



Original: English

No.: ICC-02/11-02/11
Date: 20 October 2014

PRE-TRIAL CHAMBER I

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

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. CHARLES BLÉ GOUDÉ***

Public Document

**with Confidential *Ex parte* Annex, only available to the OPCV
and same public redacted Annex**

**Observations on behalf of victims on the "Defence application pursuant to Articles
19(4) and 17(1)(d) of the Rome Statute"**

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. James Stewart

Mr. Eric MacDonald

Counsel for the Defence

Mr. Nicholas Kaufman

Legal Representatives of the Victims

Ms. Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

Mr. Enrique Carnero Rojo

Ms. Ludovica Vetrucchio

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL BACKGROUND

1. On 30 September 2013, the warrant of arrest issued against Mr. Blé Goudé by Pre-Trial Chamber III on 21 December 2011 was made public.¹

2. On 4 November 2013, the decision on the Prosecutor's application for a warrant of arrest against Mr. Blé Goudé, issued by Pre-Trial Chamber III on 6 January 2012, was made public.²

3. On 22 March 2014, Mr. Blé Goudé was surrendered to the Court.

4. On 17 April and 17 June 2014, the Single Judge of Pre-Trial Chamber I (the "Chamber") rejected two applications by the Defence to order Côte d'Ivoire to disclose documents deemed necessary by the Defence to file an admissibility challenge before the Court.³

5. On 11 June 2014, the Chamber decided to admit 199 applicants as victims at the confirmation of charges hearing and in the related proceedings, appointed the Office of Public Counsel for Victims (the "OPCV" or the "Office") as the Common Legal Representative of said victims, and specified the manner of their participation in the proceedings.⁴

6. On 1 August 2014, the Chamber decided to admit 271 applicants as victims at the confirmation of charges hearing and in the related proceedings, appointed the

¹ See the "Warrant Of Arrest For Charles Blé Goudé" (Pre-Trial Chamber III), No. ICC-02/11-02/11-1, 21 December 2011.

² See the "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé" (Pre-Trial Chamber III), No. ICC-02/11-02/11-3, 9 January 2012 (dated 6 January 2012).

³ See the "Decision on the Defence Request for State Party Cooperation" (Single Judge, Pre-Trial Chamber I), No. ICC-02/11-02/11-63, 17 April 2014; and the "Decision on Second Defence Request for State Party Cooperation" (Pre-trial Chamber I, Single Judge), No. ICC-02/11-02/11-85, 17 June 2014.

⁴ See the "Decision on victims' participation in the pre-trial proceedings and related issues" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-83, 11 June 2014, pp. 19-21.

OPCV as the Common Legal Representative of said victims, and specified the manner of their participation in the proceedings.⁵

7. On 1 September 2014, the Chamber decided to postpone the confirmation of charges hearing to 29 September 2014.⁶

8. On 19 September 2014, the Defence filed the “Defence notice of its intention to raise a plea pursuant to Articles 17(1)(d) and 19 of the Rome Statute” (the “Defence Notice to Challenge Admissibility”),⁷ requesting the Chamber to join its admissibility challenge to the confirmation proceedings.⁸

9. On 22 September 2014, the Chamber issued the “Decision on the schedule for the confirmation of charges hearing”,⁹ deciding *inter alia* that the Defence Notice to Challenge Admissibility did not constitute an admissibility challenge and that the issue of admissibility would not be discussed at the confirmation of charges hearing.¹⁰

10. On 27 September 2014, the Defence submitted the “Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute” (the “Admissibility Challenge”), challenging the admissibility of the case for lack of gravity.¹¹ The Admissibility Challenge was officially notified to the parties and participants on 29 September 2014.

⁵ See the “Second Decision on victims’ participation in the pre-trial proceedings and related issues” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-111, 1 August 2014, pp. 13-15.

⁶ See the “Decision on the ‘Defence request for a variation of a time limit’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-139, 1 September 2014, p. 5.

⁷ See the “Defence notice of its intention to raise a plea pursuant to Articles 17(1)(d) and 19 of the Rome Statute”, No. ICC-02/11-02/11-160, 19 September 2014 (the “Defence Notice to Challenge Admissibility”).

⁸ *Idem*, par. 7.

⁹ See the “Decision on the schedule for the confirmation of charges hearing” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-165, 22 September 2014.

¹⁰ *Idem*, par. 7.

¹¹ See the “Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute”, No. ICC-02/11-02/11-171, 29 September 2014 (dated 27 September 2014) (the “Admissibility Challenge”).

11. The confirmation of charges hearing was held between 29 September and 2 October 2014.¹²

12. On 29 September 2014 the Chamber decided that the Admissibility Challenge could not be addressed during the confirmation hearing because of the date on which it was filed, and granted the Prosecutor and the victims who have been admitted to participate in the proceedings and who have communicated with the Court in connection with the current case the possibility to respond in writing to the Admissibility Challenge by 20 October 2014.¹³

13. Pursuant to the abovementioned directions of the Chamber, the Principal Counsel of the OPCV, acting as the Common Legal Representative of the victims (the “Common Legal Representative”),¹⁴ submits the following observations to the Admissibility Challenge.

14. Pursuant to regulation 23 *bis* of the Regulations of the Court, the Annex to this submission is filed Confidential *ex parte*, only available to the OPCV because it contains information which might identify the victims concerned. A public redacted version of said Annex is filed simultaneously.

II. OBSERVATIONS ON BEHALF OF VICTIMS

15. The Common Legal Representative submits that the Admissibility Challenge should be rejected *in limine* because it is unjustifiably incomplete and unsubstantiated. Assuming *arguendo* that the Admissibility Challenge is found to be admissible, the Common Legal Representative contends that it must be dismissed

¹² See the transcripts of the confirmation of charges hearing sessions held on 29 and 30 September 2014 and 1 and 2 October 2014, Nos. ICC-02/11-02/11-T-5-CONF-ENG ET, ICC-02/11-02/11-T-6-CONF-ENG ET, ICC-02/11-02/11-T-7-CONF-ENG ET, and ICC-02/11-02/11-T-8-CONF-ENG ET.

¹³ See the transcript of the confirmation of charges hearing session held on 29 September 2014, No. ICC-02/11-02/11-T-5-CONF-ENG ET, p. 5, lines 10 to 14, and p. 61, lines 15 to 24 (decisions issued in open session).

¹⁴ See *supra* notes 4 and 5.

because the case brought by the Prosecutor against Mr. Blé Goudé is sufficiently grave both in its quantitative and qualitative dimensions.

1. The Admissibility Challenge must be rejected *in limine*

16. The Defence grounds the Admissibility Challenge on the interpretation that the Chamber may eventually make of the evidence to be presented during the confirmation hearing.¹⁵ In this regard, the Common Legal Representative submits that the Defence's lack of clarity, precision and specificity regarding the elements supporting its challenge does not allow for a decision on the merits of the Admissibility Challenge. Consequently, said challenge should be dismissed *in limine*.

17. In fact, the sole argument presented by the Defence is its intention to provide at a later stage some evidence in support of the Admissibility Challenge – *i.e.* some statistics and some further unidentified elements of proof.

18. In particular, the Defence refers to some unspecified statistical data that it intended to provide in the context of its oral or written submissions at the confirmation of charges hearing and that would support the Defence's allegation that the number of causalities linked to the case is limited.¹⁶ In addition, the Defence refers to similarly unidentified evidence that could in its view clarify the role and position of Mr. Blé Goudé within the *Galaxie Patriotique*.¹⁷

19. The Common Legal Representative submits that these arguments do not amount to anything else other than vague suggestions that some of the evidence presented at the confirmation hearing could somehow support the Admissibility Challenge, filed only two days before the start of said hearing. The Defence does not clarify by any means which evidence it is referring to and does not explain how said

¹⁵ See the Admissibility Challenge, *supra* note 11, paras. 1, 34 and 37.

¹⁶ *Idem*, par. 34.

¹⁷ *Ibid.*, par. 37.

evidence could sustain the Admissibility Challenge.

20. The Common Legal Representative contends that since the Chamber decided that the Admissibility Challenge would not be discussed during the confirmation of charges hearing,¹⁸ the Defence cannot rely on the evidence discussed between 29 September and 2 October 2014 in order to fill in the gaps in the Admissibility Challenge submitted on 27 September 2014.

21. In these circumstances, the Admissibility Challenge must be rejected without addressing its unsubstantiated arguments.

22. In this regard, as recognised by the Appeals Chamber, lack in diligence and clarity may entail the dismissal *in limine* of a request.¹⁹ In the words of Pre-Trial Chamber II, “[i]f the [...] Application falls short of the proper level of specificity, the Chamber will not effectuate its authority”.²⁰

23. Against this background, the Common Legal Representative argues that the Defence had enough time to develop the scarce arguments that are now before the Chamber in the Admissibility Challenge.

24. Indeed, several months ago the Defence started to explore the opportunity to challenge the admissibility of the case.²¹ In this context, the Chamber recalled the Defence that it was among its faculties to seek to obtain the relevant information

¹⁸ See *supra* notes 10 and 13.

¹⁹ See the “Decision on Mr Matsanga's requests for reclassification of documents, for suspension or arrest of the former and present Prosecutors and for arrest and prosecution of the former Prosecutor” (Appeals Chamber), No. ICC-01/09-127-Red OA2, 10 March 2014, par. 12. See also the “Decision on the ‘Requête de la Défense aux fins d'obtenir de la Chambre de Première Instance III des décisions appropriées avant l'ouverture du Procès prévue pour le 22 Novembre 2010’” (Trial Chamber III), No. ICC-01/05-01/08-1010, 16 November 2010, par. 13.

²⁰ See the “Decision on the Prosecutor's Application Under Article 58” (Pre-Trial Chamber II), No. ICC-01/04-613, par. 8. See also ECHR, *Trofimchuk v. Ukraine*, Application No. 4241/03, Decision on admissibility of 31 May 2005; and ECHR, *Baillard v. France*, Application No. 6032/04, Decision on admissibility of 25 September 2008.

²¹ See the “Defence Request for State Party Cooperation”, No. ICC-02/11-02/11-56, 10 April 2014; and the “Second Request for State Party Cooperation”, No. ICC-02/11-02/11-76, 23 May 2014.

from Côte d'Ivoire with respect to a potential admissibility challenge.²² However, the Admissibility Challenge was filed at the eleventh hour, in the eve of the start of the confirmation of charges hearing,²³ and without any reference to information obtained from Côte d'Ivoire.

25. Moreover, the Admissibility Challenge does not refer to any new or previously unknown information that could have justified its late submission. Indeed, the Defence solely refers to the Document Containing the Charges, filed by the Prosecution one month earlier.²⁴

26. In conclusion, the Common Legal Representative submits that the late filing of the Admissibility Challenge, just before the start of the confirmation of charges hearing on which the Defence even intended to rely in order to support its challenge, and the lack of clarity and factual basis of said challenge must entail its rejection *in limine*.

2. The Admissibility Challenge must be rejected in substance

27. Assuming *arguendo* that the Chamber decides to adjudicate on the Admissibility Challenge in its current form, the Common Legal Representative submits that, contrary to the Defence's contention, the allegations brought by the Prosecutor against Mr. Blé Goudé are grave enough, both from a quantitative and a qualitative point of view.

28. As a preliminary note, the Common Legal Representative contends that the Defence's analysis of gravity is premised on the wrong basis. The gravity analysis under article 17(1)(d) of the Rome Statute is not to be conducted with reference to the

²² See the "Decision on the Defence Request for State Party Cooperation", *supra* note 3, par. 8; and "Decision on Second Defence Request for State Party Cooperation *supra* note 3, paras. 9 and 15.

²³ See *supra* note 11.

²⁴ See the Admissibility Challenge, *supra* note 11, paras. 2, 31, 34 and 36.

“incidents charged” in the Document Containing the Charges,²⁵ but must refer to the “crime(s)” charged in said document. Accordingly, the gravity analysis must include all elements of said crimes, including their “contextual elements”, *i.e.* the widespread and systematic attack against the civilian population in the context of which the victims of this case were inflicted harm.

29. The jurisprudence of the Court is clear in this regard. The literal wording of article 17(1)(d) of the Rome Statute indicates that the gravity analysis must be conducted over the “case” as such. Pre-Trial Chambers II and I have found that in the context of a “situation”, said analysis is to be conducted over “potential cases”, whereas after the issuance of a warrant of arrest, the gravity analysis is to be conducted over the “concrete cases” arising from the investigation of a situation.²⁶

30. In turn, the analysis of the gravity of a “case” requires assessing *inter alia* the gravity of the crimes alleged in said case.²⁷ And as already concluded by the Trial Chambers in the *Lubanga* and *Katanga* cases, a crime is defined not only by the criminal conduct and its consequences, but also by its contextual circumstances.²⁸

31. Consequently, the limitation by the Defence to considering “*the context of those incidents* [charged against Mr. Blé Goudé]”²⁹ for its analysis of the gravity of this case leads to a narrower analysis than what is required by the legal texts and the

²⁵ See the Admissibility Challenge, *supra* note 11, paras. 29-30.

²⁶ See the “Corrigendum to ‘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’” (Pre-Trial Chamber I), No. ICC-02/11-14-Corr, 15 November 2011, par. 202; the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya” (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 1 April 2010, paras. 57-58; and the “Decision on the Prosecutor’s Application for a warrant of arrest. Article 58” (Pre-Trial Chamber I), No. ICC-01/04-01/06-8-Corr, 10 February 2006, par. 44.

²⁷ See the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, *supra* note 26, par. 61; and the “Public Redacted Version - Decision on the Confirmation of Charges” (Pre-Trial Chamber I), No. ICC-02/05-02/09-243-Red, 8 February 2010, par. 31.

²⁸ See the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012, paras. 531-541; and the “Jugement rendu en application de l’article 74 du Statut” (Trial Chamber II), No. ICC-01/04-01/07-3436, 7 March 2014, paras. 1094-1100 and 1176.

²⁹ See the Admissibility Challenge, *supra* note 11, par. 29.

jurisprudence of the Court. The Common Legal Representative submits that the analysis of the gravity of the case must also include the contextual elements of the crimes charged against Mr. Blé Goudé. The submissions on quantitative and qualitative gravity provided below include said analysis.

i. The crimes charged are quantitatively grave enough

32. The Defence contends that the number of “casualties” is not high enough for the case to meet the required gravity threshold.³⁰ The Common Legal Representative submits that the Defence’s assertions in this regard are wrong both legally and factually.

33. From a legal point of view, the Defence mixes apples with oranges when it relies on a prosecutorial pronouncement on gravity regarding the *situation* in Iraq in order to determine the gravity of the *case* brought against Mr. Blé Goudé.³¹ Needless to say, the number of victims is usually higher in the context of “situations” as a whole, such as the one in Iraq in 2003, than in the context of particular “cases”, such as the one brought against Mr. Blé Goudé in 2011.

34. However, contrary to the apparent argument of the Defence, the Common Legal Representative submits that quantitative considerations of gravity based on the number of victims of a situation cannot be directly applied to the concrete cases arising from said situation because of the different scope of the respective concepts.

35. As repeatedly held by the Pre-Trial Chambers, the gravity analysis conducted before the start of an investigation of a situation is a general assessment over the entire “situation” and over “potential cases”.³² By contrast, the gravity analysis of the

³⁰ *Idem*, par. 32.

³¹ *Ibid.*, par. 33.

³² See the “Corrigendum to ‘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’”, *supra* note 26, paras. 202-203;

result of an investigation is a more detailed assessment conducted over a “concrete case”, which by its very nature is more limited both temporally and geographically.³³

36. For instance, in its preliminary assessment of admissibility regarding the *situation* in Côte d’Ivoire, the Chamber made a general finding that the criterion of gravity was met considering the seriousness of the crimes allegedly committed in the whole situation,³⁴ *i.e.* crimes within the jurisdiction of the Court committed in the whole territory of Côte d’Ivoire since 28 November 2010.³⁵ By contrast, the current *case* is limited to the alleged responsibility of Mr. Blé Goudé for identified crimes committed during particular periods of time in concrete locations in Côte d’Ivoire, such as the crimes allegedly committed in Abidjan on 16-19 December 2010, in Abobo on 3 and 17 March 2011 and in Yopougon on 25-28 February and 12 April 2011.³⁶

37. Turning to the facts of this case, the Defence claims that “*the number of casualties is extremely limited*”.³⁷ The Common Legal Representative strongly disagrees with this assessment and provides the following clarifications to the Chamber.

38. Firstly, the 470 victims admitted to participate at the confirmation of charges

and the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, *supra* note 26, par. 60.

³³ See *e.g.* the “Decision on the admissibility of the case under article 19(1) of the Statute” (Pre-Trial Chamber II), No. ICC-02/04-01/05-377, 10 March 2009, par. 14 (“*The sole limit entailed by the lean wording of the provision [article 19 of the Rome Statute] appears to be that the proceedings must have reached the stage of a case (including ‘specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects’), as opposed to the preceding stage of the situation following the Prosecutor’s decision to commence an investigation*”) (footnotes omitted, emphasis added). See also OLÁSOLO (H.) and CARNERO-ROJO (E.), “The Application of the principle of complementarity to the decision of where to open an investigation: the admissibility of ‘situations’” in STAHN (C.) and EL ZEIDY (M.M.) (Eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011, Vol. 1, p. 402.

³⁴ See the “Corrigendum to ‘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’”, *supra* note 26, par. 205.

³⁵ *Idem*, par. 212.

³⁶ See the “Corrigendum of Annex 1 to the Prosecution’s Submission of Document de notification des charges and l’Inventaire des éléments de preuve à charge”, No. ICC-02/11-02/11-124-Anx1-Corr, 28 August 2014, paras. 127-170.

³⁷ See the Admissibility Challenge, *supra* note 11, par. 34.

hearing and in the related proceedings reflect a minor percentage of the actual victimisation connected to this case. In this regard, other applications have been received by the VPRS but not yet transmitted to the Chamber due to the limited time available to collect and assess said applications before the confirmation of charges hearing. Moreover, potential victims might not be interested in filling in application forms or might not yet be aware of this opportunity, or might prefer to apply at a further stage of the proceedings if the charges are confirmed.

39. Secondly, as the Chamber has already found in the *Gbagbo* case, the “attack” or the “series of multiple acts of violence (including killings, attempted killings, rapes, severe injuries, and arbitrary arrests) [...] carried out by the pro-Gbagbo forces and directed against civilians perceived to be Ouattara’s supporters”³⁸ in the context of which the crimes charged against Mr. Blé Goudé were allegedly committed “was large-scale in nature, as it: (i) involved a large number of acts; (ii) targeted and victimised a significant number of individuals; (iii) extended over a time period of more than four months; and (iv) affected the entire city of Abidjan, a metropolis of more than three million inhabitants”.³⁹

40. The Common Legal Representative submits that the findings quoted above support the quantitative gravity of this case, in particular by the reference made to the “significant” number of victims and the “extended” temporal scope of the crimes.

41. Lastly, the Chamber in the *Gbagbo* case considered “to be substantiated by evidence with a sufficient level of specificity [...] numerous violent acts [...] committed against the civilian population within the context of a number of incidents which occurred in Abidjan during the post-election crisis”.⁴⁰ In this context, the Chamber made reference to the pro-Gbagbo forces in general, as well as to the pro-Gbagbo Youth specifically as perpetrators of said acts.⁴¹

³⁸ See the “Decision on the confirmation of charges against Laurent Gbagbo” (Pre-Trial Chamber I), No. ICC-02/11-01/11-656-Red, 12 June 2014, par. 211.

³⁹ *Idem*, par. 224.

⁴⁰ *Ibid.*, par. 73.

⁴¹ *Ibid.*, paras. 74-77.

42. Once again, the extent of the victimisation is extremely large in quantity. In this regard, the Common Legal Representative recalls that several victims filed applications to participate indicating that numerous members of their family suffered harms from the events occurred in Côte d'Ivoire during the post-electoral crisis, instead of each family member submitting an application form. Said families being large, the number of applications received and granted by the Chamber cannot be considered to accurately reflect the number of persons actually harmed by the crimes alleged against Mr. Blé Goudé.

43. In conclusion, the Common Legal Representative submits that the number of victims is relevant for the case to merit adjudication before the Court.

ii. The crimes charged are qualitatively grave enough

44. The Defence also contends that the case does not meet the “*qualitative portion of the gravity test*”, on the grounds of its alleged “*extremely limited [...] temporal and geographical scope*” and the contention that Mr. Blé Goudé was “*neither a political leader of consequence nor a military leader*”.⁴² The Common Legal Representative disagrees with the Defence’s conclusions in law and in fact.

45. Regarding the applicable legal test to determine the gravity of a case in qualitative terms, the Common Legal Representative agrees with the Defence that, as stated by Pre-Trial Chambers I and II, rule 145(1)(c) and (2)(b)(iv) of the Rules of Procedure and Evidence provides applicable guidelines to determine said gravity.⁴³

46. However, she disagrees with the contention of the Defence that the

⁴² See the Admissibility Challenge, *supra* note 11, paras. 36-37.

⁴³ See the “Corrigendum to ‘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’”, *supra* note 26, par. 204; and the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, *supra* note 26, paras. 62 and 188.

geographical and temporal standards used for the referral of cases by the ICTY to domestic jurisdictions must be applied to determine the gravity of a case before the ICC.⁴⁴

47. The Defence fails to notice that, given the position of supremacy of the ICTY over domestic jurisdictions, the purpose behind the ICTY application of rule 11 *bis* of its Rules of Procedure and Evidence is to determine whether its cases can be transferred to national courts for trial, rather than deciding if the cases at hand are admissible before the ICTY.⁴⁵ By contrast, the purpose behind the assessment carried out by the ICC under article 17 of the Rome Statute is to decide whether the Court can complement the action or inaction of domestic authorities by exercising its jurisdiction over a given situation and/or case.⁴⁶ Hence, it is not apparent why the Chamber must pay regard to the practice of the ICTY under rule 11 *bis* for its application of article 17 of the Rome Statute in this case.

48. More importantly, the Common Legal Representative submits that the geographical and temporal criteria used by the ICTY under rule 11 *bis*, in addition to not being a source of law under article 21 of the Rome Statute,⁴⁷ are not applicable

⁴⁴ See the Admissibility Challenge, *supra* note 11, paras. 25-26.

⁴⁵ See e.g. ICTY, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR11*bis*.1, Decision on Milan Lukić's Appeal Regarding Referral, 11 July 2007, paras. 25-26 ("*[t]his case becomes too significant to be appropriate for referral. As noted earlier, the Security Council intended for the Tribunal to try top paramilitary leaders and the allegations against the Appellant put him into this category [...] the Appeals Chamber considers that the Appellant's case should be retained by the Tribunal*").

⁴⁶ See the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA8, 25 September 2009, paras. 79 and 85 ("*If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in*").

⁴⁷ See the "Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'" (Appeals Chamber), No. ICC-01/09-01/11-414 OA3 OA4, 24 May 2012, par. 31; and the "Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'" (Appeals Chamber), No. ICC-01/09-02/11-425 OA4, 24 May 2012, par. 37. See also the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'" (Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, par. 56.

before the Court because they may give rise to impunity gaps.

49. As the Appeals Chamber has already found, *“the national or regional scope of activities of a group or organization [and other criteria of the group(s) to which a suspect may belong] are not necessarily directly related to gravity as set out in article 17 (1) (d). They 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 [...]. In other words, predetermination of inadmissibility on the above grounds could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future”*.⁴⁸

50. Moreover, contrary to the Defence’s contention,⁴⁹ the Appeals Chamber has also expressly rejected the application of the ICTY criterion of *“the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal”* in order to determine the gravity of a case before the Court.

51. As stated by 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. [...] the reference made by the Pre-Trial Chamber to the current criteria applicable to the ICTY and the ICTR [the most senior leaders suspected of being most responsible] does not lead the Appeals Chamber to the conclusion that article 17 (1) (d) of the Statute should be interpreted as imposing the extremely high threshold attributed to it by the Pre-Trial Chamber, thereby also weakening the preventive effect of the proceedings of the Court”*.⁵⁰

52. By contrast, the impact of the crimes and the harm caused to the victims and

⁴⁸ See the “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’” (Appeals Chamber), No. ICC-01/04-169 OA, 13 July 2006, par. 77.

⁴⁹ See the Admissibility Challenge, *supra* note 11, par. 27.

⁵⁰ See the “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’”, *supra* note 48, paras. 79-80.

their families are valid criteria for assessing the gravity of a case, both according to the Pre-Trial Chambers⁵¹ and the Defence.⁵² In fact, the Chamber in the *Gbagbo* case made reference to several aggravating factors, including the impact of the harm caused to entire families.⁵³

53. Against this background and pursuant to rule 59(1) of the Rules of Procedure and Evidence, the Common Legal Representative provides the following factual observations made by victims participating in the case and victims who have already communicated with the Court in relation to the case.⁵⁴

54. The victims consulted by the Common Legal Representative have repeatedly emphasized the massive scale of their victimisation, making reference to the huge number of fellow citizens affected by the crimes.⁵⁵ The victims have also brought to the attention of the Common Legal Representative the unspeakable nature of the crimes they suffered from and the cruel means whereby the crimes were committed.⁵⁶ In particular, many victims suffered brutal types of sexual violence and were discriminated against for no other reason than having a particular political opinion, professing a given religion or belonging to certain ethnic group.⁵⁷ Others witnessed how their friends and relatives were burnt to death.⁵⁸

55. The victims also state that the crimes they suffered from have had a deep impact on them because of their scale, nature and means of commission. Many of

⁵¹ See the “Corrigendum to ‘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’”, *supra* note 26, par. 204; and the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, *supra* note 26, par. 62.

⁵² See the Admissibility Challenge, *supra* note 11, par. 24.

⁵³ See the “Decision on the confirmation of charges against Laurent Gbagbo”, *supra* note 38, paras. 74-77. The Chamber referred to several people being lynched and burnt alive by the pro-Gbagbo Youth; the killing of several children, women and elderly persons; and the use of heavy weapons, including rockets, mortars and grenades.

⁵⁴ See the Annex to this response.

⁵⁵ *Idem*, victims A/20017/13 and A/10113/14.

⁵⁶ *Ibid.*, victim A/20003/13.

⁵⁷ *Ibid.*, victims A/10007/14, A/10042/14, A/10130/14 and A/20021/13.

⁵⁸ *Ibid.*, victims A/10121/14 and A/20021/13.

them still suffer emotionally and financially for the loss of family members.⁵⁹ Others still fear for their security and have concerns about their safety.⁶⁰ More worryingly, there are victims who have lost any hope in the future after witnessing the massive involvement of the youth in violent actions during the post-electoral crisis.⁶¹

56. In light of the views of the victims referred to above, the Common Legal Representative submits that the crimes charged against Mr. Blé Goudé are so grave that they merit adjudication before the Court. Said crimes have had a profound impact on the victims and their families, who are still enduring the harm resulting from actions that took place almost four years ago.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber to reject *in limine* the Admissibility Challenge, or in the alternative, to dismiss the Admissibility Challenge as unfounded and to find that the case against Mr. Blé Goudé meets the gravity threshold set up in article 17(1)(d) of the Rome Statute.



Paolina Massidda
Principal Counsel

Dated this 20th day of October 2014

At The Hague, The Netherlands

⁵⁹ *Ibid.*, victim A/20005/13.

⁶⁰ *Ibid.*, victim A/10118/14.

⁶¹ *Ibid.*, victims A/10113/14 and A/10128/14.