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**TRIAL CHAMBER I**

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

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE**

***IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO***

**Public**

**Prosecution's Submissions on the Provisional Agenda for the 4 November 2014  
Status Conference**

**Source:** Office of the Prosecutor

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

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**REGISTRY**

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**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. The Office of the Prosecutor (“Prosecution” or “OTP”) submits its observations on the provisional agenda for the status conference pursuant to Trial Chamber I’s (the “Chamber”) order of 8 October 2014 (“Scheduling Order”).<sup>1</sup>

## Procedural History

2. On 12 June 2014, Pre-Trial Chamber I (“PTC I”) confirmed, by majority, four charges of crimes against humanity against Laurent Gbagbo and committed him to trial (“Confirmation Decision”).<sup>2</sup>
3. On 17 September 2014, the Presidency re-constituted Trial Chamber I and transmitted to it the full record of proceedings.<sup>3</sup>
4. On 8 October 2014, the Chamber scheduled a status conference for 4 November 2014 and invited the parties to submit written observations on the Chamber’s provisional agenda and to inform the Chamber of any items they wish to be added to it.<sup>4</sup>

## Submissions

5. As a preliminary matter, the Prosecution informs the Chamber that if the charges against Mr Blé Goudé are confirmed, the Prosecution will request the joinder of the case of the *Prosecutor v. Charles Blé Goudé* (“Blé Goudé case”) and the case of the *Prosecutor v. Laurent Gbagbo* (“Gbagbo case”).<sup>5</sup> Consequently, the Prosecution’s answers on each item enumerated in the Chamber’s provisional agenda take that possibility into account.

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<sup>1</sup> ICC-02/11-01/11-692.

<sup>2</sup> ICC-02/11-01/11-656-Red.

<sup>3</sup> ICC-02/11-01/11-682.

<sup>4</sup> ICC-02/11-01/11-692.

<sup>5</sup> The Defence of Mr. Blé Goudé filed its final written submission on 14 October 2014. Consequently, the Chamber should issue its decision at the latest on 15 December 2014.

**a. Timing, volume and modalities of disclosure pursuant to Rule 76**

6. The Prosecution intends to disclose all statements and other witness-related material sufficiently in advance to enable for adequate preparation of the Defence, in accordance with Rule 76 of the Rules of Procedure and Evidence ("Rules"). A substantial portion of the evidence that the Prosecution intends to rely on, including material that falls within the ambit of Rule 76 of the Rules, has already been disclosed to the Defence. Further, statements, together with other witness-related material, were provided to the Defence for 55 Prosecution witnesses prior to the confirmation hearing. The Prosecution disclosed to the Defence the identities of all but three of these witnesses.<sup>6</sup> The current situation in relation to these specific witnesses is addressed at paragraphs 18-20 below.
7. Material related to a further 15 Prosecution witnesses who have been relied upon at the confirmation hearing in the Blé Goudé case will also be disclosed to the Defence in the Gbagbo case, pending the Chamber's guidance regarding redactions, as is discussed at paragraphs 11-17 below. None of these additional witnesses require anonymity.
8. The Prosecution intends to call expert witnesses at trial. One of these witnesses, P-0410 is a medical expert who examined some of the Prosecution witnesses. His testimony will focus on the reports that were drafted as a result of these medical examinations.<sup>7</sup> P-0411 is an expert in ballistics who will be testifying about his Report on the alleged shelling sites in Abidjan,<sup>8</sup> related to the 17 March 2011 incident. The Prosecution also intends to call an expert on the phenomenon of youth groups in Côte d'Ivoire and their impact on post-electoral violence. The Prosecution is looking into the possibility of calling an expert on another topic. If additional experts are identified, the Prosecution will provide timely updates to the Defence and the Chamber.

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<sup>6</sup> P-0049, P-0238 and P-0316.

<sup>7</sup> The disclosure of the material provided by witness P-0410 is pending in the Gbagbo case. It will be disclosed as soon as the issues relating to redactions, as discussed at paragraphs 11-17 of this filing, are resolved.

<sup>8</sup> CIV-OTP-0049-0048.

9. The Prosecution also informs the Chamber that it is currently conducting confined further investigations. These post-confirmation investigations are necessary, in particular, to clarify, confirm or corroborate certain aspects of the case, to authenticate a number of previously collected materials, including videos for instance, or to pursue lines of enquiries pursuant to Article 67(2).

**b. Issues concerning the protection of witnesses and other persons  
(including the need for redactions)**

10. The Prosecution anticipates that there may be ongoing security risks impacting on its investigations and the protection of witnesses and other persons throughout the trial. It will continue to monitor its witnesses' security and take appropriate measures.

*i. Material requiring redactions*

11. The Prosecution is in possession of just over 400 items of evidence that were disclosed in the Blé Goudé case as incriminating evidence and that require redactions to their content and/or metadata before they can be disclosed in the Gbagbo case. While these documents are relevant to the Gbagbo case, the redaction regime for incriminating material is currently different in the two cases. The Prosecution is of the view that the same redaction regime should be adopted in both cases in order to harmonise and simplify the disclosure procedure for incriminating material. For the reasons set out below, the Prosecution submits that the regime in place in the Blé Goudé case should be implemented in the Gbagbo case.
12. The Prosecution relies on the same evidence in both the Gbagbo and Blé Goudé cases and therefore discloses the same evidence in both. However, the different disclosure systems currently applicable to incriminating evidence that contain redactions render the process more time-consuming and cumbersome in the Gbagbo case. A simplified and uniform disclosure procedure would ensure a more efficient process, avoiding unnecessary delays.

13. Additionally, if both cases were to be joined, a uniform system of disclosure would be necessary, including in order to facilitate the work of the parties and of the Chamber.

14. The differences in the two current disclosure systems are briefly explained below:

- In the Gbagbo case, the Prosecution is required to seek the authorisation of PTC I prior to applying redactions to incriminating evidence.<sup>9</sup> However, the Prosecution can directly disclose, with the redactions that it deems necessary, items of evidence that potentially fall under the category of Article 67(2) or Rule 77. In case of disagreement, the Defence can seek further explanations or the lifting of the redactions by the Prosecution. If the disagreement persists, the Defence can seek a ruling from the Single Judge no later than five days after the Prosecution's response.<sup>10</sup> The Prosecution notes that to date no such disagreement has occurred. Not once has the Gbagbo Defence team requested any clarifications or explanations to items of evidence disclosed pursuant to Rule 77 and Article 67(2) with *proprio motu* redactions.
- In the Blé Goudé case, a uniform system for the redaction of all types of evidence, be it incriminating, potentially exonerating or pursuant to Rule 77, was adopted following an agreement between the parties and as approved by the Single Judge.<sup>11</sup> The Prosecution can therefore directly disclose items of evidence with *proprio motu* redactions while simultaneously providing the Defence with a document indicating the basis for these redactions. Defence may seek further information from the Prosecution regarding the redactions applied. If the disagreement persists, the Defence may seize PTC I of the matter. After each disclosure a filing in the form of a report is made to the Chamber including the mention of redactions if any. In this manner the Chamber is kept informed of all redactions and, as noted by the Single Judge

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<sup>9</sup> ICC-02/11-01/11-30, para.52.

<sup>10</sup> ICC-02/11-01/11-30, para.51.

<sup>11</sup> ICC-02/11-02/11-67, paras.10-12.

in the Blé Goudé case, retains control over individual exceptions to disclosure in compliance with Rule 81 of the Rules.<sup>12</sup>

15. The Prosecution notes that the system of *proprio motu* redactions for incriminating evidence in the Blé Goudé case has proven to be efficient. This process has worked well between the parties and has alleviated the workload for the Prosecution and PTC I and has led to prompter disclosure of evidence to the Defence. Further, the Single Judge noted that the same redaction procedure would apply to both parties. Therefore the workload of the Defence is also alleviated in their disclosures to the Prosecution.<sup>13</sup>
16. Moreover, the redactions applied by the Prosecution are limited and the Blé Goudé Defence is provided with the legal basis for each redaction, as well as a brief explanation of what type of information the redaction is applied to. For example, if the redaction is pursuant to Rule 81(2), it is also indicated whether it is the “identity of ICC staff member”, the “location and/or dates of interview”, a “potential OTP witness” or an “OTP source” that is being redacted. For Rule 81(4), the redactions are mainly to family members or persons whose identity are simply mentioned in order to understand the narrative (innocent third parties).
17. In January 2012, the Defence of Mr Gbagbo stated that it could further envisage a simplified approach to redactions to incriminating evidence depending on how the process would evolve.<sup>14</sup> The Prosecution and Defence met on 16 October 2014 to discuss a number of issues and the Prosecution’s proposal to adopt the redaction process that is currently in place in the Blé Goudé case was communicated to the Defence. However, at the time of this submission, the discussions are still ongoing.

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<sup>12</sup> ICC-02/11-02/11-67, para.11.

<sup>13</sup> ICC-02/11-02/11-67, para.13.

<sup>14</sup> ICC-02/11-01/11-27, p.6, para.3.

*ii. Disclosure of identities of witnesses*

18. The Prosecution has disclosed all but the identity of three of the witnesses it relied upon during the confirmation hearing to the Defence.
19. The Prosecution will be in a position to disclose the identities of witnesses P-0316 and P-0049 to the Defence as soon as the Chamber clarifies the appropriate redaction regime to be applied, as there are no further security concerns relating to the disclosure of these witnesses' identities.
20. However, the reasons that necessitated the anonymity of witness P-0238 are still applicable today. The Prosecution refers the Chamber to its submission dated 15 October 2013,<sup>15</sup> which sets out these reasons in detail. This request for the non-disclosure of P-0238's identity was authorised by PTC I on 7 November 2013.<sup>16</sup> The Prosecution will meet as soon as practicable with the witness and discuss the feasibility of the disclosure of his identity. The Prosecution will report to the Chamber promptly the outcome of this meeting.

*iii. Referrals to the ICC Protection Programme ("ICCPP")*

21. None of the witnesses the Prosecution intends to rely on for trial are in the ICCPP nor are there any such outstanding requests. However, the Prosecution continually assesses the security situation of its witnesses and will inform the Chamber promptly should any change occur.

*iv. In-court protective measures*

22. The Prosecution will seek in-court protective measures for several witnesses, and will submit timely applications once a trial date is known.

<sup>15</sup> ICC-02/11-01/11-535-Conf and its Annex 2.

<sup>16</sup> ICC-02/11-01/11-554-Conf.



**c. Disclosure of material pursuant to Article 67(2) and Rule 77**

*i. Overview of the current state of disclosure pursuant to Article 67(2) and Rule 77*

23. To date, the Prosecution has disclosed an extensive body of evidence to the Defence in the Gbagbo case, totalling 6,070 items. This total includes 2,519 items disclosed as incriminating evidence,<sup>17</sup> 199 items disclosed as potentially exonerating pursuant to Article 67(2), and 3,352 items disclosed pursuant to Rule 77 of the Rules.
24. As stated above, the Prosecution is currently in the process of disclosing all additional evidence that was disclosed in the related Blé Goudé case to the Defence of Mr Gbagbo. It has already disclosed six items pursuant to Article 67(2)<sup>18</sup> and 252 items pursuant to Rule 77 of the Rules.<sup>19</sup> This material included documents that contain redactions because, as stated above, the Prosecution can apply *proprio motu* redactions to both items disclosed pursuant to Article 67(2) and Rule 77.<sup>20</sup>
25. The Prosecution will continue its ongoing review of newly collected evidence and of evidence already in its possession for Article 67(2) and Rule 77 material to ensure timely disclosure. The Prosecution continues to regularly review its evidence collection during the course of the pre-trial and trial phases in order to identify information that may become relevant as the case and as the lines of the Defence evolve or become known. Evidence review and disclosure are therefore not static, but a continuous process.

<sup>17</sup> While 2,519 items were disclosed under the heading of incriminating evidence, 1,619 items were relied upon on the Prosecution's List of Evidence for the confirmation proceedings.

<sup>18</sup> See ICC-02/11-01/11-683 for material disclosed on 17 September 2014.

<sup>19</sup> See ICC-02/11-01/11-683 for material disclosed on 17 September 2014 and ICC-02/11-01/11-694 for material disclosed on 10 October 2014.

<sup>20</sup> ICC-02/11-01/11-30, para.51 and ICC-02/11-02/11-67, para.12.

*ii. Software changes that will impact on the current process of disclosure of material pursuant to Article 67(2) and Rule 77*

26. In her “*Decision establishing a disclosure system and a calendar for disclosure*” of 24 January 2012,<sup>21</sup> the Single Judge of PTC I ruled that for material disclosed pursuant to Article 67(2), the Prosecution shall include in the disclosure note (i) a concise summary of the content of each item and (ii) an explanation of the relevance of such item as potentially exculpatory. The Prosecution shall also highlight in each disclosed item the relevant portions that it believes fall within the ambit of Article 67(2).<sup>22</sup> The Single Judge ruled on the same procedure for material disclosed pursuant to Rule 77, *i.e.* the same information shall be included in the Pre-inspection Report and highlights shall be applied on the relevant portions of each item.<sup>23</sup>

27. The Prosecution informs the Chamber that the Ringtail database software was upgraded on 6 October 2014. This upgraded Ringtail software has new capabilities, a new user interface and faster response times. However, this new version of Ringtail no longer allows highlights to items of evidence. Therefore, the Prosecution can no longer comply with this obligation.

28. On 16 October 2014, during a meeting between the parties, the Prosecution notified the Gbagbo Defence team of this change to Ringtail.

*iii. Differences in the disclosure regime pursuant to Article 67(2) and Rule 77 in the Gbagbo and Blé Goudé cases*

29. The Prosecution notes the current differences in the regimes of disclosure pursuant to Article 67(2) and Rule 77 in the Gbagbo and the Blé Goudé cases. In the Blé Goudé case, no concise summary of the relevant portions of the documents disclosed is provided to the Defence. However, highlights of the relevant portions, as well as a short explanation of the relevance of each item, were provided for each of the disclosed documents in that case.

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<sup>21</sup> ICC-02/11-01/11-30.

<sup>22</sup> ICC-02/11-01/11-30, paras.23-25.

<sup>23</sup> ICC-02/11-01/11-30, paras.26-27.

30. Because of the new Ringtail constraints and the different procedure in the Blé Goudé case, the Prosecution submits that the procedure for the disclosure of evidence in the Gbagbo case has to be revisited.

**d. Victims' applications and participation at trial**

*i. Continued participation of victims approved for participation during confirmation hearing*

31. The Prosecution supports a process whereby victims who were authorised to participate during the pre-trial stage are authorised to participate in trial proceedings without filing a new application. Charges against Mr Gbagbo were confirmed in relation to all four of the originally charged incidents. They were also confirmed for all the charged crimes against humanity of murder, rape, and other inhumane acts or – in the alternative – attempted murder, and persecution.<sup>24</sup> Therefore, the victims who previously qualified for the status of victims pursuant to Rule 85 in the present case should continue to fall within this category for the purposes of trial.

*ii. Procedure for allowing new victims to participate at trial*

32. The Prosecution considers that the start of the trial should be the latest deadline for further applications from victims for participation. This is without prejudice to the right of victims who may later seek to qualify for the purpose of reparations proceedings.

**e. Languages to be used in the proceedings**

33. Based on the languages used during their interviews, Prosecution witnesses will testify mostly in French, with some also testifying in Dioula and English.

**f. Commencement date of the trial**

34. A number of issues impact on setting the provisional date for the commencement of trial, including those listed in the Chamber's provisional agenda and discussed

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<sup>24</sup> ICC-02/11-01/11-656, para.266.

above and further below. These issues are among the many steps that must be completed prior to the beginning of trial. In light of all these considerations and the discussions held with the Defence on 16 October 2014, the Prosecution proposes that September 2015 would be a realistic date for the commencement of trial.

35. In particular, this date foresees: a) the possibility of a joinder of the Gbagbo and Blé Goudé cases; b) the ongoing disclosure of evidence, including from its further investigations; c) the completion of the process of transcription of audio- and video-recorded evidence, including of interviews conducted under Article 55(2); and d) advancement of the Prosecution's supplementary focussed investigations.

*i. Joinder of the Gbagbo and Blé Goudé cases*

36. As mentioned above, the Prosecution will seek to join the cases if the charges against Mr Blé Goudé are confirmed. The Gbagbo and Blé Goudé cases are based on the same attack and for the same charges.<sup>25</sup> The Prosecution will rely on the same witnesses and the same evidence to prove its cases against both Mr Gbagbo and Blé Goudé. The Prosecution has consistently been disclosing the same material in both cases and, as mentioned above, intends to complete its disclosure of outstanding items provided to the Defence in the Blé Goudé case to the Defence of Mr Gbagbo, namely once the redaction process is clarified by the Chamber.

37. Evidently, the Prosecution will not be in a position to know whether a joinder should be requested until the Decision on the confirmation of charges in the Blé Goudé case is issued and, if any ensuing issue reaches the Appeals Chamber, the appeal process exhausted. The confirmation hearing in the Blé Goudé case was held between 29 September and 2 October 2014. The Defence "Final Confirmation Submissions" were then filed on 14 October 2014.<sup>26</sup> The Confirmation Decision

<sup>25</sup> The additional incident (25-28 February 2011) as charged in the Blé Goudé case is part of the same widespread and systematic attack and it will be argued that it should not preclude the cases from being joined.

<sup>26</sup> ICC-02/11-02/11-179.

should therefore be delivered at the latest in mid-December 2014. This timeframe, as well as any potential resulting appellate proceedings linked to the joinder request, will have to be taken into account when considering a trial commencement date.

*ii. Further focussed investigations and ongoing assessment of evidence for disclosure*

38. The Prosecution continues its review of material in its possession as well as collected pursuant to its further focussed investigations. The Prosecution reviews material already in its possession in order to assess whether its disclosure is necessary in light of the evolution of the case. Given the large pool of evidence, its review, including the assessment of material for redactions or protective measures, is time-consuming and a resource intensive task. The assessment of the necessity of security measures also requires up-to-date assessments to be conducted regularly for all witnesses.

*iii. The transcription*

39. During its further investigations, the Prosecution is conducting a limited number of Article 55(2) interviews, which are audio recorded pursuant to Rule 112 of the Rules. These audio recordings must be transcribed, reviewed for quality control, finalised and then registered in Ringtail, prior to being reviewed (including for the purposes of redactions) and disclosed to the Defence. Transcription of these interviews is time-consuming, particularly when taking into account that each of these interviews is generally conducted over a period of several days.

40. The Prosecution will be adding a large number of additional videos to its list of evidence at trial. Some of these videos were previously disclosed as Rule 77 or exonerating material prior to the confirmation hearing and will be re-disclosed as incriminating evidence prior to the commencement of the trial. In addition, a large number of videos were recently collected and a review is currently ongoing to eliminate duplicates. A significant number of videos which the Prosecution

was only recently granted permission to review should be collected in the near future.

41. The Prosecution will provide transcripts for all excerpts of videos it intends to rely on at trial. Given that the content of video files are not searchable in electronic format and that the total number of videos the Prosecution intends to rely on at trial will potentially be in the hundreds, the provision of transcripts will greatly facilitate the in-court presentation of video evidence. Transcripts will also enhance the quality and efficiency of transcription and interpretation during court sessions. The transcription of video excerpts is a time-consuming exercise that will take several months to complete. The Prosecution notes that the same staff members assigned to transcribe insider interviews are also responsible for transcribing the video material. In addition, the OTP resources are shared among all the cases before the Court and therefore must accommodate all requests from the different Prosecution teams.<sup>27</sup>

**g. Additional issues proposed to be added to the agenda**

*i. Joinder of the Gbagbo and Blé Goudé cases*

42. As already advanced, the Prosecution intends, should the charges against Mr Blé Goudé be confirmed, to seek the joinder of the two cases and requests that this item be added to the agenda of the status conference.

*ii. The imposition of deadlines to Defence pre-trial challenges*

43. It is anticipated that the Defence will make several pre-trial applications and challenges. The Prosecution submits that, to ensure the proper conduct of the pre-trial proceedings, the Chamber should impose a final deadline for all pre-trial applications and challenges.

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<sup>27</sup> The Prosecution will provide further details at the status conference as to the number of videos it possibly intends to rely on at trial.

*iii. Necessity of providing the Elements-Based Chart*

44. The Prosecution would also like to revisit the necessity of the Elements-Based Chart (“EBC”) that it currently provides to the Defence. In accordance with the Single Judge’s Decision of 24 January 2012<sup>28</sup> the Prosecution has been producing two types of EBCs. One is provided to the Defence with every disclosure of incriminating material and organises each disclosed item in light of the constituent elements of the relevant crimes. The other is a consolidated version of the EBC, which is also based on the constituent elements of the relevant crimes, is based on the facts set out in the Prosecution’s Document Containing the Charges (“DCC”) and was provided to the Defence prior to the confirmation hearing together with the DCC and the Prosecution’s List of Evidence (“LoE”).
45. However, since the DCC in the Gbagbo case is sourced thoroughly, the Defence is already on notice of the specific information each item from the LoE pertains to. The added value of the additional EBC is therefore minimal.
46. The Prosecution suggests to source additional incriminatory items it intends to rely on at trial in an amended, footnoted and hyperlinked DCC, which can be filed three months prior to trial. This approach would ensure that all new incriminatory documents are also linked to specific facts as laid out in the amended DCC.

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<sup>28</sup> ICC-02/11-01/11-30, paras 33-41.

### Conclusion

47. The Prosecution respectfully provides these submissions as requested in the Chamber's Order of 8 October 2014.



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Fatou Bensouda, Prosecutor

Dated this 27<sup>th</sup> day of October 2014

At The Hague, The Netherlands