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Date: **27 September 2014**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

THE PROSECUTOR V. CHARLES BLÉ GOUDÉ

Public Document

Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute

Source: **Defence for Charles Blé Goudé**

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

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I. Introduction

1. Pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute of the International Criminal Court (the "Court"), the Defence for Charles Blé Goudé (the "Suspect") will request that the present case be declared inadmissible for insufficient gravity. The Defence submits that the arguments presented hereinafter will assume more force once the evidence is considered and the Pre-Trial Chamber makes its determinations of fact. Accordingly, the Defence 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.

II. Procedural History

2. On 3 October 2011, Pre-Trial Chamber III authorized the commencement of an investigation in Côte d'Ivoire with respect to crimes within the jurisdiction of the Court committed since 28 November 2010, calling for an evaluation of "gravity…as regards the entire situation, but also against the backdrop of the potential case(s) within the context of a situation".[1]

3. On 21 December 2011, Pre-Trial Chamber III issued a warrant of arrest against the Suspect.[2]

[1] ICC-02/11-14-Corr, para. 212 (NB: corrigendum issued 15 November 2011), para. 202.
[2] ICC-02/11-02/11-1.

4. On 22 August 2014, the Prosecutor issued her Document Containing the Charges ("**DCC**")[3], charging the Suspect with criminal liability for the murder of 184 individuals[4], the rape of 38 individuals,[5] serious bodily harm caused to 126 individuals,[6] and other forms of religious or political persecution upon 348 individuals in five separate incidents.[7]

5. On 18 September 2014, the Defence and representatives of the Prosecutor met regarding upcoming procedural and legal issues, at which, according to the Prosecution, "the Defence also informed the Prosecution that it would raise the issue of gravity."[8]

6. Immediately thereafter, also on 18 September 2014, the Defence informed the parties and the Chamber that it intended on challenging admissibility of the case by way of a gravity argument at the confirmation of charges hearings, pursuant to Article 17(1)(d).[9]

7. On 19 September 2014, the Prosecutor expressed her opinion that "the mere mention of this issue in the Defence proposed schedule is not sufficient or a proper notice pursuant to Article 19 of the Rome Statute and Rule 58 of the Rules of Procedure and Evidence".[10]

8. Immediately thereafter, also on 19 September 2014, the Defence issued its "Defence notice of its intention to raise a plea pursuant to Articles 17(1)(d) and 19 of the Rome Statute" (the "Notice"), stating that "it is firmly opposed to any attempt to

[3] CC-02/11-02/11-124-Conf-Anx2.
[4] DCC, p. 233.
[5] *Ibid*.
[6] *Ibid*.
[7] *Ibid*. at p.233-4.
[8] ICC-02/11-02/11-159, para. 4.
[9] ICC-02/11-02/11-156, para. 6.
[10] ICC-02/11-02/11-159, para. 4.

catch the other party off-guard by raising an issue which was not fully announced in advance"[11] and briefly explained the basis for its admissibility on the grounds of insufficient gravity.[12]

9. On 22 September 2014, the Single Judge issued her "Decision on the schedule for the confirmation of charges hearing" in which she stated that the Notice did not "constitute an admissibility challenge as it does not contain the basis for it" and that therefore "the issue of admissibility will not be discussed at the hearing."[13]

III. Applicable Law

A. The Court's applicable texts

10. Article 17(1)(d) of the Statute requires the Court to determine that a case is inadmissible where "[t]he case is not of sufficient gravity to justify further action by the Court".

11. Article 19(4) permits the Suspect to challenge the admissibility of the case "prior to or at the commencement of the trial".

12. Rule 122(2) states that Rule 58 applies should a challenge arises concerning admissibility at the confirmation hearings.

13. Rule 58(1) requires that a request or application under article be made in writing and contain the basis for it.

[11] ICC-02/11-02/11-160, para. 4.
[12] *Ibid*. at para. 2.
[13] ICC-02/11-02/11-165, para. 7.

14. Rule 58(2) permits a Chamber to decide upon the procedure to be followed and any appropriate measures for the proper conduct of the proceedings including joining the challenge to confirmation proceedings "as long as this does not cause undue delay".

B. Statutory History

15. Neither the Statute nor the Rules define the notion of "gravity," leading scholars to widely acknowledge that "the overall concept of gravity remains largely unclear"[14] and "undertheorized"[15].

16. Notwithstanding, the gravity threshold has been included in the Statute since its very preliminary drafts[16] and was consistently discussed throughout the *travaux préparatoires* as a concept that would prevent the Court from being overburdened with "less serious crimes".[17] From the very inception of the Court, the "gravity" notion was introduced in order to assure State Parties that the Court would not prosecute crimes that could be handled more expeditiously at a national level.[18]

[14] *See, e.g.*, K. Ambos, I. Stegmiller, *Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?*, 10.1007 Crime Law Soc. Change s10611-012-9384-z (2012); S. SáCouto & K. Cleary, *The Gravity Threshold of the International Criminal Court*, 23 Am. J Int'l. Law 807, 820 (2008).

[15] M.M. DeGuzman, *The International Criminal Court's Gravity Jurisprudence at Ten*, 12 Global Studies Law 475, 480 (2013).

[16] Report on the Commission to the General Assembly on the Work of its Forty-Sixth Session, 49 U.N. GAOR Supp. (No. 10), U.N. Doc. A/49/10, reprinted in [1994] 2 Y.B. Int'l L. Comm'n 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

[17] *Ibid*. at 66,58 ("In the case of some conventions defining offences which are frequently committed and very broad in scope, it may be necessary to limit further the range of offences which fall within the court's jurisdiction *ratione materiae*. Otherwise there may be a risk of the court being overwhelmed with less serious cases, whereas it is intended that it should only exercise jurisdiction over the most serious offences, namely those which themselves have an international character.").

[18] *Summary Records of the 46th Meeting*, A/CN.4/SR.46, I Yearbook Int'l L Comm. (1950) at p. 27, para. 59 ("The court should be given some discretion in certain circumstances to decline to accept a particular case on specific grounds-for instance, that it did not consider the case of sufficient gravity to merit a trial at international level or that the existing national tribunals could handle the matter expeditiously. Such discretion on the part of the court might mitigate the concerns raised with regard to the inclusion . . . of crimes under national law, such as drug-related crimes and, for that matter, the "terrorism" conventions").

C. Jurisprudence regarding gravity

17. The Court has repeatedly "found that the gravity threshold contemplated therein 'is in addition to the [Statute] drafters' careful selection of the crimes included in articles 6 to 8 of the Statute'."[19] Moreover, Pre-Trial Chambers I and II have underscored that "the 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."[20]

18. Pre-Trial Chamber II has also determined that "the gravity assessment is a mandatory component for the determination of the question of admissibility", further stipulating "that all crimes that fall within the subject-matter jurisdiction of the Court are serious, and thus, the reference the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases".[21]

19. Furthermore, it has been held that the Article 17(1)(d) analysis "mainly concerns the gravity of the crimes committed within the incidents, which are likely to be the focus of an investigation. In this regard, there is interplay between the crimes and the context in which they were committed (the incidents). Thus, the gravity of the crimes will be assessed in the context of their *modus operandi*."[22]

20. In the Abu Garda case a two-prong test to determine gravity was formulated pursuant to which both a "quantitative perspective" and a "qualitative dimension of the crime" was taken into account.[23]

[19] ICC-02/05-02/09-243-Red, para. 30 (citing ICC-01/04-01/06-8-Corr, para. 41).
[20] ICC-01/09-19-Corr, para. 57; ICC-01/04-01/06-8-Corr, para. 41; ICC-02/05-02/09-243-Red, para. 56.
[21] ICC-01/09-19-Corr, para. 56.
[22] ICC-01/09-19-Corr, para. 61.
[23] ICC-02/05-02/09-243-Red, para. 31.

21. The Court has accepted this approach to a gravity analysis in the Côte d'Ivoire situation.[24]

22. The quantitative analysis is performed by "considering the number of victims".[25]

23. The qualitative analysis may be performed by considering factors which "are listed in rule 145(1)(c) of the Rules, relating to the determination of sentence", such as "the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime".[26]

24. This practice was confirmed by Pre-Trial Chamber II which summarized the following "several factors concerning sentencing as reflected in rule 145(l)(c) and (2)(b)(iv) of the Rules" as "useful guidance":

> "(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."[27]

25. The Rule 11*bis* referral practice at the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has, in addition, shown that a gravity analysis should

[24] ICC-02/11-14, paras. 202-203.
[25] *Ibid*.
[26] *Ibid*. at para. 32.
[27] ICC-01/09-19-Corr, para. 62.

be confined to the facts alleged in the indictment. Thus in the *Ljubičić* case, for example, the ICTY held as follows:

> "In evaluating the gravity of the crimes charged and the level of responsibility of the Accused, the Referral Bench will consider only those facts alleged in the Indictment – they being the essential case raised by the Prosecution for trial – in arriving at a determination whether referral of the case is appropriate (…). While these acts were undoubtedly grave, they must be considered in the context of the jurisdiction of the Tribunal, which is limited to serious violations of international humanitarian law, and the other cases dealt with by the Tribunal. Serious as the charges are in the present case, nevertheless, they are limited in geographic scope and temporal frame (…) these alleged crimes are not so serious as to preclude the possibility of trial before another court."[28]

26. Similarly, in the *Mejakić* case, it was held that the crimes charged[29], while serious, were "limited in geographical and temporal scope. Hence, they do not necessarily require the case to remain at the Tribunal."[30]

27. Finally, in the *Ademi & Norac* case, the ICTY considered both the accused's *military rank* and his *actual role* in committing the crimes charged in the indictment to be of relevance.[31] Accordingly, in the *Ljubičić* case, it was held that even though "the Accused was a military commander and had a position of authority, in the context of other cases being tried before this Tribunal, it is not apparent that he was one of the most senior leaders who were the most responsible for the crimes within the Tribunal's jurisdiction."[32]

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[28] *Prosecutor v. Ljubičić*, Decision to refer the case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, 12 April 2006 (IT-00-41-PT), para. 18.
[29] The accused was charged with crimes of persecution, murder, and inhumane treatment of a large number of victims in two camps which were in operation for approximately three months.
[30] *Prosecutor v. Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, 20 July 2004 (IT-02-65-PT), para. 21.
[31] *Ibid*., paras. 29-30.
[32] Prosecutor v. *Ljubičić*, Decision to refer the case to Bosnia and Herzegovina Pursuant to Rule 11 bis, 12 April 2006 (IT-00-41-PT), para. 18.

IV. Submission

28. A mere accusation of crimes against humanity, *per se*, even with the accompanying "widespread" or "systematic" contextual elements, will not, necessarily, meet the requirements of Article 17(1)(d). To assert otherwise would remove an important safeguard of the Rome Statute and run contrary to the Court's prior holdings.

29. Therefore, and as discussed above, the Court's case law demonstrates that gravity will be determined by reference to the incidents charged and with the application of a two-pronged test contemplating both the context of those incidents and the alleged *modus operandi*.

30. In the present case, the incidents charged do not meet either the quantitative or the qualitative portions of this test.

A. The incidents charged do not meet the quantitative portion of the gravity test

31. The Prosecutor alleges that the Suspect is criminally answerable for five incidents which, so she suggests, can be proved to have led to at least 184 deaths, 38 rapes, 126 cases of serious bodily harm, and 348 cases of religious or political persecution.

32. With the maximum of respect to the victims of this case and their individual suffering, the Defence submits that the numbers of casualties attributed to the Suspect do not, of themselves, meet the requisite gravity threshold.

33. The former Prosecutor of the International Criminal Court made one notable pronouncement on gravity in his decision on an Article 15 communication concerning Iraq. In this decision, the Prosecutor decided that his office would not initiate, *proprio motu*, an investigation when the casualties were not of the "order" of those affected by the "long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur"; *i.e.,* upwards of thousands of deaths and rapes conducted over years with a large geographical span.[33]

34. In the present case, 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. These statistics will be presented in more detail in the Defence's oral and written submissions.

B. The incidents charged do not meet the qualitative portion of the gravity test

35. As discussed above, the Chamber will look to the Rules 145(l)(c) and 145(2)(b)(iv) as factors "of relevance" in determining whether the charged incidents meet the qualitative dimension of the gravity standard.

36. All 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.

[33] Prosecutor Luis Moreno-Ocampo's Letter regarding the situation in Iraq, 9 February 2006, available at http://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

37. The 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".

V. Relief Sought

38. In light of all the aforementioned, the learned Pre-Trial Chamber will be respectfully requested to declare the case against the Suspect inadmissible due to insufficient gravity.

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27 September 2014