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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

**Prosecution's Response to the Defence application pursuant to Articles 19(4) and
17(1)(d) of the Rome Statute**

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

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Introduction

1. The Office of the Prosecutor (“Prosecution” or “OTP”) charges Mr Blé Goudé as an indirect co-perpetrator of crimes against humanity arising from the murder of at least 184 persons,¹ the rape of at least 38 women and girls,² the infliction of serious bodily harm on at least 126 persons,³ further resulting in acts of persecution against at least 348 persons by the FDS, pro-Gbagbo youth, militia and mercenaries.⁴ Mr Blé Goudé is also charged for ordering, soliciting, inducing or otherwise aiding and abetting these crimes and for contributing to the commission of these crimes by a group of persons acting with a common purpose.⁵ Moreover, the crimes are alleged to have been committed with particularly aggravating characteristics which impact on qualitative considerations of gravity in this case.

2. The Defence’s application that the case be declared inadmissible for alleged lack of sufficient gravity pursuant to Article 17(1)(d) of the Rome Statute (“Application”) is without merit and should be dismissed. In support of its challenge, the Defence relies primarily on (i) factors inappropriately drawn from ICTY/R Rule 11*bis* case-law, contrary to a previous decision of the Appeals Chamber, and (ii) an exclusively quantitative assessment that is based on alleged deficiencies in the evidence underpinning the charges, which therefore goes to the merits of the case and falls outside the proper scope of an admissibility challenge.

¹ ICC-02/11-02/11-124-Conf-Anx2, para.327.

² *Ibid.*, para.328.

³ *Ibid.*, para.329.

⁴ *Ibid.*, para.330.

⁵ As set out in the Document containing the Charges (“DCC”), the charges arise from the context of the alleged killing by pro-Gbagbo forces of more than 800 victims in the 38 incidents forming the attack, over a period of more than four months, and having comprised numerous violent crimes, and having affected the entire city of Abidjan and its more than three million inhabitants. ICC-02/11-02/11-124-Conf-Anx2, para.94.

3. Whether or not a case meets the gravity threshold is a case-by-case determination that flexibly considers, in a holistic manner, all relevant factors. Moreover, all relevant factors need not be present in every case, but a determination must be reached on the basis of a consideration of all existing factors. In *casu*, the scale and nature of the crimes which form the subject-matter of the case, the manner of their commission, and their impact, render the case of sufficient gravity to justify further action by the Court.

Procedural History

4. On 18 September 2014, the Defence filed its “Defence submission on the schedule for the confirmation hearing” in which it indicated its intention to raise the issue of admissibility of the case at the confirmation hearing.⁶
5. On the same day, the Defence also filed its “Defence notice of its intention to raise a plea pursuant to Articles 17(1)(d) and 19 of the Rome Statute”⁷ (the “Defence Admissibility Notice”) specifically raising the issue of admissibility of the case under Article 17(1)(d) of the Rome Statute (the “Statute”).⁸
6. On 22 September 2014, Pre-Trial Chamber I (the “Chamber”) issued its “Decision on the schedule for the confirmation of charges hearing”⁹ in which it determined that the Defence Admissibility Notice did not constitute an admissibility challenge in compliance with Rule 58 of the Rules of Procedure and Evidence (the “Rules”).
7. On 27 September 2014 at 23:29 p.m., the Defence provided a courtesy copy of its “Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute”¹⁰ (the “Defence Admissibility Challenge”). Official notification of this

⁶ ICC-02/11-02/11-156.

⁷ ICC-02/11-02/11-160.

⁸ ICC-02/11-02/11-160.

⁹ ICC-02/11-02/11-165.

¹⁰ ICC-02/11-02/11-171.

filing was circulated on the morning of 29 September 2014, the date on which the confirmation hearing commenced.

8. On 29 September 2014, the Chamber, mindful of the timing of the Defence Admissibility Challenge and of Rules 58 and 59 of the Rules, ruled that the admissibility issue would not be addressed during the hearing.¹¹
9. Later that same day, the Chamber issued an oral decision under Article 19 of the Statute and Rules 58 and 59 of the Rules in relation to the Defence Admissibility Challenge, granting the Prosecutor and the legal representative of victims the opportunity to respond to the Defence Admissibility Challenge by Monday, 20 October 2014.¹²
10. On 30 September 2014, during its presentation at the confirmation hearing, the Defence raised two points of law (points three and four) relating to the Defence Admissibility Challenge.¹³
11. On 2 October 2014, during its final submissions at the confirmation hearing, the Prosecution briefly addressed these two points, noting that “the Defence advances arguments that relate more closely to its admissibility challenge, which the Prosecution will respond to in its submissions by 20 October.”¹⁴

Submissions

1. Burden of proof

12. Chambers of the Court have consistently held that the party lodging an admissibility challenge bears the burden to substantiate its claim.¹⁵ Although

¹¹ ICC-02/11-02/11-T-5-CONF-ENG ET 29-09-2014, p.5.

¹² ICC-02/11-02/11-T-5-CONF-ENG ET 29-09-2014, p.61.

¹³ ICC-02/11-02/11-T-6-CONF-ENG ET 30-09-2014, pp.41-45.

¹⁴ ICC-02/11-02/11-T-8-CONF-ENG ET 02-10-2014, pp.7-10.

¹⁵ ICC-01/05-01/08-802, paras.201-202; ICC-01/09-01/11-307 OA, para.62; ICC-01/11-01/11-547, para.178; ICC-01/11-01/11-565, para.166.

rendered in the context of challenges based on complementarity, this holding bears equal relevance to admissibility challenges based on gravity, given the common requirement in Rule 58 that any challenge pursuant to Article 19 must be in writing and contain the basis for it.

2. Gravity as a legal threshold

13. Although any crime falling within the jurisdiction of the Court is serious,¹⁶ Article 17(1)(d) requires the Court to assess, as an admissibility threshold, whether a case is of sufficient gravity to justify further action by the Court. Thus, a case that falls within the jurisdiction parameters of the Court may yet be found inadmissible due to insufficient gravity.¹⁷

14. Whether or not a case meets the gravity threshold is a case-by-case determination that flexibly considers, in a holistic manner, all relevant factors. As the Appeals Chamber has observed in the *Ntaganda* case, the assessment of gravity must be based on the circumstances of the case at hand and not predetermined on excessively formalistic grounds.¹⁸

15. Pre-Trial Chamber I in the *Abu Garda* case elaborated further on the content of the gravity assessment, stating: “issues of the nature, manner and impact of the [alleged] attack are critical”; “the gravity of 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 when assessing the gravity of a given case”; and that “certain factors that may be of relevance to the assessment of gravity are listed in rule

¹⁶ See Preamble at para.4, Articles 1 and 5 of the Statute. As Pre-Trial Chambers I and II have recalled, “[t]he fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court”; ICC-01/09-19-Corr, para.56; ICC-01/04-01/06-8-Corr, para.41; ICC-02/05-02/09-243-Red, para.56.

¹⁷ ICC-02/05-02/09-243-Red, para.30.

¹⁸ ICC-01/04-169, para.76.

145(1)(c) of the Rules”, which elaborate on the factors that the Court shall consider when determining the gravity of the crime for the purpose of sentencing.¹⁹

16. Pre-Trial Chamber II, in authorising the opening of investigations into the Situation in Kenya, summarised several factors drawn from both Rule 145(1)(c) and Rule 145(2)(b)(iv) as including: “(i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (*i.e.*, the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families. In this respect, the victims' representations will be of significant guidance for the Chamber's assessment.”²⁰

17. All of these factors need not be present in every case, but a determination of gravity must turn on a holistic consideration of all relevant factors arising from the case at hand.

A. The Defence's construction of the gravity threshold is excessively narrow and formalistic

18. Although the Defence acknowledges much of the applicable case-law on gravity from the ICC, its argument relies primarily on (i) factors inappropriately drawn from ICTY/R Rule 11*bis* case-law and (ii) an exclusively quantitative assessment that is based on alleged deficiencies in the evidence underpinning the charges.

¹⁹ ICC-02/05-02/09-243-Red, paras.31-32. See similarly ICC-01/09-19-Corr, para.62; ICC-01/09-02/11-382-Conf, para.50; ICC-02/11-14, para.203.

²⁰ ICC-01/09-19-Corr, para.62.

(i) *Reliance on ICTY/R Rule 11bis case-law is misconceived*

19. Contrary to the Defence's submissions, the factors applied by the ICTY and ICTR for the referral of cases from the Tribunals to national jurisdictions as part of their completion strategies are not relevant criteria for the assessment of gravity before the ICC.²¹
20. In particular, the Defence argues that the "geographical and temporal scope" of the charges should be incorporated as a relevant factor, citing to Rule 11bis proceedings in two cases where the ICTY Referral Bench held on this basis that the case was "not so serious as to preclude the possibility of trial before another court" (*Ljubičić*),²² and that the case did not necessarily need to remain at the Tribunal (*Mejakić*).²³ The Defence further urges the Chamber to consider ICTY Rule 11bis decisions that have examined the military rank and actual role of the accused (*Ademi and Norac*),²⁴ and whether the accused was one of the most senior leaders who were most responsible for the crimes within the Tribunal's jurisdiction (*Ljubičić*).²⁵
21. The Appeals Chamber of this Court has previously held, in the *Ntaganda* case, that reliance on the procedural law and practice of the *ad hoc* Tribunals to determine gravity for the purpose of admissibility was "flawed". In particular, it observed that the more restrictive approach of the *ad hoc* Tribunals arose from the context of their completion strategies, prior to which they had also conducted proceedings against individuals of various ranks over a number of years without being restricted to the most senior leaders. By contrast, the Appeals Chamber

²¹ Application, paras.25-27.

²² Application, para.25, citing to *Prosecutor v. Ljubičić*, Decision to refer the case to Bosnia and Herzegovina Pursuant to Rule 11bis, 12 April 2006 (IT-00-41-PT), para.18.

²³ Application, para.26, citing to *Prosecutor v. Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2004 (IT-02-65-PT), para.21.

²⁴ Application, para.27, not cited, but in apparent reference to *Prosecutor v. Rahim Ademi and Mirko Norac*, Referral Decision, 14 September 2005, (IT-04-78-PT), para.29.

²⁵ Application, para.27, citing to *Prosecutor v. Ljubičić*, Decision to refer the case to Bosnia and Herzegovina Pursuant to Rule 11bis, 12 April 2006 (IT-00-41-PT), para.18.

noted that the ICC was beginning, rather than at the end, of its activities; that, as a permanent institution, it might face a variety of different and unpredictable situations; and that application of an extremely high threshold would weaken the preventive impact of the Court.²⁶

22. Specifically, in relation to formal rank and role, the Appeals Chamber rejected an assessment of gravity that is based on the seniority of the suspect. It held that the predictable exclusion of many perpetrators on this basis could severely hamper the preventative, or deterrent, role of the Court by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court.²⁷ It further observed that the role of a person or organisation may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formalistic grounds.²⁸ As the Appeals Chamber emphasised:

Criteria considered by the Pre-Trial Chamber [...] ignore the highly variable constitutions and operations of different organizations and could encourage any future perpetrators to avoid criminal responsibility before the International Criminal Court simply by ensuring that they are not a visible part of the high-level decision-making process. Also, individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of very serious crimes.²⁹

²⁶ ICC-01/04-169, para.80. ICTY/R Rule 11*bis* and Article 17(1)(d) of the Rome Statute, moreover, serve different purposes: the former seeks to regulate the deferral of cases to national jurisdictions from a Tribunal that otherwise enjoys primacy. By contrast, the purpose of gravity under Article 17(1)(d) is not to transfer cases from the ICC to national courts: a function that is performed rather by the complementarity provisions of Articles 17(1)(a)-(c). Thus, the observation in the *Ljubicic* Rule 11*bis* proceedings that the charges are “not so serious as to preclude the possibility of trial before another court” reflects the fact that the ICTY otherwise enjoys primacy over national jurisdictions (see Application para.25). Conversely, any case before the ICC enjoys the possibility of trial domestically, this being an expectation of complementarity: it is not demonstrative of a lack of gravity.

²⁷ ICC-01/04-169, para.75.

²⁸ ICC-01/04-169, para.76.

²⁹ ICC-01/04-169, para.77.

23. In relation to the geographical and temporal scope, the Appeals Chamber also rejected the approach of the Pre-Trial Chamber in the *Ntaganda* case insofar as it considered as relevant the ‘mere’ regional scope of the perpetrator’s organisation as part of its assessment of whether he was among the most senior leaders within the Democratic Republic of the Congo (“DRC”).³⁰ In this regard, adoption of a test based on geographical and temporal scope of the charges, as the Defence proposes, would undermine the Appeals Chamber’s disavowal of an overly restrictive legal bar for the interpretation of gravity that would hamper the deterrent role of the Court.³¹

24. Moreover, other cases have been confirmed before this Court concerning alleged crimes occurring in a single location on a single day (*Katanga & Ngodjolo, Banda & Jerbo*), or a confined set of events occurring within limited temporal and geographic parameters (*Ruto & Sang, Kenyatta & Muthaura, Gbagbo*) without Chambers finding that this *ipso facto* rendered those cases of insufficient gravity. Although gravity was not contested in the above cases,³² Pre-Trial Chamber II expressly considered and upheld the gravity of the case against *Mohamed Hussein Ali*, notwithstanding that the crimes were alleged to have been committed in two locations over the course of a number of days.³³

25. Thus, the formal rank and actual role of the suspect, and the geographical and temporal parameters within which the alleged crimes occurred, are not, in and of themselves, relevant considerations for the assessment of gravity before this Court. Whether a case meets the threshold of gravity is a case-by-case determination that flexibly considers all relevant factors: factors which must be

³⁰ ICC-01/04-169, para.77 “Criteria considered by the Pre-Trial Chamber such as the national or regional scope of activities of a group or organization, the exclusively military character of a group, the capacity to negotiate agreements, the absence of an official position, the capacity to change or prevent a policy, are not necessarily directly related to gravity as set out in article 17 (1) (d).” See ICC-01/04-02/06-20-Anx2, paras.82-85.

³¹ ICC-01/04-169, paras.81-82.

³² The gravity of the case against *Banda and Jerbo* was considered by the Pre-Trial Chamber on its own motion pursuant to Article 19(1); ICC-02/05-02/09-243-Red, para.27.

³³ ICC-01/09-02/11-382-Conf, paras.49-50.

approached not piece-meal, but holistically. Moreover, all relevant factors need not be present in every case, but a determination must be reached on the basis of a holistic consideration of all existing factors. In *casu*, as described more fully below, the scale and nature of the crimes which form the subject-matter of the case, the manner of their commission, and their impact, render the case of sufficient gravity to justify further action by the Court.

(ii) Arguments based on the sufficiency of the evidence fall outside the proper scope of an admissibility challenge

26. The other main limb of the Defence's submissions relates to quantitative gravity, but appears to be largely predicated on the alleged lack of evidence in support of the charges presented by the Prosecution, as well as the alleged lack of attribution to the suspect of some of the charged incidents that were not directly perpetrated by the pro-Gbagbo youth (*i.e.* the scope of the case).³⁴
27. During the confirmation hearing the Defence made a number of submissions which appear to relate to the above assessment insofar as they relate to the sufficiency of evidence to support the elements of the attack and the requirements of an organisation policy; the attribution of incidents to the pro-Gbagbo youth (as opposed to other parts of the 'organisation' as set out in the arrest warrant); and ultimately the liability of the suspect.³⁵ From its written submissions, the Applicant appears to have intended these submissions to support its position both in relation to the gravity of the crimes and on the merits of the confirmation hearing.³⁶ The Prosecution observes that since the Chamber directed the parties not to address the question of gravity during the

³⁴ Application, paras.34, 37.

³⁵ ICC-02/11-02/11-T-6-CONF-ENG ET 30-09-2014, pp.35-45.

³⁶ Application, paras.1, 34, 37.

confirmation hearing,³⁷ these oral submissions, as well as the Prosecution's responses thereto,³⁸ may be properly disregarded for the purpose of the present admissibility proceedings.

28. To the extent the Chamber chooses to consider the Applicant's submissions on this issue, whether by reference to its written submissions in the challenge, and/or its oral submissions during the confirmation hearing, the Prosecution observes that arguments related to the sufficiency of the evidence to support the charges in any event fall outside the proper scope of a gravity challenge. As Pre-Trial Chamber II found in the gravity challenge brought during the confirmation proceedings in the case against *Mohamed Hussein Ali*, submissions on the sufficiency of evidence at the confirmation stage do not relate to the admissibility of the case, but rather to its merits.³⁹ Accordingly they should be considered solely within the confines of the confirmation decision, as part of the Chamber's examination of the sufficiency of the evidence underpinning the charges against Mr Blé Goudé, and not separately, and repetitively, under Article 17(1)(d).⁴⁰

29. In relation to the scope of the case, the Prosecution observes that the Defence appears to misconstrue the nature and scope of the case against the suspect, based on the same alleged lack of evidence and attribution. The Prosecution recalls that the case against Mr Blé Goudé is not limited to the crimes directly perpetrated by the pro-Gbagbo youth, and thus cannot be re-cast by the Defence for the purpose of its admissibility challenge.⁴¹ The gravity of "the case" as defined by Article 17(1)(d) of the Statute has to be assessed in light of the person

³⁷ ICC-02/11-02/11-T-5-CONF-ENG ET 29-09-2014, p.5.

³⁸ ICC-02/11-02/11-T-8-CONF-ENG ET 02-10-2014, pp.2-10.

³⁹ See similarly *Prosecutor v. Gotovina, Cermak and Markac*, IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para.15, rejecting a jurisdictional challenge that went to the merits of the case, rather than demonstrating lack of subject-matter jurisdiction.

⁴⁰ In this regard, the Prosecution rests on the DCC and its submissions during the confirmation hearing as to the sufficiency of the evidence for the purpose of the confirmation of charges and does not repeat them here.

⁴¹ Application, paras.34, 37; ICC-02/11-02/11-T-6-CONF-ENG ET 30-09-2014, p.43.

and conduct which forms the subject of the proceedings before the Court.⁴² In particular, as this Chamber has previously held in the context of admissibility proceedings:

a case before the Court is defined by the suspect against whom the proceedings before the Court are being conducted and the conduct giving rise to criminal liability under the Statute that is alleged in the proceedings; and [...] “the parameters of the ‘conduct’ alleged in the proceedings before the Court in each individual case are those set out in the document that is statutorily envisaged as defining the factual allegations against the person at the phase of the proceedings in question.”⁴³

As recalled by this Chamber in the context of admissibility proceedings in the related case against *Simone Gbagbo*, the conduct alleged in the case is set out in the warrant of arrest, read with the Article 58 Decision and, by way of incorporation into the latter, the relevant parts of the “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo”.⁴⁴ Thus, the Defence cannot bring arguments related to the sufficiency of the evidence that attaches to the merits of the case rather than its gravity, nor unilaterally amend the scope of the charges in the case for the purpose of its admissibility challenge.

B. The Defence misrepresents the OTP’s position on gravity

30. Contrary to the Defence’s submissions, the Prosecution has not previously taken the position that it would *only* investigate crimes in the order of hundreds or

⁴² As the Appeals Chamber has previously held, in the context of admissibility proceedings under the complementarity limb of Article 17: “the defining elements of a concrete case before the Court are the individual and the alleged conduct”; ICC-01/09-01/11-307, para.40.

⁴³ ICC-02/11-01/12-44, para.7, citing to ICC-01/11-01/11-547-Red, para.1, and ICC-01/11-01/11-466-Red, para.66(iii). Although these parameters were set out in the context of admissibility proceedings pursuant to Article 17(1)(a)-(c), the same considerations must perforce apply to admissibility assessments related to the gravity of the case pursuant to Article 17(1)(d).

⁴⁴ ICC-02/11-01/12-44, para.8.

thousands of prohibited acts, or that quantitative considerations of gravity alone were paramount. The Defence cites a passage in a 2006 letter from the then Prosecutor relating to the Prosecutor's decision, at that time, to close the preliminary examination of the situation in Iraq in relation to the conduct of State Party nationals. That letter compared the limited number of potential victims of crimes within the jurisdiction of the Court – four to 12 victims of wilful killing and a limited number of victims of inhuman treatment – with the number of victims found in other situations under investigation or analysis by the OTP, which included long-running conflicts in Northern Uganda, the DRC and Darfur, each involving thousands of wilful killings as well as intentional and large-scale sexual violence and abductions, and large-scale displacement.⁴⁵ The Prosecutor's illustration through these examples of the difference between the scale of the crimes attributable to State Party nationals in Iraq with other situations under investigation does not mean that only crimes reaching the magnitude described above meet the Prosecution's definition of gravity.⁴⁶

31. The position of the OTP on the content of the gravity test under Article 17(1)(d) of the Statute, which relies on multiple factors that examine the scale, nature, manner of commission, and impact of the crimes in both quantitative and qualitative terms, is apparent from its statements dating from September 2003;⁴⁷

⁴⁵ Office of the Prosecutor response to communications received concerning Iraq (9 February 2006), pp.8-9; available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/documents.aspx.

⁴⁶ *Ibid.* Notably, the letter states that the “the Office considers various factors in assessing gravity” and that the number of victims was a “key consideration”, not the exclusive one.

⁴⁷ See *Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo*, 8 September 2003, making reference to the particular gravity of the crimes, both in terms of their scale and nature; their manner of commission, including summary executions, the burning of people alive, physical mutilation and the specific targeting of vulnerable groups, in particular women and children; and the effect of the crimes in causing massive displacement, exacerbated poverty, famine and disease; available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/second%20assembly%20of%20states%20parties%20to%20the%20rome%20statute%20of%20the%20international%20crim.aspx.

from OTP policy documents;⁴⁸ from regulatory instruments;⁴⁹ and from the Prosecution's submissions in proceedings.⁵⁰

32. In particular, as to the indicators which may be relied upon for the assessment of gravity, the Prosecution has previously stated that the scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of crimes over a brief period or low intensity of crimes over an extended period).⁵¹

33. The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.⁵²

34. The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed to execute the crime, the degree of participation and intent of the perpetrator, the extent to which the crimes were systematic or resulted from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the

⁴⁸ See Policy Paper on the Interests of Justice (September 2007), referring at page 5 to the assessment of gravity as including consideration of “the scale of the crimes, the nature of the crimes, the manner of their commission and their impact”; and Policy Paper on Preliminary Examinations (November 2013), para.61; both available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/documents.aspx.

⁴⁹ Regulation 29(2) of the Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009: “In order to assess the gravity of the crimes allegedly committed in the situation, the Office shall consider various factors including their scale, nature, manner of commission, and impact”.

⁵⁰ See e.g. ICC-02/05-02/09-16-Anx1, para.7; ICC-01/09-3, paras.56-59; ICC-01/09-02/11-356, para.50, citing to prior ICC case-law; ICC-02/11-3, para.54.

⁵¹ Policy Paper on Preliminary Examinations, para.62.

⁵² *Ibid.*, para.63.

victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.⁵³

35. The impact of crimes may be assessed in light of, *inter alia*, the suffering endured by the victims and their increased vulnerability; the terror subsequently instilled, and the social, economic and environmental damage inflicted on the affected communities.⁵⁴

3. Gravity of the case against the suspect

A. Quantitative considerations

36. The Prosecution charges Mr Blé Goudé as an indirect co-perpetrator of crimes against humanity arising from the murder of at least 184 persons,⁵⁵ the rape of at least 38 women and girls,⁵⁶ the infliction of serious bodily harm on at least 126 persons,⁵⁷ further resulting in acts of persecution against at least 348 persons by the FDS, pro-Gbagbo youth, militia and mercenaries.⁵⁸ Mr Blé Goudé is also charged for ordering, soliciting, inducing or otherwise aiding and abetting these crimes and for contributing to the commission of these crimes by a group of persons acting with a common purpose.⁵⁹

⁵³ *Ibid.*, para.64.

⁵⁴ *Ibid.*, para.65.

⁵⁵ ICC-02/11-02/11-124-Conf-Anx2, para.327.

⁵⁶ *Ibid.*, para.328.

⁵⁷ *Ibid.*, para.329.

⁵⁸ *Ibid.*, para.330.

⁵⁹ As set out in the DCC, the charges arise from the context of the alleged killing by pro-Gbagbo forces of more than 800 victims in the 38 incidents forming the attack, over a period of more than four months, and having comprised numerous violent crimes, and having affected the entire city of Abidjan and its more than three million inhabitants. ICC-02/11-02/11-124-Conf-Anx2, para.94.

B. Qualitative considerations

37. The crimes with which Mr Blé Goudé is charged were violent by nature:⁶⁰ murders, rapes, other inhumane acts or attempted murders causing great suffering or serious injury, and persecution.⁶¹
38. The incidents in question were all committed against non-armed civilians. They were committed pursuant to a common plan to keep Mr Gbagbo in power by all means, including by committing a widespread and systematic attack against civilians perceived to support Mr Ouattara.⁶²
39. The multiple crimes are alleged to have been organised and planned within the context of a widespread and systematic attack against selected segments of the Ivorian civilian population. Groups, and persons belonging to these groups, were stigmatised and deliberately targeted on the basis of nationality, ethnicity or religious affiliation and political affiliations.⁶³ The commission of the acts espoused the following *modus operandi*: victims were often identified during identity checks at illegal roadblocks or through targeted attacks in specific neighbourhoods or religious institutions generally frequented by Ouattara supporters.⁶⁴
40. Perpetrators used heavy weaponry, grenades and live ammunition to attack densely populated residential neighbourhoods including to disperse civilian protesters.⁶⁵ Perpetrators also used weapons such as machetes and bricks to attack their victims; other victims were burned alive. In addition, sexual violence crimes were prevalent during the period. Women and young girls were sexually

⁶⁰ *Ibid.*, paras.83-93 and 95.

⁶¹ *Ibid.*, paras.327-330.

⁶² *Ibid.*, para.323.

⁶³ *Ibid.*, para.330.

⁶⁴ *Ibid.*, para.95 and fn.273.

⁶⁵ *Ibid.*, para.95 and fn.274.

abused. Foreigners, northerners, muslims and members of certain ethnicities were also specifically targeted for violent crimes.⁶⁶

41. Mr Blé Goudé is alleged to have played a key role in the conception and implementation of the common plan to maintain Laurent Gbagbo in power by all means, which resulted in the commission of the crimes charged.⁶⁷ The charged conduct also makes Mr Blé Goudé allegedly liable for crimes pursuant to the modes of liability under Articles 25(3)(b), (c) and (d) of the Statute. Mr Blé Goudé is alleged, *inter alia*, through hate speeches and messages, to have incited the pro-Gbagbo youth to commit violent and xenophobic crimes against civilians perceived to be pro-Ouattara.⁶⁸

42. The crimes committed had a devastating impact on the victims. Hundreds of innocent civilians were killed, gravely injured, raped and persecuted.⁶⁹ The survivors of the crimes suffered grave physical injury, psychological trauma, and other social stigma.

⁶⁶ *Ibid.*, paras.273, 300.

⁶⁷ *Ibid.*, paras.323, 332.

⁶⁸ *Ibid.*, para.170.

⁶⁹ *Ibid.*, para.170.

Relief Requested

43. For the reasons set out above, the Prosecution requests the Chamber to dismiss the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 20th day of October 2014

At The Hague, The Netherlands