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TRIAL CHAMBER I

Before: **Judge Cuno Tarfusser, Presiding Judge**
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR
v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion

Source: **Office of the Prosecutor**

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

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Introduction

1. The Prosecution respectfully requests the Trial Chamber to provide guidance on the applicable standard of a "no case to answer" motion in order to assist the Parties in helping the Chamber with focused submissions and avoiding unnecessary analyses on matters inappropriate for a half-time submission.

Procedural Background

2. The relevant submissions relating to the particular issue raised in this motion are to be found in the following filings:

    a. On 8 May 2015, the Prosecution's Observations on the Conduct of the Proceedings, at paragraph 6;[1]

    b. On 19 May 2015, the Blé Goudé Defence observations on the conduct of proceedings, at paragraphs 3-4;[2]

    c. On 3 September 2015, the Decision on the conduct of the proceedings;[3]

    d. On 4 May 2016, the Decision adopting amended and supplemented directions on the conduct of the proceedings;[4]

    e. On 19 March 2018, Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings, at paragraph 9 of the cover filing;[5]

    f. On 24 April 2018, the Gbagbo Defence *Observations de la Défense présentées à la suite de l'ordonnance de la Chambre « on the further conduct of the proceedings » du 9 février 2018*, at paragraphs 18-33;[6] and

[1] ICC-02/11-01/15-59.
[2] ICC-02/11-01/15-77.
[3] ICC-02/11-01/15-205.
[4] ICC-02/11-01/15-495.
[5] ICC-02/11-01/15-1136.
[6] ICC-02/11-01/15-1157.

g. On 24 April 2018, the Blé Goudé Defence's written observations on the continuation of the trial proceedings pursuant to Chamber's Order on the further conduct of the proceedings, at paragraphs 18-27.[7]

h. On 4 June 2018, the Trial Chamber issued the Second Order on the further conduct of the proceedings ("Order").[8]

Submissions

3. There is a need for the Trial Chamber to clarify the applicable standard for a "no case to answer" submission given the diverging positions of the Parties. The principles adopted in the *Ruto* and *Sang* case, which is referred to in the Order, correctly set out the standard for a "no case to answer" motion and only envisages qualitative assessment of the evidence in exceptional circumstances. The exceptions are not applicable in this case, which is not on the "brink of breaking down"[9] nor is the Prosecution's evidence of an isolated nature on any of the counts.
4. Furthermore, a departure from the accepted standards for a "no case to answer" submission would be inconsistent with the "submission regime" adopted by this Trial Chamber which requires a holistic evaluation of the totality of the evidence at the time of deliberation of the final judgment.[10] The consequence of departing from these accepted standards is the conversion of half-time submissions into closing submissions, for which the Prosecution will need a substantial amount of additional time.

I. The Need for Clarity as to the Standard for a "No Case to Answer" Motion

5. The Parties have presented their submissions on the standard to be applied at the "no case to answer" stage in their pre-trial observations (filings 59 and 77) as well as their mid-trial submissions (filings 1136, 1157 and 1158).

[7] ICC-02/11-01/15-1158.
[8] ICC-02/11-01/15-1174.
[9] ICC-01/09-01/11-2027-Red-Corr, paras. 57 and 144 (Reasons of Judge Fremr).
[10] ICC-02/11-01/15-405, paras. 13 and 15.

6. The Order requires the Defence to make "concise and focused submissions" on the specific factual issues for which "the evidence presented is insufficient to sustain a conviction and in respect of which, accordingly, a full or partial judgment of acquittal would be warranted".[11] This is an articulation of the finding elaborated in the *Ruto* and *Sang* case that "an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need of the defence to mount a defence case".[12] Indeed, the Chamber cites, in support of its Order, the principles and procedure on "no case to answer" motion as adopted in Decision no.5 by Trial Chamber V(a) in the *Ruto* and *Sang* trial ("Ruto Principles").[13] While the Prosecution believes that this amounts to an implicit incorporation of the Ruto Principles in the present case, it cannot afford to assume this to be the case. For this reason, and to avoid uncertainty, the Prosecution seeks clarification that the range of principles elaborated in the *Ruto* case applies.

7. In essence, the Prosecution is seeking guidance to best assist the Chamber. In the Prosecution's submission, guidance similar to the Ruto Principles as adopted by Trial Chamber V(a) will greatly assist the Parties in helping the Chamber with focused submissions and avoiding unnecessary arguments on matters inappropriate for a half-time submission.

8. The absence of guidelines from the Trial Chamber as to the applicable standard may result in the Defence, in their written submissions, engaging in irrelevant arguments – for example, on issues of credibility and reliability of evidence - thereby extending the length of their submissions unnecessarily in order to cover all possible avenues, and presenting the Trial Chamber with sweeping filings stretching over several hundreds of pages, as opposed to specific and discrete challenges meeting the required threshold at the current stage of the trial. This will defeat one of the intended goals of the "no case to answer" process, as the

[11] Order, para. 10.
[12] ICC-01/09-01/11-1134, para. 12.
[13] ICC-01/09-01/11-1134.

Chamber expressed its desire for a "shorter and more focused trial"[14] as well as "concise and focused submissions".[15]

9. In addition, whilst the *Ruto* and *Sang* case sets out the accepted practice and applicable standards on a "no case to answer" motion, both before this Court and the *ad hoc* tribunals, the Blé Goudé Defence invites the Chamber to depart from these well-established principles and to embark upon quality assessments more appropriate to the Chamber's final deliberation under article 74 of the Statute.[16] To be clear, the "no case to answer" stage is not the appropriate phase to address the credibility and reliability of every single piece of evidence. These principles are further elaborated below.[17]

10. Furthermore, the Prosecution notes the Gbagbo Defence's apparent conflation of the terms "counts" and "incidents". At paragraph 28 of its observations,[18] the Gbagbo Defence states that because a charge relies on incidents, a lack of evidence in relation to an incident must amount to the withdrawal of a charge in its entirety. This is contrary to rule 142(2) as cited by the Chamber at paragraph 11 of its Order. And as explained below at paragraph 17, this is not the approach elaborated in the Ruto Principles. There, Trial Chamber V(a) held that "charges" and "counts" are synonyms and that for the purposes of that decision, the Chamber opted for the term "counts".[19]

11. The Confirmation Decision includes specific incidents (such as the 16 December march on the RTI or the 3 March killing of women in Abobo) constituting factual allegations. On the other hand, the legal characterisation of these facts are organised per count (murder, rape, other inhumane acts and persecution). The Gbagbo Defence's position is misguided; a lack of evidence on one incident does

[14] Order, para. 9.
[15] Order, para. 10.
[16] ICC-02/11-01/15-1158, paras. 20-24.
[17] *See* section "The Appropriate Standard for a "no case to answer" Motion".
[18] ICC-02/11-01/15-1157.
[19] Ruto Principles, footnote 40: "Whereas a Document Containing the Charges and a Decision on the Confirmation of Charges can refer to 'charges' or 'crimes' rather than 'counts', the relevant filings in the present case are arranged by 'counts' (see ICC-01/09-01/11-373, para. 22 and page 138). The Chamber will therefore follow that language."

not result in the collapse of an entire count if there is sufficient evidence relating to another incident under the same count.

12. In effect, what the Gbagbo Defence is seeking from the Chamber amounts to acquittal on an entire count if a specific *incident* is not sufficiently proven, whereas the standard requires a Chamber to make a finding on *counts*.

II. The Appropriate Standard for a "no case to answer" Motion

13. The Prosecution does not challenge that half-time submissions are consistent with the Court's regulatory framework. Yet, as cautioned by Trial Chamber V(a) in *Ruto*, "[s]uch motions should not be pursued on a merely speculative basis or as a means of raising credibility challenges that are to be considered at the time of final deliberations. Nor should they be filed merely to shape the Chamber view as to the strength of the Prosecution case thus far presented".[20] This is where the Blé Goudé Defence invites the Chamber to depart from these well-established principles and to embark upon qualitative assessments.[21]

14. To date, Trial Chamber V(a) is the only Chamber to set and apply the applicable standards for a "no case to answer" submission. The Ruto Principles established by Trial Chamber V(a) are consistent with the jurisprudence of the *ad hoc* tribunals. Indeed, while the primary sources remain the Rome Statute and the Court's legal texts, the Appeals Chamber has held that the jurisprudence of international tribunals may be of assistance in its interpretation of the Statute and can be instructive when there is a *lacuna* in the legal texts of the Court.[22] The standards adopted by the *Ruto* and *Sang* Trial Chamber can be summarised as follows.

[20] ICC-01/09-01/11-1334, para. 39.
[21] ICC-02/11-01/15-1158, paras. 20-24.
[22] *Lubanga* Appeals Judgment, para. 53; *Bemba* Trial Judgments, paras.69 and 72. As will be seen below, the case law of the International Criminal Tribunal for the former Yugoslavia ("ICTY") is particularly instructive given that its Rules of Procedure and Evidence include a provision, rule 98*bis*, precisely dealing with the "no case to answer" procedure and given that this rule was interpreted by different trial chambers.

A. Evidence on which a reasonable Trial Chamber *could* convict

15. First, the test should be whether there is sufficient evidence, if accepted, on which a reasonable Trial Chamber *could* convict. "The emphasis is on the word 'could' and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of the trial".[23] Judge Carbuccia specified in her dissent that "the words 'if accepted' entail also the theoretical nature of this *prima facie* determination, as the Chamber cannot establish at this stage of the proceedings whether it 'could' (with certainty) convict on the basis of the evidence submitted".[24] As stated by Judge Eboe-Osuji, it is not a question of proof beyond reasonable doubt, but one of "a minimum of equal likelihood of conviction and acquittal".[25] That is to say that, theoretically, a Trial Chamber may find that the evidence meets the half-time requirements, yet decide to enter an acquittal on some or all counts in its final deliberation – after the Defence has decided if they wish to present a defence or not. This is illustrated in the *Mrkšić et al.* case at the ICTY where the Trial Chamber acquitted the Accused Miroslav Radić despite finding – during the "no case to answer" phase – that the evidence taken at its highest could lead to a conviction.[26]

B. Elements to be proven

16. Second, with respect to the elements to be proven in order to sustain a conviction before the Court, (a) both the legal and factual components of the alleged crime and (b) the individual criminal responsibility of the accused must be established. Therefore, evidence which could support both of those aspects must be present.[27]

[23] ICC-01/09-01/11-1334, para. 23.
[24] ICC-01/09-01/11-2027-AnxI, para. 17.
[25] ICC-01/09-01/11-2027-Red-Corr, para. 113 (Reasons of Judge Eboe-Osuji).
[26] *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, transcripts of 28 June 2006, pp. 11311-11312, stating that "a decision that there is evidence capable of sustaining a conviction on a particular count is in no sense an indication of the view of this Chamber as to the ultimate guilt or innocence of the accused on that count."
[27] ICC-01/09-01/11-1334, para. 26.

C. A decision based on counts and modes of liability

17. Third, each count in the Confirmation Decision will be considered separately and, for each count, it is only necessary to satisfy the test in respect of *one* mode of liability.[28] This means that should several incidents be charged, for example, under the crime of murder, it is enough – for the purposes of the "no case to answer" process – to find that there is sufficient evidence for one of the incidents under one of the modes of liability to maintain the count of murder.

D. Assessment of reliability and credibility is inappropriate

18. Fourth, the Chamber should not consider questions of reliability or credibility relating to the evidence, save in exceptional circumstances, such as where the evidence in question is incapable of belief by any reasonable Trial Chamber. Matters which go to strength of the evidence, rather than its existence, are to be weighed in the final deliberations in light of the entirety of the evidence.[29] At the half-time stage, the standard is one where the Prosecution's evidence is taken at its highest. Trial Chamber V(a) ruled in the Ruto Principles that "taken at its highest" meant to "assume that the prosecution's evidence was entitled to credence *unless incapable of belief* on any reasonable view".[30]

19. Although the majority in the *Ruto* and *Sang* decision terminating the proceedings referred to the standard articulated earlier, Judge Fremr and Judge Eboe-Osuji did engage in credibility assessments. However, this was due to the particularities of that case. Judge Fremr explained that:

> "The evidence before it, at the close of the Prosecution case, is of an isolated nature and the falling away of any of the testimonies (if found that it could not be relied upon) would cause (significant) gaps in the Prosecution's theory of the case that would make it unlikely that a conviction in the case could ultimately follow".[31]

[28] ICC-01/09-01/11-1334, para. 32 (emphasis added).
[29] ICC-01/09-01/11-1334, para. 32.
[30] ICC-01/09-01/11-1334, para. 24 (emphasis added).
[31] ICC-01/09-01/11-2027-Red-Corr, para. 144 (Reasons of Judge Fremr).

20. The evidence presented by the Prosecution in the present case is not of an isolated nature on any of the counts, and the testimony of witnesses was not such that it caused significant gaps in the Prosecution's theory of the case that would make it unlikely that a conviction in the case could ultimately follow. The factors justifying departure from the Ruto Principles by Trial Chamber V(a) do not apply. The jurisprudence of the International Criminal Tribunal for Rwanda is instructive with respect to the meaning of a case "on the brink of breaking down":

> "Generally, the sufficiency of the evidence shall be determined without consideration of the reliability and credibility of the available evidence, leaving those matters to the final determination of the case. However, there is one situation in which the Chamber is obliged to consider somehow such matters: it is where the Prosecution's case has *completely broken down*, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case. In this situation, a judgement of acquittal pursuant to Rule 98bis of the Rules should be entered".[32]

21. The *Ntaganda* Trial Chamber considered that the case was distinguishable from the *Ruto* and *Sang* case because "it was already known at the time of the parties' submissions on whether there was a case to answer for the accused that the presentation of evidence by the Prosecution had been severely affected by the special circumstances of that case".[33]
22. This is not the situation of the present case. It is important to recall that in the *Ruto* case, the Appeals Chamber's ruling which reversed the rule 68 Decision,[34] had the effect of excluding the prior recorded testimony of *five key Prosecution witnesses* from the Court record of the case.
23. In the present case, there is sufficient evidence for the Defence to answer to, as the Prosecution submitted relevant and reliable evidence for each count both at the level of the perpetration of the crime through crime base witnesses and other actors on the ground, as well as linkage evidence demonstrating the conduct, knowledge and/or the intent of the Accused.

[32] *Prosecutor v. Rwamakuba*, ICTR-98-44C-R98*bis*, Decision on Defence Motion for Judgment of Acquittal, 28 October 2005, para. 7 (emphasis added).
[33] ICC-01/04-02/06-1931, para. 28.
[34] ICC-01/09-01/11-2024.

24. Judge Carbuccia (dissenting) however considered that credibility issues should not have even been assessed in that case. She held that a departure from the "no case to answer" principles – which involves a determination "based on a *prima facie* analysis, *ergo* superficial and 'on the first appearance' of the evidence submitted in trial up until now"[35] – would be contrary to the principle of legal certainty and overall fairness of proceedings[36] and would result in implications "on the impartiality of the judges, if and when the no case to answer findings would be reversed in appeal and referred back to the Trial Chamber."[37] Indeed, should the Trial Chamber, at this stage, assess the credibility of the evidence, and in a scenario where the Appeals Chamber overturns a "no case to answer" decision, the Trial Chamber will find itself having to issue a judgment pursuant to article 74 having already expressed its opinion on the quality of the evidence. The need for clarity as to the rules is therefore paramount.

25. The risks of applying such a higher standard are illustrated by the ICTY Appeals Chamber's instructive decision in the *Karadžić* case:

> "[T]he Appeals Chamber recalls that pursuant to Rule 98 *bis* of the Rules, a trial chamber is required to 'assume that the prosecution's evidence [is] entitled to credence unless incapable of belief" and "take the evidence at its highest'. The Appeals Chamber notes that the evidence reviewed by the Trial Chamber, taken at its highest, indicates that Bosnian Muslims and/or Bosnian Croats suffered injuries, including rape and severe non-fatal physical violence which are, on their face, suggestive of causing serious bodily harm. While the commission of individual paradigmatic acts does not automatically demonstrate that the *actus reus* of genocide has taken place, the Appeals Chamber considers that no reasonable trial chamber reviewing the specific evidence on the record in this case, including evidence of sexual violence and of beatings causing serious physical injuries, could have concluded that it was insufficient to establish the *actus reus* of genocide in the context of Rule 98 *bis* of the Rules. Accordingly, the Trial Chamber failed to take the evidence at its highest".[38]

26. This is to say that engaging with credibility and quality assessments would be warranted in exceptional cases, such as where the evidence has not reflected the Confirmation Decision "on first appearance". And this is not such a case.

27. For this reason, the Prosecution submits that the standard enunciated in the Ruto Principles are representative of the jurisprudence both at the Court and before the

[35] ICC-01/09-01/11-2027-AnxI, para. 17.
[36] ICC-01/09-01/11-2027-AnxI, para. 21.
[37] ICC-01/09-01/11-2027-AnxI, para. 21.
[38] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR98*bis*.1, Judgment, 11 July 2013, para. 37.

ad hoc tribunals and that no cogent reasons exist to depart from these principles in the present case.

III. The Consequences of Engaging in a Qualitative Assessment

28. The Trial Chamber in the present case decided to reserve its ruling on the admissibility of the evidence to the end of the trial and instead adopted a regime based on the concept of submission.[39] The backbone of the submission regime is the appreciation and evaluation of the totality of the evidence at the end of the trial, after the Trial Chamber has heard the presentation of the Prosecution's and the Defence's case. Indeed, in that ruling the Chamber expressly rejected the idea of evidence being assessed in an isolated or piecemeal fashion, favouring a holistic evaluation of the entire body of evidence produced and discussed at trial. Unless the Defence of Mr Gbagbo and Mr Blé Goudé clearly state on the record now that they will not be calling any evidence subsequent to filing their "no case to answer" submissions, the current process – and the standards that apply – need to be distinguished from a closing submission.

29. It follows from this that a "no case to answer" procedure engaging in a qualitative assessment of the evidence defeats the rationale of the submission regime. At the end of trial, the Parties are expected to produce detailed briefs providing the Trial Chamber their arguments, and in particular, their position on the credibility, reliability and probative value of the evidence. Not at the "no case to answer" stage. Otherwise, the entire structure of the proceedings before the Court would be illogical.

30. However, should the Trial Chamber be inclined to engage in a qualitative assessment, this will require that the Prosecution be afforded a substantial amount of additional time to engage in the process in order to adequately prepare its arguments on the credibility of each of its witnesses and the reliability of the documentary evidence submitted to the Trial Chamber.

[39] ICC-02/11-01/15-405, Decision on the submission and admission of evidence.

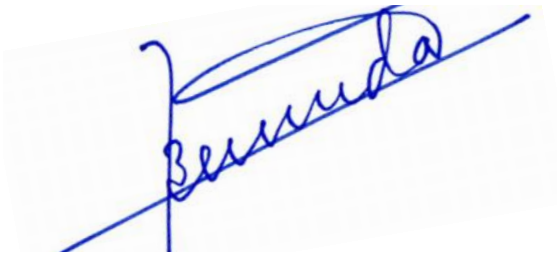
Conclusion

31. For the foregoing reasons, the Prosecution respectfully requests that the Trial Chamber:

    a. clarify the Order with respect to the applicable standard at the "no case to answer" stage;

    b. adopt the Ruto Principles adopted in Decision No.5 as to the standard for this stage of the proceedings; and

    c. rule on the matter on an expedited basis in light of the deadlines on the "no case to answer" submissions.



Fatou Bensouda, Prosecutor

Dated this 8th day of June 2018

At The Hague, The Netherlands