever in this desert landscape. And, of course, they are far from having proven that there was a forest.

Consequently, when the Prosecution brings forward hearsay that cannot be verified before the Court, he has not demonstrated that there was a single tree.

When the Prosecution brings before the Court evidence that has not been

authenticated, he has not shown that there is a single tree.

When the Prosecution adduces evidence that we know nothing about as far as the chain of custody goes, they have demonstrated the existence of not a single tree.

When the Prosecution provides two items of information that contradict one another and states that they corroborate one another, they have not demonstrated the existence of a single tree.

When the Prosecution interprets an item of documentary evidence, or what a witness has said as one thing but it says the contrary, he has not shown that there is a single tree.

When the Prosecution advances an argument without even attempting to base such an argument on the slightest item of evidence, he has not shown the existence of a single tree.

This reality, Mr President, your Honours, must lead to only one conclusion: This arid landscape, the procedural and normal departure point for any criminal trial, also represents the Prosecution's case in its entirety, at the very beginning of the case right up until the last day of their case. There was nothing at the beginning and there is still nothing today. Thank you.

PRESIDING JUDGE TARFUSSER: [12:08:10] Thank you, Mr Jacobs.

Maître Altit.

MR ALTIT: [12:08:13] (Interpretation) Thank you, your Honour. Your Honours, this concludes the Defence's presentation.

PRESIDING JUDGE TARFUSSER: [12:08:20] Thank you very much.

There is Judge Henderson who wants to pose a question to you, Mr Jacobs, I think. Or to Maître Altit, I don't know. The floor is yours.

JUDGE HENDERSON: [12:08:31] Thanks. It's just one short question to Maître

Jacobs.

Yesterday you made reference to some 35 of 57 witnesses that had been called by the Prosecutor who had given oral evidence. I refer to, it's page 5 -- I beg your pardon, page 50, line 9 to 15 of the transcript of yesterday.

It's really a short question. You had submitted that these witnesses had given evidence and that the Prosecutor had to confront these witnesses with their witness statements which contained either inconsistencies or contradictions. So the short question is, I would like to get the references, or for my assistance, so that I can put your submission properly in context. So if you can in due course, the sooner the better, have them sent.

MR JACOBS: [12:09:33] (Interpretation) Of course, your Honour. We will do that expeditiously.

PRESIDING JUDGE TARFUSSER: [12:09:45] Thank you very much to the Defence team for Mr Gbagbo.

And I give now the floor to Mr Knoops, lead counsel for the Defence for Mr Blé Goudé, for the beginning of the submissions by the Defence team.

Do you need a break of a few minutes? Or, no. We can go ahead. We have half a session now and then - just a minute - and then the third session for you.

Mr MacDonald.

MR MACDONALD: [12:10:32] I presume it goes without saying that everyone will be copied on those references.

PRESIDING JUDGE TARFUSSER: [12:10:39] Of course, of course. It goes without saying, yes, as you said. I hope as well that I am copied on it.

Mr Knoops, yours the floor.

MR KNOOPS: [12:10:52] Thank you very much, Mr President, your Honours.

Good morning.

Your Honours, remember our opening statement in which we, with our team, anticipated what we intended to prove in our Defence case. Actually, what we intended to prove in our Defence case already materialised in the Prosecution case. Everything what we said in our opening statement in terms of Defence arguments was, in our submission, confirmed by the Prosecution witnesses, except for one, Mr P-435. We'll submit that, on the basis of his statement, the Prosecution theory cannot be built.

And this is actually, Mr President, the main reason, the main rationale why we are here today, why a Defence case on behalf of Mr Blé Goudé is superfluous, and that these proceedings are not inappropriate as suggested by the Prosecution.

Mr President, your Honours, as to the case of Mr Charles Blé Goudé, many essential evidentiary questions remain unsolved and remain a mystery in the Prosecution theory.

We just mention briefly at the outset of our submissions nine essential questions which remain a mystery in all the evidence:

First, where was the evidence that Mr Charles Blé Goudé was a protagonist of the common plan? As asserted in paragraph 875 of the trial brief. No witness or no evidence was submitted to say this, to support this.

Where was the evidence or where were the witnesses to say that Charles Blé Goudé was "fully aware" that a conception of the common plan and his or other members of the alleged inner circle's contribution to it would bring about the charges, the crimes charged? Trial brief page 875.

Where was the evidence to say that Charles Blé Goudé, I quote from the trial brief, paragraph 873, "Did not intend to give up his plan until the very end, when on 5 April

2011, he thanked and congratulated the patriots for their resistance."?

Mr President, what plan are we referring here? His plan? A plan of Mr Blé Goudé himself? As the Prosecution suggests, his plan. Not that of the alleged inner circle?

Fourth, where was the evidence to demonstrate that Charles Blé Goudé and his speeches had a so-called direct effect on the population? Which part of the population? Which specific groups out of the many groups or districts in Abidjan would his speeches had a direct effect?

Which witnesses did tell us this? And where was the evidence that the 12 April incident, incident 5, occurred as part of a, what the Prosecution says in paragraph 887 of its trial brief, "continuum of violence" by the very *mots d'ordres* at the Baron Bar which, in the Prosecution's mind, culminated in Mr Blé Goudé's alleged instructions of 5 April 2011 to "reinforce the roadblocks." Unquote.

Mr President, which continuum are we referring to? To which concrete incidents this alleged continuum of violence refers to out of the 20 contextual incidents the Prosecution refers to and relies on?

And what was the evidence for an evidentiary linkage between this so-called *mots d'ordres* and those 20 contextual incidents which, in the view of the Prosecution, was part of this continuum of violence?

Question 7: Where was the evidence to say that Charles Blé Goudé's speeches were made for the purpose of facilitating crime as required under the law? The purpose which is accentuated as your Honours know by, for instance, the Mbarushimana confirmation of charges decision, paragraphs 274, 281.

And finally, as the ninth question of the mystery of the Prosecution theory, where was the evidence that Charles Blé Goudé knew of the alleged inner circle's intention to commit each of the crimes charged as being part of a common purpose? A

requirement which is also set forth by the trial judgment in Katanga of 7 March 2014, paragraph 1642.

As your Honours are aware of, the judges in this case promulgated that knowledge of such circumstances must be established for each specific crime, and knowledge of a general criminal intention is not sufficient to prove.

Moreover, we can read in this paragraph 1642 of this trial judgment that the accused's knowledge must be inferred from relevant facts and circumstances and be connected to the group's intention.

Mr President, such evidentiary connection to any group's intention remains absent in the Prosecution theory when it concerns the case of Charles Blé Goudé.

It is for reasons that the Prosecution cannot present evidence on these nine essential questions that it tries to convince your Chamber to not go into the quality of the evidence and abstain from a determination of the credibility of the evidence.

And that brings us first and foremost to the proper test for such a ruling. I will, Mr President, set forth five introductory points to illustrate the test. And first of all, you will find on your display, an updated road map which you find on evidence channel 1. And if your Honours and the other parties and participants would look at evidence channel 1, you will find the schedule we have in mind with our team for the next couple of days. Of course, we'll update it by the end of today for Monday morning.

So Mr President, I would like to start now with those five introductory points relating to the proper test for a motion for acquittal.

Let me start with the basic principle which is set forth by Judge Eboe-Osuji of this Court, which relies on analysis made by the Court of Appeal of England and Wales in 2011, the case of R versus F. Mr Eboe-Osuji cited this authority in paragraph 52 of

his opinion in a no case to answer decision in the case of Prosecution versus Ruto and Sang. And the reason he did so was because this ruling of the Court of Appeal of England and Wales summarises the large number of authorities and decisions and therefore setting forth, as a result of this exercise, the basic principle of a no case to answer procedure. And I quote this principle:

"Where the state of the evidence called by the prosecution, and taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable, that no" court or "jury, properly directed, could convict ... it is the judge's duty to direct the jury that there is" indeed "no case to answer and to return a 'not guilty verdict.'" Unquote.

Mr President, your Honours, if your Court, if your Court arrives at this conclusion, there is indeed no case against Mr Charles Blé Goudé.

Second, Mr Honourable Judge Eboe-Osuji also quoted in paragraph 51 of his opinion, the Appeals Chamber decision of the Yugoslav tribunal in the case of Karadžić. In deciding a no case to answer submission, the Appeals Chamber in this specific case held that the Prosecution, "Cannot pick and choose among parts of its evidence" to reach a conclusion.

Our question to you, Mr President, your Honours: Is this the case here with Mr Charles Blé Goudé's position when we look at the Prosecution evidence? Our answer: Yes. This is clearly the case. And this is evidence, this methodology of pick and choose, this is evidence simply when your Honours look at how the Prosecution approaches their own insiders, such as P-9, but also when you look at how the Prosecution approaches the concept of police reports.

We come back to this topic later in our presentation and this was already referred to by our learned colleagues from the team of Mr Gbagbo.

Third, third introductory remark, the same Court of Appeal of England and Wales,

although in the case of Masih versus Regina in 2015, as also quoted by Judge Eboe-Osuji in paragraph 75, held that the decisive criterion for a no case to answer is actually the following question, citation:

"Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?"

Mr President, what is important here in this citation which also, in our submission, applies to professional judges as opposed to a jury, is the question whether the evidence presented by the Prosecution was able to exclude all possible realistic avenues, evidentiary avenues.

The question, therefore, is justified in the case of Mr Blé Goudé: Did the Prosecution in its evidence exclude all the realistic possibilities in this case which might be consistent with Mr Blé Goudé's innocence? Our answer: No, no, your Honours. Clearly, the Prosecution failed to do so and even admitted this throughout his oral argument by repeatedly relying on the evidence as being the reasonable inference when it concerned Mr Blé Goudé's position, without demonstrating that this was the only reasonable inference as required in the law.

We'll come back to this topic later in our submissions.

Fourth, speaking about inferences, the law on no case to answer motions is such that if you arrive at all at making inferences, these must be compelling to be drawn, compelling. That is the word which you'll also find in paragraph 86 of the Ruto decision as analysed by Judge Eboe-Osuji.

I'll quote a very brief quote, "In a criminal case, the burden of compellingness necessarily weighs heavier upon inferences in the direction of guilt than in the opposite direction; as a consequence of the presumption of innocence and the requisite burden of proof of guilt beyond a reasonable doubt."

Now, our question to the Chamber is the following: Were the inferences as provided to you by the Prosecution to sustain that there is evidence which could support conviction of Charles Blé Goudé such that these were compelling, compelling in that they weigh heavier towards direction of guilt than in the opposite direction of innocence? Our answer, Mr President: No, no, this was clearly not the case. The Prosecution merely submitted to your Honours that there were reasonable inferences to be drawn from the evidence, without showing the Chamber that these inferences were compelling in terms of weighing heavier towards guilt than innocence.

We can already submit in this introduction one example, one example. When we speak about the proof or the so-called contextual elements of Article 7, the Prosecution ignores the absence of the mens rea evidence vis-à-vis Mr Charles Blé Goudé. And to this extent we refer to the commentary of Professor Antonio Cassese, the late Professor Antonio Cassese in his benchmark book International Criminal ` Law, 2003, page 82.

Just a brief quote from this page, because I think it's rather essential for the case of Charles Blé Goudé. Professor Cassese writes on page 82 the following:

"The additional element, which helps distinguish crimes against humanity from war crimes, consists of awareness of the broader context into which the crime fits, that is knowledge that the offences are part of a systematic policy or widespread and large-scale abuses." Unquote.

Mr President, your Honours, our question to the Bench, based on this analysis of Professor Cassese, is the following: Did the Prosecution in its case provide compelling inferences which exclude all realistic other inference to be made which show that Charles Blé Goudé was aware of any alleged broader context of underlying crimes, as well as was it able to prove his alleged knowledge that these so-called

contextual crimes were part of a systematic policy, which is the distinguishing element from war crimes?

Our answer: No, your Honours. You did not see any piece of evidence or witness before you, let alone a compelling inference that such knowledge of this so-called broader context existed in the mind of Mr Charles Blé Goudé.

My last and fifth introductory question to the Chamber is the following: As Mr Stewart stated on 1 October during the Prosecution oral submission, if the case normally calls for an explanation by the Defence, then we should continue with the Defence case. These were the words of Mr Stewart on 1 October, transcript T-221, page 10, lines 20, et cetera.

Our question to the Chamber is the following: Was Mr Stewart misinterpreting the law? Our submission, our answer: Yes, he was, because you can find the applicable law in paragraphs 90 and 91 of the opinion of Judge Eboe-Osuji in the Ruto case, where he answered a similar question posed by the Prosecution. He answered the Prosecution written argument at the end of the trial that the Chamber should first have all the evidence at its disposal, including the Defence case, to make the appropriate credibility and reliability assessment.

And Judge Eboe-Osuji formulated this in a rhetorical way, I quote:

"... is it that a court of law can never make credibility assessment of the Prosecution case unless the Defence actually call their own evidence?" Unquote.

He also rhetorically asked the following, quote:

"Would this not amount effectively to compelling the Defence to call evidence in every case - in order to make available to the Chamber 'all the evidence' ... Is this approach consistent with the accepted principles of criminal law and procedure, which both places on the Prosecution the obligation to prove its case ..."

Mr President, the answer of Judge Eboe-Osuji was also a rhetorical one. His answer was the following:

"Would this," this approach of the Prosecution, "not amount to compel the Defence to call evidence in every case, in order to make available to the Chamber all the evidence?"

Now, our answer is the following to this discussion: Indeed, your Honours, such an approach, as also proposed by the Prosecution in the Ruto and Sang case, would indeed defeat the nature and purpose of a motion for acquittal.

Your Honours, based on these five questions and answers given by our Defence team, it's our submission that the Chamber can already dismiss all the charges against Mr Charles Blé Goudé.

However, the oral submissions of the Prosecution call for a more detailed response, and I will delve now into the first essential point of law and evidence which relates to the test on the quality of evidence.

Mr President, the Defence will respond to three of the Prosecution arguments with respect to the standard of review and provide examples.

Although the Defence team of Mr Gbagbo touched upon this topic also, we will approach this topic from a different perspective.

We will present to you two -- pardon, three arguments. First, we'll go into the argument that the Chamber will be limited in its assessment of credibility and reliability.

Second, we will argue that the Prosecution itself makes an inappropriate comparison between the case of Mr Blé Goudé and Ruto when stating that the so-called exceptional circumstances would justify to not follow the Ruto precedent;

And thirdly, we will give you examples where the Prosecution requests the Chamber

itself to make quality assessments of the evidence.

First point: The Chamber should be limited in its ability to assess credibility and reliability.

You find this argument in the English transcript, T-221, page 10, of 1 October 2018.

The Chamber should refrain from engaging in any sort of evaluation of credibility and reliability.

Our response: These submissions are, in our submission, not correct. Under Article 64(2) of the Rome Statute, the Chamber has the power to not sustain the Prosecution case when there is an argument to acquit, even at the no case to answer stage.

It's also our submission that the Chamber is not bound by the Ruto principles, and we recall the Presiding Judge's ruling in this case on the urgent Prosecution motion seeking clarification on the standard of no case to answer motion.

Secondly, both Judge Fremr and Eboe-Osuji found that were Trial Chamber V(a) were to find that the Prosecution evidence was not capable of sustaining a conviction, it could have entered an acquittal in the case of Mr Ruto. The Court would not have been obliged, according to their reasoning, to continue with the trial even if under the application of the Ruto principles it would have found that another reasonable Trial Chamber could have been convinced of the guilt of the accused.

Interestingly, Judge Eboe-Osuji quoted Judge Shahabuddeen's analysis in the appeals judgment of Prosecutor versus Jelisić, cited in paragraph 97 of his reasons. I quote: "These considerations support the argument that, at the close of the case of the Prosecution, the Trial Chamber has a right, in borderline cases, to make a definite judgment that guilt has not been established by the evidence." Unquote.

Mr President, here at the least, it's our submission we deal with a borderline case as

set forth by these judges.

Further, the Prosecution argues at paragraph 30 of its written submissions that there is no compelling reason to depart from the no case to answer standards adopted by the ad hoc tribunals. But our response is: Is there a difference at all? It seems a universal principle as set forth by the rulings of the Court of appeal of England and whales as cited by the judges in the Ruto case that in order to assess a motion for acquittal, the evidence has to be weighed.

And our response is further, Mr President that continuing procedure in a criminal trial in such circumstances would indeed as set forth by judges Fremr and Eboe-Osuji contrary to the rights of the accused whose trial should not continue beyond the moment that it has become evident that no finding of guilt beyond all reasonable doubt can follow.

This you can find in paragraph 19 of the opinion of Judge Fremr in the Ruto and Sang decision of 5 April 2016, the last sentence.

Similarly, Mr President, similarly, Mr President, Judge Eboe-Osuji determined that if upon the hearing of submissions of both parties the Chamber finds that it could not convict, it would be what he calls impermissible academic and futile exercise to imagine whether another Chamber could, could decide that the outcome would be different. Paragraph 71 of the opinion of Judge Eboe-Osuji.

Now we arrive at the contention of the Prosecution that the Chamber should not enter into assessment of credibility and reliability before a Defence case has been presented.

Our answer: There is nothing inappropriate that chambers of this Court makes such assessments since, unlike in most national jurisdictions, the judges at this Court are the ultimate arbiters of fact. This is also echoed by Judge Eboe-Osuji in his opinion, paragraph 96.

In support of his position, he relies on the partially dissenting opinion of Judges Pocar and Shahabuddeen in the mentioned Appeals Chamber decision, the Yugoslav tribunal in the Jelisić case. Paragraph 96 of the opinion of Judge Eboe-Osuji.

When you look at the partially dissenting opinion of Judge Pocar, he also finds nothing inconsistent with the text of Rule 98bis; it's the text of the Yugoslav Rules of Procedure and Evidence document, which allows judges to terminate a case if they are not convinced of the sufficiency of the evidence. Paragraph 6 of the partially dissenting opinion of Judge Pocar.

Also, Judge Fremr appears to have the same reasoning in paragraph 144 of his opinion in the Ruto and Sang decision on no case to answer. He even finds that it would be unfair to not engage in the quality assessment of the evidence.

Similar to these two judges, Judge Pocar, in the mentioned decision of Prosecution versus Jelisić, found that the accused is entitled, and I quote:

"... not only to be presumed innocent during the trial, but also not to undergo a trial when his innocence has already been established."

Paragraph 6 of his partially dissenting opinion to the Prosecution Jelisić Appeals Chamber judgment.

Our conclusion: Now that we have established that a no case to answer procedure which takes into account reliability and credibility tests of the evidence is not inappropriate, we will show the Chamber why, apart from these legal texts, factually, in the instant case it has merit to be granted.

I'll give two examples at the outset of this first paragraph. The Prosecution itself, Mr President, in paragraph 32 of its submissions quotes the Appeals Chamber, the Appeals Chamber judgment in the case of Mr Ntaganda against the Defence request for leave to file a no case to answer motion. In this case the Appeals Chamber ruled

that a no case to answer procedure protects the rights of the accused to not answer a charge unless there is credible evidence supporting it.

In other words, the authority quoted by the Prosecution itself in para 32 of its response undermines its own argument. And also, moreover, the Appeals Chamber in the Ntaganda case clearly implied that the assessment of the quality of the evidence can be made at this stage of a no case to answer. You find this in the Appeals Chamber decision, paragraph 46, in the case of Mr Ntaganda.

Second example to show you that the Prosecution itself actually concedes that a motion for acquittal cannot be decided without such an assessment of the quality of the evidence can be found in paragraph 198 of its written response. Here you see that the Prosecution discusses corroboration of evidence relevant to the contextual elements of Article 7.

The Prosecution there on this point, relying on four ICTR rulings but no ICC authority, alleges that the evidence would be deemed to be corroborative when one prima facie credible piece of information is compatible with another prima facie credible information regarding the same fact.

In other words, Mr President, your Honours, by using the word "credible" twice in this context of corroboration, the Prosecution relies indeed on the assumption that certain information or evidence would be credible for this Court during these proceedings.

This clearly requires a quality test of the evidence and, therefore, Prosecution with this citation, in paragraph 198 of its written response, already undermines its own argument.

Even more, in the same paragraph 198 of the response, your Honours will find the words of the Prosecution, I

quote: "... this means that any evidence of acts under Article 7(1) or any other evidence that is logically consistent with such a sequence of linked facts should be considered to determine whether there is a course of conduct as meant by Article 7." End quote.

Mr President, also here it is the Prosecution's own terminology, namely, logically consistent, which clearly implies that your Honours are to be asked to determine the quality of the evidence also from the perspective of the Prosecution.

Thirdly, the Prosecution again made the argument against quality assessment in its oral submissions, but actually acknowledges at the same time that a quality assessment has to be made. It did so when asking your Chamber to weigh the admissibility of the evidence. When addressing the issue of admissibility of evidence, including documentary evidence, the Prosecution said on 1 October, English transcript T-221, page 12, lines 24 and further, up to page 13, line 1, I quote: "Thus, in applying the test of the capability of the evidence reasonably to support a conviction, without at this point weighing its credibility or reliability, all of the evidence submitted and discussed to this stage should be considered by the Chamber." End quote.

Now our question, Mr President is the following: How is it possible to discuss this type of evidence without weighing the credibility at this point? And isn't this an argument in contradiction to the Prosecution's submission which they provided after the oral argument in their email of 8 October, referring to the 2001 Supreme Court of Canada case of Arcuri?

Prosecution cited the Supreme Court of Canada, page 831: The preliminary judge "must determine whether there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict, and the corollary that the judge must weigh the

evidence in the limited sense of assessing whether it is capable of supporting the inferences the Crown asks the jury to draw."

These were the words of the Prosecution citing the Arcuri case of the Supreme Court of Canada 2001.

Now, our answer to this authority is the following: This authority introduces an artificial argument, because let's be honest, what is the difference between weighing the evidence and weighing the evidence in a limited sense as set forth by this authority in the context of a preliminary inquiry?

In our submission, in both situations this comes down to a common sense argument, namely, that any judge in order not to defeat the purpose of a motion for acquittal has to draw justifiable inferences of fact from the evidence in its totality. There is no distinction between weighing the evidence and weighing it in a limited sense. That is artificial.

Secondly, there is a major difference between the authority cited by the Prosecution derived from the Arcuri case and the instant case of Charles Blé Goudé. The procedural stage at which the Arcuri case dealt with was a preliminary stage, and the task of a preliminary judge. The task of a preliminary judge is totally different from the Bench at the ICC.

In the Arcuri case, the question was whether the judge could commit the case for trial before a jury, before any evidence by the Prosecution and Defence was to be presented to the jury. That's the major difference and, therefore, it's our conclusion that the reference to the Arcuri case cannot alter the conclusion that the Chamber is at liberty to weigh the evidence in its full.

Mr Stewart's argument, Mr President, in this regard was also refuted by the domestic jurisprudence cited by Judge Eboe-Osuji in the Ruto and Sang mentioned.

Honourable Judge Eboe-Osuji referred to the UK case of R versus Shippey. And you find the reference to this Shippey case in his opinion, saying that taking the Prosecution case at its highest does not mean picking out the plums and leaving the duff behind.

That was the important and famous phrase coined by Honourable Judge Turner in the R versus Shippey case which was quoted by Honourable Judge Eboe-Osuji.

Mr President, there is another argument advanced by the Prosecution itself with which it has tried to evade this inevitable conclusion. It asked the Chamber to apply a so-called holistic approach.

Our answer: A holistic approach does not prevent the Chamber to apply a quality test. As the Honourable Judge Henderson said in his dissenting opinion in the decision on the Common Legal Representative of victims' application to submit one item of documentary evidence of 19 June, paragraph 7, it is imperative that the evidence for each incident meets the requisite standard of proof.

In our submission, Mr President, this observation by Honourable Judge Henderson implies that also at the stage of a no case to answer, and that is what we think logic dictates, the quality of the evidence for each incident should be assessed in order not to defeat the rationale of such a motion for acquittal.

Mr President, I think now moving to a second argument, it's 1 minute to 1, so if we can take the break here.

PRESIDING JUDGE TARFUSSER: [12:59:31] If it's good for you to break here.

MR KNOOPS: [12:59:34] Yes.

PRESIDING JUDGE TARFUSSER: [12:59:35] We do break for the lunch break and we come back at 2.30 for the third session.

The hearing is adjourned.

THE COURT USHER: [12:59:42] All rise.

(Recess taken at 12.59 p.m.)

(Upon resuming in open session at 2.31 p.m.)

THE COURT USHER: [14:31:28] All rise.

Please be seated.

PRESIDING JUDGE TARFUSSER: [14:31:47] Good afternoon.

We are now starting the third session of this day, the last day of the week, and I give the floor immediately to Mr Knoops.

MR KNOOPS: [14:32:05] Mr President, before the break, we spoke about the first argument relating to the standard of review. Now this was about the alleged limitation for the Chamber to ascertain the reliability, credibility.

We now go to the second point and the last point, we'll touch upon this briefly.

The second issue is the argument of the Prosecution it makes in its submissions that in the Ruto case, the majority departed from its principles and conducted an assessment of the quality of the evidence, because there were exceptional circumstances. We'll show you briefly with two examples that the Prosecution in its oral submissions in the case of Mr Blé Goudé created actually itself an argument for exceptional circumstances.

As your Honours know, the Prosecution conceded that it should weigh the evidence, that the Chamber should weigh the evidence when it concerned Witness P-435. By conceding this, the Prosecution created actually a self-serving argument of exceptional circumstances.

Our point is, if the Prosecution were to be followed, a no case to answer standard would be a rather arbitrary operation, it would be a matter of pick and choose, depending on how well it serves its own case theory. It's our submission that this is

not the way to deal with exceptional circumstances within the context of this decision. Secondly, the Prosecution argument is flawed because it makes, in our submission, an unsuitable comparison between the case of Mr Blé Goudé and the Ruto case, simply because the Prosecution's submissions in paragraph 41 till 44 of its response are not to be applied to the instant case.

It submits in its response that the majority in the Ruto case deviated from its decision number 5 because of exceptional circumstances in that six insider witnesses in that case, the Ruto case, were declared hostile by the Trial Chamber and cross-examined by the Prosecution.

In view of the Prosecution, that would be a major difference with the instant case.

Our answer: Making a comparison with this case, the case of Mr Blé Goudé, merely on the basis of the concept of so-called hostile witnesses is not correct. As the Prosecution is well aware, in this case, your Chamber decided to adopt a different procedure for the conduct of proceedings which did not follow the common law practice directions of direct examination by the Prosecution followed by cross-examination by the Defence.

It's therefore not surprising, Mr President, that a procedure for declaring a witness hostile in the case of Mr Blé Goudé was taken out of the amended and supplemented directions on the conduct of proceedings. Therefore, it is not correct of the Prosecution to recall that in the Ruto case, six witnesses, insider witnesses were declared hostile.

This creates, in our submission, an illusion that in the case of Mr Blé Goudé, the testimony of witnesses at trial mirrored their previous recorded statements. And the reality is, as your Honours are aware of, the reality is not true.

The Chamber is well aware that most of the insider witnesses in this case were often

confronted by the Prosecution with their prior recorded statements simply because their statements in court deviated on various points from their prior recorded statements.

And this confrontation with prior recorded statements was done such that it could be considered a type of cross-examination by the Prosecution of its own witnesses were the Chamber to have adopted a common law approach.

Our answer is therefore that the parallel with the Ruto case doesn't fit.

The Prosecution also submits in this case that no exceptional circumstances arose similar to the Ruto and Sang case.

Our answer: We'll give you two examples out of many which show that the Prosecution's own case theory clearly contradicted the case, which was presented through prior recorded statements presented at the pre-trial stage, and that the evidence actually presented at trial contradicted that theory and its case fell apart during the trial stage.

The most illustrative example is of course the testimony of Witness P-0625, the first insider witness to testify in this case. It's our submission that his testimony, Mr President, was the first crack in the Prosecution case which eventually fell apart on key facts, specifically on facts pertaining to Mr Blé Goudé's alleged role in the crisis.

The oral testimony of P-0625 greatly differed from his prior recorded statement. For example, with respect to the content of the alleged meeting that occurred between Mr Blé Goudé and certain youth leaders, 14 December 2010, Witness 625 testified at trial that the purpose of this meeting was not to discuss the upcoming 16 March -- 16 December march and its alleged repression. I will not quote the entire transcript, but you can find in the English transcript, T-27, page 24, lines 4 till 12, the full citation from Witness P-0625.

His answer was, questioned by the Prosecution:
"What did you discuss during that meeting?"
His answer was:
"It was not a decision-making meeting."
So the march "... was discussed?"
Answer: "Not specifically. We discussed general information on everything happening in the country."
Your Honours, though the witness had absolutely no problem recalling what was discussed during this meeting, the Prosecution proceeded to confront him with his previous statement. I will not read out the relevant portion, but only provide the reference to the Chamber. It's the same English transcript, T-27, pages 43, 44.
Now, Mr President, your Honours, the Prosecution would still like the Chamber to accept what Witness P-0625 said in his previous recorded statement. However, his evidence given at trial on this important issue is ambiguous at best or contradicts the Prosecution theory at worst. In any event, the Chamber should not simply give credence to the Prosecution interpretation.
The second example, which I will not delve in too deeply, was Witness P-0046, who also had to be confronted by the Prosecution with his previous recorded statement on a very relevant issue and on which he differently testified at court.
Mr President, the conclusion is that similar to the decision in the Ruto case, the case of Mr Charles Blé Goudé, which was committed to trial by the Pre-Trial Chamber, was considerably different from the case that ended up unfolding during the presentation of the Prosecution case at trial. Therefore, the Chamber in this case would be justified to indeed engage in the assessment of the credibility evidence, just like in the case of Mr Ruto and Sang, based on the concept of so-called exceptional

circumstances.

My last point, Mr President, concerning the standard of review will relate to some examples we provide to your Chamber to illustrate it is the Prosecution itself that asked the Chamber to make extensive assessments on the quality of the evidence. Every time, Mr President, when the evidence on record at trial contradicts the Prosecution theory, the Prosecution asked your Chamber to conduct a test on the quality of evidence.

Two examples. First, the Prosecution wants the Chamber to make such a credibility test when it concerns the testimonies of the FDS generals and also the police reports. The Prosecution states that their evidence of those generals should be deemed not credible when they, these generals, quote, "testify on evidence which indicates their own complicity" end quote. Paragraph 65 of the Prosecution response.

Now, first of all, this begs the question why this would be different from P-435, a witness who was implicated in certain acts himself, as discussed in closed session. I will not go into details.

So what would be the difference than to rely on P-435 if, on the other hand, the Prosecution says you should not rely on the generals because they were, in a way, in the Prosecution's submission, complicit to certain acts during the crisis?

One striking example, Mr President, is of course the Prosecution argument with regard to P-9. His testimony should be approached with great caution, the Prosecution argues in paragraph 67 and 68 of its response. Particularly in regard to the second requisition in January 2011, Prosecution argues this was a clear attempt, his evidence, to distance himself from a plan to employ the armed forces.

This is clearly, we submit, an attempt of the Prosecution to still ask the Court to give an assessment on the credibility.

Second, the example of the use of police reports. The Prosecution similarly asked in paragraphs 81 and 82 of its response that your Honours make such a qualitative assessment of certain police reports. Our answer is it is clearly an arbitrary use of evidence within the context of a non-case to answer proceedings.

On 1 October, T-221, page 30, line 6 till 16, the Prosecution actually argues that the Chamber has the discretion to rely on the trustworthy parts of a police report and ignore any unreliable information that it may contain, particularly when it concerns exculpatory information of the actions of the police.

Those should be examined with great caution, as suggested by the Prosecution.

But how to make such an assessment, Mr President, without going into the credibility.

And it is also an arbitrary approach of the evidence while undermining the Prosecution's own argument not to apply the test of Ruto based on exceptional circumstances.

Prosecution goes into painstaking detail about the alleged unreliability of certain police reports, such as the important report CIV-OTP-0045-0729. It argues in paragraph 571 of its response that this report would not be a contemporaneous record of events, and even states that the author had a motive to lie when drafting this report.

By suggesting this, Mr President, your Honours, the Court is simply asked to apply a quality test.

Our conclusion, the Prosecution cannot have its cake and eat it too. It cannot be so that the Chamber can only make assessments on the quality of the evidence with respect to exculpatory elements, but when it would relate to incriminatory evidence, the Chamber should give that incriminating evidence full credence. Apart from the question how to differentiate those two types of evidence.

This line of reasoning, by the way, is also not accepted in the opinion of Judge Fremr

in paragraph 146 in his opinion to the earlier mentioned Ruto decision.
Finally, as to this test to be applied for a motion for acquittal, finally. The Prosecution in its oral submissions tried to convince the Chamber to not apply such a test based on the existence of Article 61 of the Statute, namely, the availability to secure the rights of the accused by the confirmation of charges proceedings. Transcript 221, 1 October, page 13, line 17 till 24. This was an argument brought by Mr Stewart.
Mr President, your Honours, the availability before this Court of a confirmation of charges proceeding, does that alter the analysis we just gave you?
Our answer: No, your Honours, it doesn't. This can simply be proven by the mere fact that at the time of the confirmation of charges decision, the Pre-Trial Chamber in the case of Mr Charles Blé Goudé did not have the evidence before it which the Chamber has now before it.
We have just mentioned some examples of the differentiation between those two types of evidence before the Chamber in the pre-trial stage and the trial stage.
The Pre-Trial Chamber simply had only previously recorded statements, untested witness statements before it, which can and were considerably different from the in-court testimonies, and we have just shown to you, with some examples, that this situation indeed arises in the case of Mr Blé Goudé.
And Mr President, your Honours, the proof of the Prosecution being wrong by saying that Article 61 therefore justifies a different approach is simply the Prosecution's own submission that the charges for the incidents 3 and 4 should be dismissed. This is the most striking example that even with the existence of a confirmation of charges procedure, a no case to answer procedure is totally justified within the procedural context of the ICC.

And Mr President, the mere fact that the Prosecution does not oppose the dismissal of the charges for the incidents 3 and 4 in the case of Mr Blé Goudé, doesn't this also prove that your Honours cannot evade a quality assessment of the evidence when the incidents 3 and 4 are to be dismissed?

Prosecution says it will not change the evidence and our theory. But we will submit that it does change the evidence before the Chamber.

This concludes our presentation on the first topic, the standard of review.

I will now go into the evidence itself, starting, as the second part of this presentation, dealing with some general examples of the quality and quantity of the evidence itself.

The first question of course is, in this case: Did the Prosecution present conclusive evidence of its theory?

Our answer: No, it has not. And it is particularly visible in regard to its main witness, P-435.

What is the situation here? In paragraphs 135 till 180 of its response, the Prosecution enumerates over 20 individuals, over 20 individuals in order to have the Chamber believe that the allegations of P-435 are corroborated by other sources, whether it concerns the creation of the GPP - GPP being an armed wing of the *Galaxie Patriotique* - the GPP which underwent, allegedly, covert training, recruitment, et cetera.

Mr Gbougnon will deal with the Witness P-435 next Monday in more detail but, for the sake of the general outline of our presentation, it is important for the Chamber to be aware that the Prosecution in paragraph 135 of its response starts by saying that the formal creation of the GPP took place in 2003 by a gentleman with the name of Charles Groguhet, Mr Zéquen Touré, and, allegedly, a prominent former FESCI member, Mr Eugène Djué, and Charles Blé Goudé.

Yet, Mr President, none of these individuals have been called by the Prosecution, none. Why? I would say these are vital to construe its Prosecution theory. None have been called by the Prosecution to testify in order to support a theory. Instead, Mr President, your Honours, the Prosecution only relies on an academic document and testimony of one witness, which was, by the way, not a direct witness, but merely interviewed several individuals and did not provide any direct information, information, by the way, which never directly implicates Mr Blé Goudé in the creation of the GPP. And this will, as mentioned, it will be extensively dealt with by Mr Gbougnon next Monday.

But for the general outline, it's striking, Mr President, that while purporting that P-435's allegations could be sustained, the Prosecution did not call these individuals. We have counted 21 persons identified in the response of the Prosecution on which the Prosecution relies on in purporting that P-435's allegations are to be corroborated; 21 names appear in this response.

Your Honours, it is our submission that if the Prosecution does not call these persons at trial to have him or her examined, out of these 21 persons which are mentioned in the statement of this witness, and it didn't, it didn't call any of those 21 persons, the Prosecution cannot simply say, "Well, the names of those persons are mentioned by the witness, so there is corroboration." That is, in our submission, not the way to construe a theory.

Secondly, when we look at the nature and type of the evidence the Prosecution submits to the Chamber to support the theory, it's particularly striking that it relies on 20 remaining so-called contextual incidents. Now, what is particularly important, Mr President, the Prosecution, speaking about those contextual elements of Article 7, suggest the following, 1 October transcript T-221, page 70, lines 20 to 24, citation

Prosecution:

"While indeed the UNOCI reports do contain hearsay evidence, the methodology followed in collecting this information ensures a sufficient degree of reliability."

Unquote.

After all, reliability therefore counts for the Prosecution, but for now our answer is the following:

First, what is the methodology the Prosecution is referring to? Which methodology is used in those ONUCI reports? Was this a methodology which was actually accredited by some type of international organisation? There isn't any identified methodology presented to the Chamber.

Secondly, even if you would accept that a certain methodology underlies those ONUCI reports, such methodology as such can of course not ensure a certain degree of reliability.

This cannot be concluded without analysing the sources which underlie a methodology. Methodology as such is worthless if you don't look at the sources which are used in such a methodology, and this is exactly where the Prosecution argument misses the point. So let us look at the sources, Mr President. What is the Chamber to detect?

There are approximately 215 footnotes in the Prosecution trial brief, 215 footnotes citing NGO reports as evidence, which reports for the most part consist of anonymous hearsay evidence.

Out of these 215 footnotes in the trial brief, 77 are instances whereby only one single NGO or UN document is cited in support of an allegation, moreover also consisting of anonymous hearsay. And out of these 77 single references, more than 40 rely on inherently unreliable anonymous hearsay evidence to support the so-called

contextual elements of the allegations.

It is needless to say to your Chamber, Mr President, that the Appeals Chambers of this Court have repeatedly and also quite recently warned against reliance on anonymous hearsay evidence. Needless to again point to the opinions of Judges van den Wyngaert and Morrison already mentioned by professor Jacobs in the Bemba appeals judgment, I will not repeat those references, but you can find in paragraph 8 of their separate opinions of both judges indeed the view on how to deal with reliance on anonymous hearsay, also paragraph 10 is worthwhile to keep in mind.

Further, and it's quite important, a distinction should be made between hearsay and anonymous hearsay evidence as also stipulated by the two judges just mentioned. Paragraph 64 of the separate opinion of these two judges, you find also the differentiation between those two types of evidence.

Importantly, the so-called approach to the evidence in that it could be in a cumulative way present evidence is also counteracted by these two judges by referring to the concept of an illusion of corroboration in paragraph 67.

Now, going back to the case of Charles Blé Goudé, we submit this and these principles are not obeyed by the Prosecution in our case. Illustrative, therefore, was in our view the answer the Prosecution gave to the second question of the Honourable Judge Henderson on 3 October.

Questioned by Honourable Judge Henderson on his second question, the Prosecution answered the following, transcript T-223, page 41, lines 22-25 of the English transcript, our answer, the Prosecution:

"Your Honour, to establish an attack, you don't need to be independently satisfied that each and every individual criminal act is committed. You need to look at all the evidence in a cumulative way to determine whether there is such an attack," unquote.

Our answer: From an evidentiary point of view, this stance should not be accepted. Why? Simply because you will then ignore the nature, quality and the type of evidence which underlies each individual crime.

Suppose that each crime is only supported by an insufficient, incredible or inconsistent source, one could simply based on this argument ignore these evidentiary deficiencies by making a simple mathematic calculation, a calculation in terms of cumulation, and this is exactly what the Judges Van den Wyngaert and Morrison strongly oppose in their separate opinion in Bemba. And we believe it's right, law is not a matter of mathematics, but it's a matter of quality of evidence.

And in our case, Mr President, your Honours, we have shown you that for several of the so-called 20 contextual incidents, only one NGO or UN report is cited by the Prosecution in support of such an allegation, and these reports cannot in a cumulative way remedy the underlying evidentiary deficiencies.

And the same counts, Mr President, for the answer the Prosecution provided to Honourable Judges Henderson's third question. The third question, when he, Judge Henderson reflected on the question: What constitutes actually a pattern in order to rule out a non-accidental set of crimes?

The Prosecution answered as follows in transcript 223, page 42, line 7 till 9, British transcript of 3 October:

Answer: "You look at whether there is consistency in the criminal conduct, in the overall conduct, without focusing on the minute details of each and every act." End quote.

Our answer: In order to establish so-called consistency, Mr President, you need of course evidence which goes beyond mere inferences. You cannot simply remedy the lack of evidence in terms of quality by making also here a mathematic calculation to

arrive at the conclusion that there is consistency in the overall criminal conduct.
In conclusion, Mr President, there is no case to answer in the absence of evidence that crimes have been committed in the form of the so-called pattern in the sense of non-accidental repetition of a similar criminal conduct on a regular basis, which is required for the contextual elements of Article 7. And this already justifies the motion for acquittal.
We'll briefly touch upon now, Mr President, some of these underlying sources for those contextual elements to show you that the Prosecution theory to derive a so-called pattern from those incidents is wrong.
When it concerns documentary evidence, the reports such as human rights reports and ONUCI reports contain anonymous statements we just saw, and this type of evidence has already been disqualified, for instance, in the Milošević case, where the Trial Chamber also considered the importance of verifying whether hearsay is firsthand and whether the absence of an opportunity to cross-examine those persons affects the reliability.
You will find the full reference in paragraph 22 of the Milošević decision on the admissibility of the Prosecution evidence of 30 September 2002, presided by Judge Richard May from England.
Secondly, anonymous hearsay itself. Now that it's not possible for the Chamber to know or verify whether this hearsay is firsthand or second, third or even fourth-hand, it cannot be relied on those reports. Also here the Chamber of the Yugoslav tribunal in the Milutinovic case assessing the human rights reports in this case denied the admission of those reports on the basis that it was not in a position to assess the reliability of the factual contentions contained therein.
And that's paragraph 21 of the Milutinovic decision.

It says specifically, "The Chamber does not have sufficient material to satisfy it of the general reliability of the information on which this report is based."

Your Honours, we will show you now some examples that the Prosecution impermissibly relies on those reports to sustain the core elements of the contextual aspects of this case. It's striking that the Prosecution predominantly relies on anonymous hearsay evidence deriving from NGO and other reports to support its theory on the contextual elements of crimes against humanity, namely, the alleged existence of a course of conduct involving the multiple commission of crimes against the civilian population.

In the instant case, Mr President, the Honourable Judge Henderson already arrived at his conclusion in his dissenting opinion of 19 June with respect to the LRV's request on the paragraphs 43, 44 of the directions on the conduct of proceedings, a list of people allegedly killed in Côte d'Ivoire of Nigerian descent during the post-electoral crisis.

In the paragraphs 4 till 7 of his very instructive opinion, the Honourable Judge Henderson found, I quote, "No reasonable Chamber could ever rely on anonymous hearsay, for the simple reason that it is impossible to properly assess the credibility and reliability of its source." And we believe that this should be the case here.

As an illustration of the Prosecution's excessive reliance and impermissible reliance on anonymous hearsay evidence to support the core elements of the case, contextual core elements, we'll provide you five examples to show that these contextual elements or the so-called chapeau requirements of Article 7 cannot be based on those sources.

First, trial brief paragraph 155.13:

"On 4 and 8 March 2011, about 150 pro-Gbagbo youth armed with machete and axes broke into and pillaged the stalls of many West African market traders in Yopougon."

It's one of the contextual incidents.

Mr President, if you look at the underlying source, you will find only UN reports, Human Rights Watch reports and police reports. But a closer look at this evidence cited by the Prosecution reveals that this allegation is virtually a copy paste of a conclusion contained in the Human Rights Watch report, which report is entirely based on anonymous evidence, hearsay evidence and therefore unknown to the Chamber.

Even the ONUCI and the police reports which are cited, which by the way themselves exhibit significant reliability issues, they do not correspond with the allegation.

For instance, the human rights report mentions armed youth with machetes were chanting. However, the UN and the police report make no mention of chanting or armed youth.

These reports, to the contrary, only mentioned that goods had been stolen from market traders and records complaints which were made in this respect.

Even if the Chamber would be willing to make multiple inferences and extrapolate from this evidence, it would still not be able to arrive at the conclusion the Prosecution is asking the Chamber to draw.

Second example, trial brief, paragraph 155, example 12 as the contextual incidents, the incidents from 2 till 8 April in Sikasso, a pro-Ouattara neighbourhood in Yopougon, where allegedly armed militia members killed six people.

And a message would have been left on one of the doors in a courtyard: "No more Sikasso, either Gbagbo or nothing".

Mr President, this so-called incident relies solely on one ONUCI human rights division report. Although the report indicates that the conclusions are based on the

call centre reports and investigations, the division sources are fully anonymous and also unverifiable.

The report itself acknowledges that many of the witnesses and victims encountered could not provide sufficient evidence to support their contentions.

Third, the same goes for the alleged contextual incident of 11 April 2011, whereby the GR allegedly fired a rocket on a bakery in Treichville killing 7 people, including a Malian national. Trial brief paragraph 155, example 13.

Also here the Chamber will notice that this incident totally relies on two UN reports as well as an NGO report, Conseil des Maliens, consisting for the most part and on anonymous hearsay evidence.

The fifth and last example: To show that the attacks were carried out pursuant to a policy and followed a certain pattern, the Prosecution claims for instance that in Abidjan, particularly Yopougon, certain houses were marked with a cross or letter B (Baoulé). Trial brief, paragraph 176. And this allegation, your Honours, again relies solely on two UN reports.

Now, Mr President, your Honours, you have just seen five examples, we could enumerate many more, five examples out of the many to show you that the underlying contextual elements of Article 7 are for the most part based on anonymous hearsay evidence.

As noticed by our Defence team in paragraph 134 of our motion for acquittal and also in previous submissions we made to the Court, not only does this anonymous hearsay make it impossible for the Chamber to test the credibility of this evidence, but it introduces also the risk of what Van den Wyngaert and Morrison say, "illusion of corroboration" of evidence.

Even for reports, Mr President, containing statements made by identified sources,

even for those statements, these sources were not tested before the Chamber, were not tested in the present trial, and their credibility, therefore, could not be tested either by the Defence.

Mr President, you might recall that during the cross-examination or examination of Witness P-414, a former human rights officer, the Defence was able to reveal the lack of reliability of these call centre reports, another source for the so-called contextual elements, which are summarised in several arguments.

To name just a few, first, Witness P-414 acknowledged that she was not in a position to authenticate the documents shown to her in court as she didn't draft them. Even the Prosecution conceded that it could not ask her to authenticate those documents.

Second, the same witness during her testimony acknowledged that during the post-electoral crisis, the call centres might have been subjected to propaganda by people who called to them. This is transcript T-74, pages 75-76 of the French transcript.

Third, Witness P-414 testified that the call centre reports did not have any way of verifying the identity of the callers or where the call came from. It could have been from anywhere. Transcript T-74, page 77 of the French transcript.

Fourth, the witness acknowledged before the Chamber that when a person was mentioned as an attacker, this person was automatically assumed to be the alleged perpetrator without verification. She confirmed that the information conveyed to ONUCI was based on their own feelings, "son proper 'ressenti'". Transcript page 76, page 50, line 6 to 11 of the French transcript.

And in the fifth place, Mr President, your Honours, this witness said before the Court that the call centres did not have any way of locating the provenance of those calls and that to her knowledge no steps were taken to verify the source of the calls.

Transcript page 78 of the French transcript T-74.

Conclusion: No reasonable Trial Chamber could ever rely on such reports.

Lastly, the police reports, speaking about the quality and also quantity of the evidence. There is also another type of hearsay evidence on which the Prosecution extensively relied in its case. You will find in paragraphs 81 and 82 of the Prosecution response its submission, we already mentioned it before, that the Chamber should be very careful when it scrutinises the police reports when it concerns exculpatory information regarding the actions of the police. Extreme caution should be administered in view of the Prosecution.

Our response: Mr President, such an approach is clearly not only self-serving but is also subject to piecemeal. In the cross-examination of P-0046, through which the Prosecution introduced a large number of those police reports, we highlighted as Defence the distinction, and it was Mr Gbougnon who did the examination, the distinction between police reports and police investigations. You might recall that distinction.

The witness testimony was clearly that the police investigation does not underlie the police report. The police report has, therefore, no bearing on any type of serious investigation.

The witness explained it is on the basis of the police reports that an investigation might be instigated, but not necessarily.

It therefore emerged, Mr President, from P-0046's testimony, transcript French transcript T-128, that the information contained in the police reports with respect to alleged perpetrators were not verified and constituted hearsay based on unverifiable information.

For example, P-0046 declared that to identify demonstrators, no set of criteria were

administered and that conclusions were drawn on the basis, merely on the basis of the demonstrators' own identification or affiliation.

Mr President, while we can agree with the Prosecution that police reports should be viewed always with circumspection in every criminal case, I believe, a selective exclusion of certain reports mainly on the basis that they may be exculpatory for the police officers and thereby *ab initio* biassed and unreliable is not an acceptable principle of criminal procedure.

If these reports should be approached with circumspection, this is rather because they largely contain hearsay evidence. That is a valid argument and information which is unverified as acknowledged by this witness himself.

Therefore, the reports should be assessed on a case-by-case basis. And, for instance, did a specific police report describe firsthand information seen by an officer himself or does the report describe information which was provided by another source? These are questions which are of course relevant, but not to say upfront, because a report might be exculpatory for the police, it is to be ignored.

When we look into the nature of the evidence of the Prosecution case, it's also important to observe that beyond anonymous hearsay evidence relied upon by the Prosecution in the various NGO reports, it also extensively relies in its case theory on hearsay and on anonymous evidence derived from witnesses, not only from reports, but also hearsay and anonymous hearsay evidence derived from witnesses.

Our response: In the mentioned Ruto case, Judge Fremr rejected or at least cautioned against the use of certain testimonial evidence on the basis that it consisted of hearsay, double hearsay or anonymous hearsay. See paragraphs 41, 52, 72, 75, 78 and 107 of his opinion.

We'll give you now three examples, Mr President, of Prosecution reliance on

anonymous hearsay which were also partly raised in our motion.

First example, to support the allegation that militia members targeted Dioula houses, which they had apparently identified, the Prosecution relied on three witnesses. But if you have a closer look at those statements, they all provided opinion evidence, moreover hearsay and even anonymous hearsay evidence.

This can be found in more detail in our motion for acquittal, paragraphs 110 till 112.

Witness P-0404 testified that the information she provided was based on what she had heard in the neighbourhood, and this constitutes clearly anonymous hearsay evidence.

Prosecution also relies on P-0185, which we will not cite, but which witness did not provide any objective element to substantiate its testimony, the testimony in this specific area.

The second example concerning the allegation that Mr Charles Blé Goudé was the acknowledged leader of the *Galaxie Patriotique*, allegedly coalition of both armed and unarmed pro-Gbagbo youth organisations according to the Prosecution, it relied on P-0449's testimony, who mentioned a meeting that took place at the Cité Universitaire of Cocody, during which Mr Charles Blé Goudé was allegedly designated as leader of that *Galaxie Patriotique*.

Likewise, Mr President, this type of information clearly amounts to anonymous hearsay evidence as this witness was not present at the meeting in question and he gained apparently knowledge through this via an unknown source.

Third example, with respect to the alleged inner circle's control over mercenaries, and in particular achieved through financial sponsorship, the only evidence cited by the Prosecution is again the one of P-0435, which totally consists of hearsay evidence.

This witness mentions as his source a person with the name Charles, that he worked

for the *Garde Républicaine*. However, no additional information whatsoever was provided to the Chamber and, therefore, no one in this courtroom is able to evaluate the credibility and reliability of this piece of alleged information. Moreover, his source, the so-called Charles, did not specify the amount given, allegedly given by Charles Blé Goudé, and Mr P-0435 gleaned this information as asserted from Liberian combatants he had met, but he was not able to identify any of them or provide to the Chamber specific information.

Clearly this amounts to anonymous hearsay evidence, which cannot be relied upon and, as mentioned, Mr Gbougnon will go into this aspect Monday. But just with the general outline, these examples clearly illustrate how the Prosecution case is built.

So we arrive now, Mr President, to our conclusions of this part of the presentation, the following three merit attention.

First, a distinction should be made between hearsay where the source is known, and even then caution is required, and anonymous hearsay evidence. The latter is clearly unreliable and must be, in accordance with the jurisprudence, totally excluded. Also within the context of the substantiation of the so-called contextual elements of Article 7.

Second, the potential use of anonymous hearsay evidence at the pre-trial stage must be distinguished from the trial stage. while at the pre-trial stage the Judge might use this in the confirmation of the charges, at the trial stage the threshold, the evidentiary threshold, and also the threshold for the quality of the evidence, is much higher.

And it means that in this stage we have arrived now, a motion for acquittal, anonymous hearsay evidence should not be given any evidentiary weight.

Third, the fact that there might be multiple anonymous sources, for instance, as in the case of P-0369 on which the Chamber has already ruled, it is not important to assess

the underlying nature of those sources. The fact that there are multiple sources is irrelevant, is irrelevant for the underlying conclusion that anonymous hearsay in a multiple manner, in a mathematical manner doesn't alter the conclusion that it is inherently unreliable.

The majority of the Chamber, this Chamber when ruling on P-0369, saying that he could not testify on facts which he heard from anonymous sources was clearly in this stance. Multiple anonymous sources combined do not increase their overall evidentiary weight, because no matter what, the Chamber has no independent means to ascertain the trustworthiness of those sources.

By the way, it's a conclusion which is also accepted and ventilated by the mentioned Judges Van den Wyngaert and Morrison in their Bemba separate opinion.

For the case of Charles Blé Goudé, Mr President, the following three conclusions arise: First, indeed, we have shown to you that out of the remaining 20 so-called contextual incidents which the Prosecution claims that would constitute the chapeau requirements of Article 7, more than 70 per cent exclusively relies on these type of NGO reports, which are themselves predominantly based on anonymous hearsay.

Second, the Prosecution has therefore not linked, evidentiary linked these essential contextual elements to the person of Charles Blé Goudé or was able to link those so-called 20 incidents of the chapeau requirements to Mr Charles Blé Goudé and which are required for a conviction on the basis of Article 7.

And thirdly, this type of evidence we just analysed is incapable of belief for proof of not only a pattern, but also of a recurrence of the same events or elements in the same manner on different occasions or in different places for the majority, which is required for Article 7 as set forth by Judge Fremr in paragraph 112 of his mentioned opinion in Ruto.

Conclusion, the Prosecution allegations within the context of Article 7 contextual incidents which rely on anonymous hearsay evidence should be rejected and as a result the major contextual elements for the allegation that crimes against humanity did occur thus falls apart as well as the allegation as to the nexus of Mr Charles Blé Goudé to any common plan or inner circle based upon those 20 incidents.

My last point before 4 o'clock, Mr President, is speaking about the nature and quality of the evidence, briefly go into the lack of forensic evidence in a general way. It's the third element of the quality of the evidence pertaining to the lack of evidence.

In its oral submission, Mr President, the Prosecution when discussing the forensic evidence relied on expert P-0564, but indicated itself that the witness was unable to come to a conclusion as to the cause of 19 deaths from the mere external examination, for various reasons. You find this in transcript T-221, 1 October, page 48, lines 9; page 49, lines 1 till 3; and page 50, lines 13 to 25. You find there the answers of the expert.

Our answer to these submissions by the Prosecution, it did not tell the Chamber the full essence of what P-564 actually tried to say to the Chamber. And you can find the full text of the testimony of this witness in our paragraph 461 of our motion for acquittal.

Importantly, P-564 stated, testified, quote:

"I was not in a position to say which incident a death was linked to. ... There was no specific incident, other than the fact that ..." et cetera.

In other words, the Prosecution did not provide evidence to exclude the realistic possibility, which cannot even be excluded by way of compelling inferences, that persons who were found dead or injured were affected by acts which fall outside the five incidents or even the 20 chapeau incidents. The assumption cannot be simply

inferred by way of reasonable inference. The law clearly states that it has to be the only reasonable inference.

Second, your Honours might remember that during the Defence examination of P-564 we confronted this expert with a publication by a group of three medical doctors, Georgi, et al., who studied ballistic injuries to the abdomen over a period of four years of their surgical residency training at the American University of Beirut pertaining to 299 patients who sustained ballistic injuries during the Lebanese civil war.

Your Honours might remember that our Defence team confronted P-564 with the main conclusion of this academic research, namely, there is a huge differentiation in terms of wounds between high energy bullets and shell fragments, in short, that the witness, P-564, not familiar by the way with this publication, was not able to draw a clear link between the injuries and the kind of projectile. She indicated that her and her team did not talk about the type of projectiles because they were carrying out simply an external examination and she only spoke about a projectile from a firearm. But the nature is, according to this testimony, that she did not mention the nature of the projectile.

Now, what is the relevance for today of this statement, of this testimony? The answer of P-564 shows, indeed, that the Prosecution evidence cannot exclude the realistic possibility that injuries it relies upon in the instant case were incurred outside the five incidents or the 20 contextual incidents and to be attributed to various other individual or groups than the so-called inner circle. Forensically, it cannot be excluded, and the Prosecution conclusion is simply not the only reasonable inference based on the evidence before the Chamber.

Mr President, if the evidence allows the inference that shots were fired from a firearm, without any further specification, while knowing that the differentiation of the

firearm in terms of its calibre is of relevance for the identification of the exact trauma and, therefore, for the evidentiary relationship with the specific incident, and we don't have the evidence before it for this inference, this is not sufficient for a conviction.

It is important to observe that the Prosecution itself in its oral submission on 1 October, transcript 221, page 40, line 12 to 22, speaking about the third incident, merely refers to injuries by, I quote, "gunshot", unquote, injuries by gunshot.

Indeed, this indicates, Mr President, that the Prosecution was not able to specify the type of weaponry used to inflict those injuries, and that it has no case in terms of forensic evidence.

That is the reality before this Court.

And, of course, it mentioned the Orić ruling, which you all know, of the Yugoslav tribunal, arguing that no rigid rules of evidence should apply on the chain of custody.

The Defence team of Mr Gbagbo already referred to it.

But Mr President, our answer: Fundamental forensic evidentiary norms or deductions do not differentiate between the type of criminal proceedings. You cannot say because it's an ordinary crime, we will apply the rules more rigid in forensic evidentiary terms, and when it concerns crimes committed in an armed conflict, we can be more lenient in applying the same forensic norms. That is not the way forensic norms are construed.

Even more, when the criminal charges are serious, such as in the case at hand, the principles of justice should dictate that such forensic norms ought to be applied more strictly than even in an ordinary crime, criminal trial. Any leniency would militate against the interests of justice.

Further, the Prosecution argues that the use of live ammunition in itself would

constitute a pattern capable of proving a course of conduct. T-221, 1 October, page 23. The use of live ammunition in itself would constitute a pattern. It's an interesting observation made by the Prosecution.

Our answer: The Prosecution concedes that as of February 2011, certain parts of Abidjan were subjected to guerilla warfare and confronted with the attacks by armed groups. That's conceded by the Prosecution. One can therefore certainly not infer from the use of live ammunition and other weapons under those circumstances that the only reasonable inference would be that the primary object was to target the civilian population.

That is not a logical deduction from the evidence.

In conclusion: The forensic evidence produced by the Prosecution taken as a whole is so unsatisfactory, contradictory and even not reliable, to quote the words of the Court of Appeal England and Wales, that no reasonable Chamber could properly convict.

At the close of this argument, I give you three last examples before we can break. The first being, speaking of corroboration in forensic scientific terms, it is the argument, it's one of the arguments of the Prosecution that the damage to the Abobo market was still visible two years after the incident and that would apparently constitute corroboration in view of the Prosecution.

Well, I will not be disrespectful, but how is it possible to say that two years after an alleged attack on a market, the alleged traces can be brought in a causal relationship between this type of damage and the specific incident? There is also no forensic methodology to ascertain this.

Second, Witness P-0606, the expert from the Spanish *Guardia Civil*, who testified on 30 March 2017, T-163, transcript 163, he was asked to authenticate or enlarge the video of

3 March 2011, the incident of 3 March (Redacted).
Questioned about the scientific theory of base, the theory of base, and whether he applied this theory on his assumptions and conclusions, the answer of the witness was, as your Honours might recall, that he was not even familiar with this scientific theory, which is now common in forensic sciences. Every forensic scientist applies the theory of base when determining two hypotheses for the Chamber, for a court of law.
These are just some of the many examples whereby the Prosecution simply assumes the existence of a causal relationship between some photographic evidence with a specific incident.
My last example requires me to ask the Chamber to, for one minute, go into private session because it relates to something which was dealt with in private session.
PRESIDING JUDGE TARFUSSER: [15:49:23] Please, court officer, can we go into private session.
(Private session at 3.49 p.m.)
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(Open session at 3.52 p.m.)

MR KNOOPS: [15:52:21] I have still nine minutes left.

THE COURT OFFICER: [15:52:24] We are back in open session, Mr President.

PRESIDING JUDGE TARFUSSER: [15:52:27] Thank you very much.

Mr Knoops.

MR KNOOPS: [15:52:28] If the Court allows me, I have just six pages left, I'll

summarise it in nine minutes.

PRESIDING JUDGE TARFUSSER: [15:52:35] Okay.

MR KNOOPS: [15:52:37] Okay.

PRESIDING JUDGE TARFUSSER: [15:52:39] Thank you.

MR KNOOPS: [15:52:40] The third session of our presentation relates to the response to the Prosecution arguments on the issue of inferences.

We will demonstrate now that there is indeed no case to answer for the simple reason that the inference of the Prosecution would like the Chamber to make are certainly not the only reasonable inferences that can be drawn.

We have to distinguish two questions. I think those questions are being diffused in the Prosecution submission. The first question, which we should ask ourselves is: Is an inference reasonable at all? That's question one. If the answer is affirmative, the second question is, a reasonable inference, as presented by one of the parties, can be reasonable, but cannot be the only reasonable inference. If there are more scenarios, which are all reasonable, it doesn't mean that one of those scenarios can be excluded.

In forensic evidentiary terms, the Prosecution and Defence present their own hypothesis based on the same evidence, but both leads this to a different inference. One might say in the alternative that a reasonable inference drawn by the Prosecution may not be the only one to be drawn, since there is another reasonable inference based upon the same evidence which cannot be excluded.

Now, both situations apply here. The inferences the Prosecution makes are not reasonable and, moreover, these are not the only reasonable inferences. An example is the question just asked by Honourable Judge Henderson to the Prosecution during the hearing of 1 October.

Question of the Honourable Judge Henderson:

"What is your submission with respect to the position where there are several inferences that may be drawn from the facts that have been established?" 1 October.

Answer of Mr Stewart, transcript 221, page 15, line 23:

"If one of those inferences could reasonably support a conviction, the case must go forward, because you are not yet at the stage where you are weighing the credibility, reliability of the evidence ..."

Our answer: In our submission, the Prosecution is wrong in providing this answer and misinterprets the proper methodology when dealing with inferences to be drawn from the evidence; especially when it concerns circumstantial evidence which is actually the core of the case against Mr Charles Blé Goudé.

You'll find at footnote 79 of paragraph 48 of Judge Fremr's opinion in the Ruto and Sang decision the proper test. The test is, "If multiple other reasonable inferences can be made that would indicate towards the accused's innocence, or at least do not support a finding of guilt, there would be no case to answer."

The inference that the Prosecution wishes the Chamber to draw upon their evidence should be the only or most reasonable inference, not one of several possible explanation for certain acts or behaviour.

These were the words you find in the opinion of Judge Fremr.

And this is also the view of the Appeals Chamber of the Yugoslav tribunal in the Delalić case of 2001. The appeals judges in paragraph 458 did set forth the same test as set out by Judge Fremr:

"If there is another conclusion which is also reasonably open from the evidence, and which is consistent with the innocence of the accused, he must be acquitted."

This can be found, these words can be found in paragraph 458 of Delalić.

And the precedent cited by Judge Eboe-Osuji in paragraph 75 of his opinion in the Ruto and Sang case citing, again, UK precedent, the Masih case of the Court of Appeal England and Wales, also mentions the same test; namely, "Could a reasonable" court ... "exclude all realistic possibilities consistent with the defendant's innocence?"

In conclusion, the Prosecution's answer to the question of Honourable Judge Henderson is not correct in stating the law on this essential point of the case; namely, as to the question whether adverse inferences can be made, can be drawn against Mr Blé Goudé's case at this stage of the proceedings.

I'll just give you three brief examples. The first incident, the Prosecution urges the Chamber to make the inference that as a result of the meeting in Hotel de Ville on 14 December, FESCI members, along with members of other youth groups, committed violence against Ouattara supporters. But this is not clearly the only inference to be made on the basis of the evidence before you.

Even assuming that the Prosecution's understanding of the facts is correct and even assuming that roadblocks to stop the march were discussed, even assuming this, it does not follow that the violence was a result of this meeting. There is no evidence of any instructions to set up specific roadblocks et cetera.

To the contrary, it appears from P-625's testimony that the roadblocks were a spontaneous reaction by the population and also Witness P-433 of the Prosecution witnesses testified to this extent.

Second, moving on to Mr Blé Goudé's alleged responsibility, the Prosecution submits that it could infer from the close geographic and temporal proximity of Mr Blé Goudé's speech to the alleged violence that his speech concerning the second incident was the cause of such violence.

However, the Defence has provided and will provide, and Mr N'Dry will deal with this next week in detail, with an alternative inference which is equally reasonable, and we will show you that any alleged close geographic or temporal proximity is not sufficient to sustain the conclusion that this is the only reasonable inference.

Third and lastly, with respect to the last incident, the Prosecution argues that the violence at the roadblock continued because of Mr Blé Goudé's failure to call for their dismantling.

Mr President, even assuming that Mr Blé Goudé never did issue instruction to stop the roadblocks, which will be dealt with by my colleagues next week, even assuming this, the Prosecution inference that the violence at the roadblocks continued because he did not issue instructions is not the only reasonable one.

The Prosecution evidence on record shows, namely, that the roadblocks were uncoordinated and spontaneous. See also Witness P-0449, P-0176 and 0433.

Therefore, there is no linkage to the person of Mr Blé Goudé.

And above and moreover, in general, an erection of a roadblock is distinct from violence, from crimes at roadblocks. Erection of a roadblock as such is not a criminal act. Mr Blé Goudé did condemn violence, racketeering, discrimination on ethic grounds while telling the people to keep their neighbourhood safe, a topic which will be dealt with as mentioned next week in more detail. Therefore, also, this is not the only reasonable inference the Prosecution intends to make.

There is no evidence besides purely opinion evidence by P-440 to establish that Mr Blé Goudé's alleged omission to issue instructions to dismantle roadblocks would be the only reason that the violence continued. A reasonable inference can be drawn that this alleged omission had nothing to do with the violence.

The Prosecution throughout its arguments reiterated that Mr Blé Goudé had the

capacity to galvanise the youth and even admitted that he gave a speech instructing individuals to be peaceful at the roadblocks. So people would have obeyed that as well, according to the Prosecution's own evidence. The fact that they didn't leads to the inference that he had, Mr Blé Goudé, no power to galvanise the youth whatsoever. With respect to the attacks occurred in Mami Faitai and Doukouré, there was no evidence produced by the Prosecution to allow for the inference that those that committed the attacks in these neighbourhoods were members of groups either trained or financed by Charles Blé Goudé. None of those people testified before the Chamber and none of those alleged perpetrators wore any distinctive insignia.

Conclusions: The Prosecution admits that the issues of speeches, roadblocks and recruitment for this theory, it relies merely on making inferences since they concede that there is no direct evidence for those topics.

We conclude this section with the important observation, which is equally ignored by the Prosecution when dealing with the issue of adverse inferences, and you'll find this observation in paragraph 74 of the opinion of Judge Eboe-Osuji. I will not cite this, but I will draw my conclusion based on this paragraph 74.

The proper appreciation of the law of inferences is predicated upon the value of the presumption of innocence. This means that the interpretation of any inference led by the presumption of innocence creates an evidentiary height or barrier that can only be overcome by the Prosecution when the nature, quality and consistency of these inferences are such that they are compelling.

And this is clearly not the case with regard to the mentioned inferences the Prosecution wants to draw in the case of Mr Blé Goudé. This justifies that there is indeed no case to answer.

Thank you very much, Mr President. These were the first three sections of our

presentation.

PRESIDING JUDGE TARFUSSER: [16:05:23] Thank you very much, Mr Knoops. Now I adjourn the hearing to Monday, 9.30, for the continuing of the submissions by the Defence team for Mr Blé Goudé. Thank you. The hearing is adjourned to Monday. Thank you.

THE COURT USHER: [16:05:39] All rise.

(The hearing ends in open session at 4.05 p.m.)