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No.: ICC-02/11-02/11
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PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekaterina Trendafilova
Judge Christine Van den Wyngaert

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF *THE PROSECUTOR* v. *CHARLES BLÉ GOUDÉ***

Public

**Decision on the Defence challenge to the admissibility of the case against
Charles Blé Goudé for insufficient gravity**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

Nicholas Kaufman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Detention Section

Victims and Witnesses Unit

Others

**Victims Participation and Reparations
Section**

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the present decision on the “Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute” (the “Admissibility Challenge”).¹

I. Procedural history

1. On 22 August 2014, the Prosecutor, in accordance with article 61 of the Rome Statute (the “Statute”) and rule 121(3) of the Rules of Procedure and Evidence (the “Rules”), filed the document containing the charges on which she seeks to bring Charles Blé Goudé to trial (the “DCC”).²

2. On 19 September 2014, the Chamber received the “Defence notice of its intention to raise a plea pursuant to Articles 17(1)(d) and 19 of the Rome Statute”.³

3. On 22 September 2014, Judge Silvia Fernández de Gurmendi, acting as Single Judge, issued the “Decision on the schedule of the confirmation of charges hearing”, wherein she noted rules 122(2) and 58 of the Rules and stated:

At present, no admissibility challenge has been made as required by rule 58 of the Rules. In spite of the Defence submission to the contrary, the Single Judge takes the view that the “Defence notice of its intention to raise a plea pursuant to Articles 17(1)(d) and 19 of the Rome Statute” does not constitute an admissibility challenge as it does not contain the basis for it. Accordingly, absent an admissibility challenge in compliance with rule 58 of the Rules and a subsequent decision joining the consideration of the challenge to the confirmation of charges hearing, the issue of admissibility will not be discussed at the hearing.⁴

¹ ICC-02/11-02/11-171.

² ICC-02/11-02/11-124-Conf-Anx2-Corr.

³ ICC-02/11-02/11-160.

⁴ ICC-02/11-02/11-165, para. 7.

4. On 29 September 2014, during the first day of the confirmation of charges hearing, the Admissibility Challenge was notified. In the Admissibility Challenge, the Defence, *inter alia*, “requests that it be entitled to supplement its arguments on the issue of gravity by way of both oral submission at the confirmation hearing and written submission in its final brief”.⁵

5. In the course of the confirmation hearing, the Chamber made a number of oral rulings relevant to the proceedings following the filing of the Admissibility Challenge. In particular, the Chamber: (i) decided, at the commencement of the hearing, that the matter of the admissibility of the case raised by the Defence would not be discussed orally at the hearing;⁶ (ii) set 20 October 2014 as the limit for the written observations on the Admissibility Challenge by the Prosecutor and the legal representative of those victims who had communicated with the Court in relation to the case;⁷ and (iii) at the conclusion of the hearing, instructed the Defence, in case it intended to file written submissions, to limit itself to issues that were discussed at the hearing,⁸ which, as previously ruled by the Chamber, did not include the matter of the admissibility of the case.

6. On 20 October 2014, the Prosecutor filed her written submissions on the Admissibility Challenge.⁹ On the same day, the common legal representative filed her submissions,¹⁰ together with an annex attached thereto containing the views expressed by a number of victims on the Admissibility Challenge.¹¹

⁵ Admissibility Challenge, para. 1.

⁶ ICC-02/11-02/11-T-5-CONF-ENG (29 September 2014), p. 5, lines 3 to 16.

⁷ *Ibid.*, p. 61, lines 11 to 24;

⁸ ICC-02/11-02/11-T-8-CONF-ENG (2 October 2014), p. 64, line 15, to 65, line 1.

⁹ ICC-02/11-02/11-181.

¹⁰ ICC-02/11-02/11-180.

¹¹ ICC-02/11-02/11-180-Anx-Red.

7. On 21 October 2014, the Defence requested the Chamber to strike from the record the annex to the submissions of the legal representative of victims.¹² The common legal representative responded to this request on 22 October 2014.¹³

II. Applicable law

8. The Defence, pursuant to article 19 of the Statute, challenges the admissibility of the case against Charles Blé Goudé on the grounds that the case is not of sufficient gravity to justify further action by the Court within the meaning of article 17(1)(d) of the Statute.

9. The Chamber recalls that the parameters of a “case” are those set out in the document that is statutorily envisaged as defining the allegations against the person at a given stage of proceedings.¹⁴ In the present instance, it is the DCC, which contains the charges on which the Prosecutor requests the Chamber to commit Charles Blé Goudé to trial.

10. As made clear by rule 58(1) of the Rules, a determination of the admissibility or jurisdiction of a case is preliminary to the consideration of the merits of such case. Therefore, the Chamber must dispose of the challenge to the admissibility of the case prior to making its determination on whether to confirm or not the charges under article 61(7) of the Statute. Only if the case is found to be admissible, will the Chamber decide, on the basis of the available evidence, whether there are substantial grounds to believe that Charles Blé Goudé committed each of the crimes charged. In other words, the question with which the Chamber is confronted for the purposes of the present decision is whether the case against Charles Blé Goudé, as alleged by the

¹² ICC-02/11-02/11-182.

¹³ ICC-02/11-02/11-183.

¹⁴ See, *inter alia*, Pre-Trial Chamber I, “[Decision on the admissibility of the case against Abdullah Al-Senussi](#)”, 11 October 2013, ICC-01/11-01/11-466-Red, para. 66(iii).

Prosecutor, is of “sufficient gravity” to justify proceeding to determining whether the evidence is sufficient to commit Charles Blé Goudé to trial.

11. The Chamber is attentive to the Court’s previous decisions in relation to the interpretation of the requirement of “sufficient gravity” within the meaning of article 17(1)(d) of the Statute. As held in the *Abu Garda* case, “the gravity in a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration”.¹⁵ In another instance, Pre-Trial Chamber II added, in this regard, that “it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave”.¹⁶ In this sense, factors such as the nature, scale and manner of commission of the alleged crimes, as well as their impact on victims, are significant indicators of the gravity of a given case.¹⁷

12. Also, Pre-Trial Chambers have consistently held that certain factors which are listed in rule 145(1)(c) of the Rules for the purpose of sentencing may be of relevance to the assessment of gravity.¹⁸ This rule refers, *inter alia*, to “the extent of the damage caused to the victims and their families, the

¹⁵ Pre-Trial Chamber I, “[Decision on the Confirmation of Charges](#)”, 8 February 2010, ICC-02/05-02/09-243-Red, para. 31.

¹⁶ Pre-Trial Chamber II, “[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#)”, 31 March 2010, ICC-01/09-19-Corr, para. 62.

¹⁷ See *e.g.* Pre-Trial Chamber II, “[Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#)”, 23 January 2012, ICC-01/09-02/11-382-Red, para. 50.

¹⁸ Pre-Trial Chamber I, “[Decision on the Confirmation of Charges](#)”, 8 February 2010, ICC-02/05-02/09-243-Red, para. 32; Pre-Trial Chamber II, “[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#)”, 31 March 2010, ICC-01/09-19-Corr, para. 62; Pre-Trial Chamber II, “[Pre-Trial Chamber II, “Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute”](#)”, 23 January 2012, ICC-01/09-02/11-382-Red, para. 50; Pre-Trial Chamber III, “[Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire](#)”, 15 November 2011, ICC-02/11-14-Corr, para. 205.

nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location". For the purposes of determining whether a case is of sufficient gravity, reference has also been made to the existence of any of those aggravating circumstances listed in rule 145(2)(b) of the Rules,¹⁹ which mentions, *inter alia*, the "[c]ommission of the crime where the victim is particularly defenceless", the "[c]ommission of the crime with particular cruelty or where there were multiple victims" and the "[c]ommission of the crime for any motive involving discrimination".

III. Analysis

13. Prior to entering into the merits of the Admissibility Challenge, the Chamber addresses the Defence request to strike from the record of the case the annex to the written observations of the legal representative of victims on the grounds that the provision of this annex constitutes "a flagrant abuse of the framework of an admissibility challenge".²⁰ As recalled above, this annex contains the views expressed by a number of individual victims in relation to the Admissibility Challenge. The Chamber recalls that pursuant to article 19(3) of the Statute and rule 59 of the Rules, victims are entitled to submit observations on the admissibility of those cases in relation to which they have already communicated with the Court. The fact that, in the present case, the victims participate in the proceedings before the Court through their common legal representative does not exclude that their individual views, when communicated to the Chamber, be taken into consideration. As recalled by the legal representative of victims, in a number of other cases before the Court, *verbatim* observations by the victims collected by their legal representatives

¹⁹ Pre-Trial Chamber II, "[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#)", 31 March 2010, ICC-01/09-19-Corr, para. 62.

²⁰ ICC-02/11-02/11-182, para. 7.

were provided to the different Chambers in the respective admissibility proceedings.²¹

14. The Chamber notes the Defence argument that the making of “substantive assertions” by the victims “is highly prejudicial, breaches the Suspect’s right to the last word and impacts negatively on his entitlement to a fair trial pursuant to Article 67 of the Statute”.²² However, as stated above, the proceedings related to the merits of the case are separated from those concerning the admissibility of the case, as recognised by the Defence itself which considers “well established” that the Chamber “must not entertain any arguments at the jurisdictional phase that relate to the substantive merits of the case”.²³

15. The Chamber is aware that the confirmation of charges hearing has ended and that no other evidence may be introduced in relation to the charges brought against Charles Blé Goudé. Any factual submission made by the individual victims as part of their observations on the Admissibility Challenge is not taken into account for the purposes of the Chamber’s determination under article 61(7) of the Statute, which is exclusively based on the confirmation of charges hearing and the evidence disclosed between the parties and communicated to the Chamber. In these circumstances, the Chamber is not persuaded by the Defence assertion that the annex provided by the legal representative of victims “is [...] nothing more than a brazen attempt to besmirch the Suspect, to re-litigate the substantive merits of the case and to adduce speculative and highly prejudicial evidence”.²⁴ Accordingly, the Defence request to strike the annex from the record of the case must be rejected.

²¹ See ICC-02/11-02/11-183, para. 9 and footnote 8.

²² ICC-02/11-02/11-182, para. 3.

²³ *Ibid.*, para. 4.

²⁴ *Ibid.*, para. 6.

16. Turning to the Admissibility Challenge, the Chamber notes that the Defence submits that the case against Charles Blé Goudé is not of sufficient gravity relying on three main arguments:

- (i) “after filtering out those incidents which may be attributed to ‘pro-Gbagbo youth’, and thus to the Suspect on a *prima facie* basis alone, the number of casualties is extremely limited”;²⁵
- (ii) “[a]ll of the alleged incidents took place within a few districts of Abidjan between 16 December 2010 and 12 April 2011. These incidents are, therefore, extremely limited in temporal and geographical scope”;²⁶ and
- (iii) “[t]he evidence will also show that the Suspect was neither a political leader of consequence nor a military leader. As a youth leader, his position in the so-called *Galaxie Patriotique* was no more prominent than that of any other of the many youth leaders. Applying the ICTY comparative jurisprudence, therefore, the Suspect cannot be perceived as the ‘most senior leader’”.²⁷

17. In relation to these arguments the Chamber makes the following observations. First, as stated above,²⁸ a determination of the admissibility of the case must be made by the Chamber before it proceeds to considering whether there is sufficient evidence to confirm the charges. Such determination is made on the basis of the case as brought by the Prosecutor without delving into consideration of the evidence put forward to sustain those charges. To do otherwise would conflate the Chamber’s inquiry into admissibility with that into the merits of the case. In this sense, contrary to the submission of the Defence, the Chamber may not “filter out” aspects of the

²⁵ Admissibility Challenge, para. 34.

²⁶ *Ibid.*, para. 36.

²⁷ *Ibid.*, para. 37.

²⁸ See paras 9 and 10 above.

Prosecutor's allegations on the basis of a purported lack of evidence or consider what the evidence allegedly "will show", as this is predicated on an assessment of the available evidence and, therefore, is part of the determination on the merits of the charges presented by the Prosecutor. Rather, as clarified above, the Chamber will only take into account what the Prosecutor alleges against Charles Blé Goudé and not whether these allegations are sufficiently supported by the available evidence.

18. Second, on the discrete issue that Charles Blé Goudé cannot be considered as the "most senior leader", the Chamber is, in any case, also attentive to the jurisprudence of the Appeals Chamber, which specifically stated that the exclusion of categories of perpetrators from potentially being brought before the Court (including on the basis of whether they are to be considered the "highest ranking perpetrators") "could severely hamper the preventive, or deterrent role of the Court which is a cornerstone of the creation of the International Criminal Court".²⁹ Indeed, according to the Appeals Chamber, "[h]ad the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly".³⁰ The Appeals Chamber also considered "flawed" the reference to the procedural law and practice of the ICTY and ICTR on this matter in the context of the interpretation and application of article 17(1)(d) of the Statute.³¹

19. Third, the determination of gravity of the present case must be based on all relevant aspects of the Prosecutor's allegations against Charles Blé Goudé considered as a whole, and is thus not limited to particular factors taken in

²⁹ Appeals Chamber, "[Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'](#)", 13 July 2006 (unsealed on 23 September 2008), para. 75.

³⁰ *Ibid.*, para. 79.

³¹ *Ibid.*, para. 80.

isolation, like an allegedly low number of casualties or the purported limited temporal and geographical scope of the alleged crimes.

20. In light of the relevant factors to be taken into account, the Chamber considers that several aspects of the Prosecutor's allegations in the present case, as set out in the DCC, are relevant to the determination of its gravity and need to be considered altogether. In particular, the Chamber notes the nature and scale of the charged crimes as well as the allegations by the Prosecutor with respect to the discriminatory motive and modalities of execution of these crimes. The Chamber also notes the Prosecutor's allegation that the charged crimes constitute, in themselves, an attack against the civilian population, but are also part of a broader widespread and systematic attack. Furthermore, the Chamber notes the crucial role that the Prosecutor attributes to Charles Blé Goudé in the adoption and implementation of the policy to carry out the attack and in the plan that resulted in the commission of the crimes charged, as well as the degree of his intent and participation in the charged crimes.

21. More specifically, the Chamber notes that, in the present case, the Prosecutor alleges that:

- (i) Charles Blé Goudé committed, within the meaning of article 25(3)(a) of the Statute, the crimes against humanity of murder of at least 184 persons, the rape of at least 38 women and girls, the infliction of seriously bodily harm on at least 126 persons, also constituting acts of persecution against at least 348 persons; or, in the alternative, his conduct gives rise to criminal responsibility for these crimes under article 25(3)(b), (c) or (d) of the Statute;³²
- (ii) all these crimes were committed against non-armed civilians that were attacked by perpetrators in particular by heavy weaponry,

³² DCC, paras 327 to 329, and Counts 1 to 4 at pp. 239-240.

fragmentation grenades, firearms or blade weapons, or were burnt alive;³³ many women, including several young girls, were raped, including gang-raped;³⁴

- (iii) all the crimes charged were committed in the context of a disputed presidential election³⁵ on political, national, ethnic or religious grounds as the victims were targeted because they were assimilated to members of Alassane Ouattara's political groups or his supporters or because they lived in neighbourhoods of Abidjan believed to be Ouattara strongholds;³⁶
- (iv) the crimes were organised and planned within the context of a broader attack, which took place between 27 November 2010 and 8 May 2011,³⁷ against civilians often identified during identity checks at illegal roadblocks or through attacks in specific neighbourhoods or religious institutions where Ouattara supporters were usually found; in the city of Abidjan alone, this widespread and systematic attack comprised at least 800 criminal acts against civilians;³⁸
- (v) Charles Blé Goudé was a member of the inner circle of Laurent Gbagbo and played a key role in the very conception and implementation of the plan that resulted in the commission of the crimes charged, and was a prominent member of that group of people that also conceived, adopted and implemented the policy to commit the widespread and systematic attack against the civilian

³³ *Ibid.*, paras 133-138, 143, 154-160, 162, 164-165, 169.

³⁴ *Ibid.*, para. 144-146, 169-170.

³⁵ *Ibid.*, paras 63-65.

³⁶ *Ibid.*, para. 330.

³⁷ *Ibid.*, para. 76.

³⁸ *Ibid.*, paras 95, 331.

population, in the framework of which the crimes charges were perpetrated;³⁹

- (vi) Charles Blé Goudé shared, with the other perpetrators, the intent to commit the crimes charged as they were a means to achieve the ultimate result to keep Laurent Gbagbo in power at any cost, a result that he espoused fully and for the purpose of which he and the other members of Laurent Gbagbo's inner circle resorted to attacking the civilian population;⁴⁰ and
- (vii) Charles Blé Goudé exploited his influence over the pro-Gbagbo youth and, *inter alia*, through hate speeches and xenophobic messages, incited them to commit violent crimes against civilians perceived to be pro-Ouattara.⁴¹

22. The Chamber is of view that these allegations, taken together in light of the factors to be taken into account for the determination of gravity, make the case brought by the Prosecutor against Charles Blé Goudé sufficiently grave to justify further action by the Court within the meaning of article 17(1)(d) of the Statute. This finding is without prejudice to the determination under article 61(7) of the Statute on whether there are substantial grounds to believe that Charles Blé Goudé committed each of the crimes charged – a determination to be made in a separate decision that will be issued in due course.

³⁹ *Ibid.*, paras 323, 326, 332.

⁴⁰ *Ibid.*, paras 323, 333.

⁴¹ *Ibid.*, para. 332.

FOR THESE REASONS, THE CHAMBER

REJECTS the Defence request to strike from the record of the case the annex to filing ICC-02/11-02/11-181; and

REJECTS the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Ekaterina Trendafilova



Judge Christine Van den Wyngaert

Dated this Wednesday, 12 November 2014

At The Hague, The Netherlands