

Partly Dissenting Opinion of Judge Christine Van den Wyngaert

1. I agree with my colleagues insofar as there are substantial grounds to believe that Charles Blé Goudé is criminally responsible under article 25(3)(b) and, alternatively, under article 25(3)(c) of the Rome Statute (“Statute”) for the commission of murder, rape, other inhumane acts causing great suffering and serious injury to body or, alternatively, attempted murder and persecution as crimes against humanity committed by the pro-Gbagbo youth, mercenaries and militias in the course of three out of five incidents, namely the
 - (i) events on 16-19 December 2010 related to the demonstrations at the *Radiodiffusion-Télévision Ivoirienne* building (“First Incident”);
 - (ii) events in Yopougon on 25-28 February 2011 (“Second Incident”); and
 - (iii) events in Yopougon on or around 12 April 2011 (“Fifth Incident”).¹

2. However, for the reasons set out below, I am unable to join my colleagues in their decision to confirm the charges against Charles Blé Goudé on the basis of:
 - (i) article 25(3)(a) of the Statute;
 - (ii) article 25(3)(d) of the Statute; and
 - (iii) article 25(3)(c) for the events in Abobo related to the women’s demonstration on 3 March 2011 (“Third Incident”), as well as the shelling of the Abobo market and the surrounding area on 17 March 2011 (“Fourth Incident”).

3. Before all else, I deem it important to set out my general understanding of the case as it transpires through the evidence. The following considerations have been instrumental in my analysis and appreciation of the facts, as presented

¹ Pre-Trial Chamber I, “Decision on the confirmation of charges against Charles Blé Goudé”, 11 December 2014 (hereinafter the “Confirmation Decision”), paras 166 and 171.

by the Prosecutor. My reading of the evidence shows that Charles Blé Goudé's role evolved considerably throughout the 2010-2011 post-electoral crisis. Most crucially, based on an assessment of the totality of the evidence, Charles Blé Goudé's conduct cannot be linked to the crimes committed by the "pro-Gbagbo forces" in their entirety. Rather, his involvement can only be linked to a fraction of the "pro-Gbagbo forces", namely the pro-Gbagbo youth, mercenaries and militias. Consequently, I do not believe that there is enough evidence to attribute criminal responsibility to Charles Blé Goudé for the crimes committed by the *Forces de Défense et de Sécurité* ("FDS"), comprising mainly the National Armed Forces of Côte d'Ivoire, the Gendarmerie, the Republican Guard, the Security Operations Command Centre and the Police.

4. As a result, it remains an unsupported allegation that Charles Blé Goudé can be linked to the commission of crimes in the course of the Third Incident and Fourth Incident which are, according to the Prosecutor, attributable to the FDS. The evidence does not provide any meaningful information as to Charles Blé Goudé's role or involvement in relation to these two incidents.
5. I now turn to the three points, as set out in paragraph 2, on which my disagreement with the Majority rests. The Prosecutor contends that Charles Blé Goudé be held liable as an indirect co-perpetrator under article 25(3)(a) of the Statute. I am mindful of the recent Appeals Chamber judgment in the case of the *Prosecutor v Thomas Lubanga Dyilo* ("*Lubanga Appeals Judgment*"), in particular its holdings as regards the concept of co-perpetration within the meaning of article 25(3)(a) of the Statute.² Even if I were to accept the concept of *indirect* co-perpetration under the Statute,³ and apply the principles

² Appeals Chamber, "[Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#)", 1 December 2014, ICC-01/04-01/06-3121-Red, paras 459-473.

³ I note that the Appeals Chamber has not yet endorsed the notion of indirect co-perpetration. For the reasons I set out in previous opinions, I remain of the view that this notion is incompatible with

enunciated in the *Lubanga* Appeals Judgment as regards the co-perpetration component, including the normative assessment of the role of the suspect in the specific circumstances of the case, I would still consider the evidence in this case to be insufficient to confirm the charges on the basis of article 25(3)(a) of the Statute.

6. First, as I already noted in my dissenting opinion in the case of the *Prosecutor v Laurent Gbagbo* (“*Gbagbo Opinion*”),⁴ I am not persuaded by the available evidence that there are substantial grounds to believe that the alleged common plan to maintain Laurent Gbagbo in power, either explicitly or implicitly, involved the commission of crimes against civilians perceived to be supporters of Alassane Ouattara. Even if one accepts the existence of a common plan, I do not find sufficient evidence to confirm that Charles Blé Goudé was part of the inner circle, devising or agreeing to any common plan. The fact that Charles Blé Goudé was close to Laurent Gbagbo and had contact with some high commanders of the FDS at the time does not, in my view, make him part of the common plan, as portrayed by the Prosecutor and accepted by the Majority.
7. Second, I find no support in the evidence for the allegation that Charles Blé Goudé had control over or was in a position to frustrate the commission of the crimes by a conglomerate of actors, the so-called “pro-Gbagbo forces”, by

article 25(3)(a) of the Statute, see Trial Chamber II, “[Judgment pursuant to Article 74 of the Statute – Concurring Opinion of Judge Christine Van den Wyngaert](#)”, 18 December 2012, ICC-01/04-02/12-4; and Trial Chamber II, “[Minority Opinion of Judge Christine Van den Wyngaert](#)”, 7 March 2014, ICC-01/04-01/07-3436-AnxI. This does not exclude the possibility that Charles Blé Goudé and others could have jointly committed certain crimes through other persons whose will they jointly subjugated. However, this presupposes, in my view, that the Prosecutor shows, for each of the alleged incidents, how the indirect perpetrators subjugated the will of the relevant physical perpetrators. A reference to the position of authority of the suspect over the pro-Gbagbo youth, links with militias and mercenaries, and contacts with individual commanders of the FDS falls short in this regard.

⁴ Pre-Trial Chamber I, “[Dissenting Opinion of Judge Christine Van den Wyngaert](#)”, 12 June 2014, ICC-02/11-01/11-656-Anx, annexed to Pre-Trial Chamber I, “[Decision on the confirmation of charges against Laurent Gbagbo](#)”, 12 June 2014, ICC-02/11-01/11-656-Red.

virtue of an *essential* contribution.⁵ In fact, the evidence does not show that Charles Blé Goudé was at the appropriate level to control or frustrate the commission of the crimes committed by the “pro-Gbagbo forces”. At best, Charles Blé Goudé can be seen to have contributed to crimes committed by the pro-Gbagbo youth, mercenaries and militias.⁶ The available evidence does not show that Charles Blé Goudé had authority or powers over the FDS.⁷ Moreover, in my view, there is no specific evidence of any order/instruction or other contribution emanating from Charles Blé Goudé to this effect, nor can such an order/instruction or other contribution be inferred from the available evidence.

⁵ The evidence does not sufficiently show that the implementation of the common plan would not have been possible without Charles Blé Goudé’s contribution to the crimes charged. I do not believe that the relevant contributions were of such nature that the crimes could not have been committed in the absence thereof. For example, with regard to the allegation of Charles Blé Goudé’s contribution to the recruitment of new elements into the FDS, I do not believe that the evidence on the alleged “contingent Blé Goudé” that was created in 2003, *i.e.* well before the alleged common plan was formed, can be taken into consideration (Confirmation Decision, para. 80) without sufficient evidence about the role of this contingent during the 2010-2011 post-electoral crisis. Concerning the allegation that members of Charles Blé Goudé’s personal guard participated in training (Confirmation Decision, para. 81), the evidence does not demonstrate any obvious link to the alleged crimes against civilians. Another example is that the available evidence regarding the financing of militias can hardly be considered as an *essential* contribution, even if it was accepted that money was given for the purpose of the implementation of the common plan. More specifically, with regard to the allegation of money paid by Charles Blé Goudé to Maguy le Tocard (Confirmation Decision, para. 84), the evidence also indicates that the payment was made to reimburse the latter for speaking at “parlements”. Regarding the allegation of a payment made to a member of a FDS unit (Confirmation Decision, para. 85), the evidence does not allow inferring that this payment was given to the militia of Maguy le Tocard and for the purpose of committing crimes against civilians.

⁶ Notwithstanding other evidence on Charles Blé Goudé’s contribution to the distribution of weapons and the recruitment into and supplying of militias (Confirmation Decision, paras 76, and 82-85), I do not consider the evidence on Charles Blé Goudé’s contribution to the training of militias to be sufficient. I do not believe it is possible to find corroboration for the evidence linking Charles Blé Goudé to the training of militia before the election (see Confirmation Decision, footnote 251).

⁷ The Prosecutor seems to share this view: “Mr Blé Goudé was in a position of authority over the pro-Gbagbo youth. He was not in the same position of authority over other components of the pro-Gbagbo forces”, see Pre-Trial Chamber I, [Transcript of Hearing](#), 29 September 2014, ICC-02/11-02/11-T-5-Red, p. 71, lines 14-16. Even though the Prosecutor made this statement in the context of the discussion on “ordering” within the meaning of article 25(3)(b) of the Statute, this factual assessment must have a bearing on the legal assessment of all other modes of liability under article 25(3) of the Statute.

8. In this regard, I note that the Appeals Chamber appears to have endorsed that liability under article 25(3)(a) of the Statute requires a contribution to the “crime”, rather than a contribution to a common “plan”.⁸ In the context of discussing co-perpetration within the meaning of article 25(3)(a) of the Statute, the Appeals Chamber explained that: (i) “it is indeed appropriate to distinguish between liability as a perpetrator and as an accessory primarily based on the objective criterion of the accused person’s extent of contribution *to the crime*”; and (ii) “the blameworthiness of the person is directly dependent on the extent to which the person *actually contributed to the crime in question*”.⁹ The Appeals Chamber ultimately held that, when considering co-perpetration within the meaning of article 25(3)(a) of the Statute, Chambers must conduct an “evaluation of whether the accused had *control over the crime*, by virtue of his or her essential contribution *to it* and the resulting power to frustrate *its* commission”.¹⁰ Following the Appeals Chamber’s direction, my assessment of the evidence is that Charles Blé Goudé’s contribution *to the crimes charged* is not essential for article 25(3)(a) (indirect) co-perpetration liability.
9. I am therefore unable to consider Charles Blé Goudé as an indirect co-perpetrator, as alleged by the Prosecutor, within the meaning of article 25(3)(a) of the Statute and could not confirm the charges on that basis, even if I believed this form of criminal responsibility existed under the Statute.
10. The Prosecutor also alleges that Charles Blé Goudé is criminally responsible for having contributed in any other way to the commission of the crimes “by a group of persons acting with a common purpose” pursuant to article 25(3)(d) of the Statute. I understand the Document Containing the Charges (“DCC”) to

⁸ I have made the same point previously, see Trial Chamber II, “[Judgment pursuant to Article 74 of the Statute – Concurring Opinion of Judge Christine Van den Wyngaert](#)”, 18 December 2012, ICC-01/04-02/12-4, paras 34-35.

⁹ [Lubanga Appeals Judgment](#), para. 468 (emphasis added).

¹⁰ [Lubanga Appeals Judgment](#), para. 473 (emphasis added).

mean that such group consisted of the “pro-Gbagbo forces”. For the same reasons I developed previously in my *Gbagbo* Opinion, I cannot join my colleagues in confirming the charges under the mode of liability of article 25(3)(d) of the Statute.¹¹ Also in this case, the Prosecutor does not point to any specific evidence concerning the outline and composition of the alleged “group acting with a common purpose”.¹² Moreover, I do not think the evidence shows substantial grounds to believe that the physical perpetrators constituted one or more groups acting with a common purpose, because there is no evidence of a mutual agreement to commit crimes between them.

11. Accordingly, I am not in a position to confirm the charges under article 25(3)(d) of the Statute.

12. Before addressing my third point, I would like to observe the following. As regards the charges under article 25(3)(b) and (c) of the Statute, I am willing to confirm on this basis for the First Incident, Second Incident and Fifth Incident, despite having some doubts about whether there is enough evidence to satisfy the mental elements of these forms of criminal responsibility. In particular, I am not entirely convinced that there is sufficient evidence to show that it was virtually certain that Charles Blé Goudé’s conduct in relation to these three incidents had a direct effect on the physical perpetrators, as is required under articles 25(3)(b) and 30 of the Statute. I am also not entirely persuaded that the evidence demonstrates that Charles Blé Goudé made any contributions to the crimes committed during the First Incident, Second

¹¹ [Gbagbo Opinion](#), ICC-02/11-01/11-656-Anx, paras 8-10.

¹² The Prosecutor appears to consider *all* FDS members, *all* mercenaries, *all* militia members and *all* youth group members as constituting one large “group acting with a common purpose”. I repeat that such a position would lump together large numbers of individuals (many of whom defected during the crisis) who never intended to commit nor committed any crimes against civilians with a relatively small number of physical perpetrators.

Incident and Fifth Incident with the purpose of facilitating their commission, as is required by article 25(3)(c) of the Statute. However, as these questions depend almost entirely on circumstantial evidence, which can be best elicited at trial, I believe it is better to leave these matters to be resolved by the Trial Chamber.

13. Lastly, while I agree that there is sufficient evidence to warrant confirming the charges holding Charles Blé Goudé liable under article 25(3)(c) of the Statute for the commission of crimes in relation to the First Incident, Second Incident and Fifth Incident, I am unable to confirm those charges in relation to the Third Incident and Fourth Incident,¹³ for the reasons given above in paragraph 4.
14. In sum, although the evidence presented is rather thin, I agree with the Majority in part and find that the criminal responsibility of Charles Blé Goudé is best captured under the modes of liability foreseen in article 25(3)(b) and (c) of the Statute.



Judge Christine Van den Wyngaert

Dated this Thursday, 11 December 2014

At The Hague, The Netherlands

¹³ Confirmation Decision, para. 171.