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Date: **21 March 2013**

PRE-TRIAL CHAMBER I

Before: **Judge Silvia Fernández de Gurmendi, Presiding Judge**
Judge Hans-Peter Kaul
Judge Christine Van den Wyngaert

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

PUBLIC REDACTED VERSION
With Annex A
Prosecution's submission on issues discussed during the Confirmation Hearing

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor

Counsel for the Defence
Mr Emmanuel Altit
Ms Agathe Bahi Baroan
Ms Natacha Fauveau Ivanovic

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

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. The Confirmation Hearing in this case was held between 19 and 28 February 2013. On 28 February, the Chamber ordered the Prosecution and the Common Legal Representative of Victims to submit their written observations by 14 March 2013 and the Defence by 28 March 2013. The Chamber emphasised that "the parties and Common Representative of Victims must limit their observations to the points discussed during the hearing" and extended the page limit of the written submissions to 40 pages.[1]

Request for Confidentiality

2. The Prosecution requests that this submission be received as ''Confidential'' since it refers to evidence and information that cannot be made available to the public. The Prosecution will also file a public redacted version of its observations.

Preliminary issues raised concerning the Document Containing the Charges

3. As a preliminary matter pursuant to Rule 122(3), the Defence argued that the Document Containing the Charges ("DCC") was insufficient and imprecise, and therefore failed to provide adequate notice to the suspect of the charges. The Defence invoked two specific "defects" that they claim should lead the Chamber to "simply throw out" the DCC in part or in its entirety: 1) the lack of precision in depicting the essential elements underpinning the charges and 2) the absence of details regarding the mode of responsibility under 25(3)(d).[2] In relation to the lack of precision of the DCC, the defence claimed that the Prosecutor failed to put forth the requisite elements in support of particular legal issues, leaving the Defence unable to distinguish within the DCC the essential elements that relate to the criminal responsibility of the suspect.[3]

[1] ICC-02/11-01/11-T-21-ENG ET, p. 50-51.
[2] ICC-02/11-01/11-T-14-ENG ET, p. 18, l. 14-17, p. 18, l.18 to p. 21, l. 6.
[3] ICC-02/11-01/11-T-14-ENG ET, p. 19, l. 16 to p. 20, l. 6.

4. The arguments of the Defence do not stand. As will be further developed below, the Prosecution submits that the amended DCC, read in conjunction with the amended List of evidence ("LoE") and Element Based Chart ("EBC"), meets all the requirements under the Statute, the Rules, and decisions of this Chamber, and provides sufficient notice to Mr Gbagbo of the charges, including with respect to modes of liability, to establish his criminal responsibility.[4]

5. In response to the Defence's preliminary motion, the Prosecution submitted in its oral response that the DCC and the LoE were disclosed in compliance with Rule 121(3) of the Rules and the order of the Chamber.[5] The fact that a slightly different version of the DCC was disclosed to the Defence before the confirmation hearing, which had been previously scheduled and postponed twice, does not violate the Prosecution's disclosure obligations. Much less does it prejudice the Defence, which had been on notice since May 2012 of the Prosecution's case theory.[6] The Prosecution recalls that the Chamber itself, when it issued the warrant of arrest against Mr Gbagbo, indicated that the applicable mode of liability "may well need to be revisited in due course".[7] While the Prosecution is of the view that the facts of the case make out all modes of liability under Articles 25 and 28, with the exception of direct perpetration under Article 25(3)(a), the Prosecution chose to add Article 25(3)(d), as this mode of liability also best encompasses the full scope of the suspect's criminal conduct.

The DCC provides sufficient notice of the specific facts and allegations

[4] See also the Prosecution's oral closing arguments, at ICC-02/11-01/11-T-14-ENG ET, p. 29, l. 24 to to p. 33, l. 4.
[5] ICC-02/11-01/11-325. See also the Prosecution's oral submissions, ICC-02/11-01/11-T-14-FRA ENG ET, p. 30, l. 9-12.
[6] ICC-02/11-01/11-T-14-ENG ET, p. 29, lines 1-24. The Prosecution filed the first version of its DCC on 16 May 2012 - see ICC-02/11-01/11-124.
[7] See ICC-02/11-01/11-9-Red, para 77.

6. The purpose of the DCC is to provide the Defence with sufficient notice of the specific facts and allegations on which the Prosecution bases its case.[8] The Prosecution is not required to set out its evidence in the amended DCC, but instead must put forward *factual allegations* that support each of the legal elements of the crimes charged to the requisite standard.[9] However, the jurisprudence of this Court establishes that the document containing the charges is to be read in conjunction with the Prosecution's LoE[10] as well as the in-depth analysis chart of the incriminating evidence (in this case, the EBC).[11]

7. The Prosecution's DCC sets out the facts and circumstances underpinning the charges in considerable and sufficient detail.[12] Additionally, the LoE sets out all the evidence on which the Prosecution relies and identifies the evidence supporting each factual allegation put forth in the DCC. The EBC further identifies how each item of evidence on the LoE supports the elements of the crimes charged and the mode of liability pursuant to Article 25(3)(a). Reading these three documents together, the Defence clearly received adequate notice of the crimes charged and the evidence supporting those charges. The Prosecution also emphasizes that both legal characterisations of the facts under Article 25(3)(a) and 25(3)(d) rely on the same facts and evidence as was made clear in the DCC.

The sufficiency of the information in support of the mode of responsibility under Article 25(3)(d)

[8] In structuring the amended DCC, the Prosecution followed the approach laid out by the jurisprudence of Pre-Trial Chamber I in *Prosecutor v. Banda and Jerbo,* ICC-02/05-03/09-121, paras. 36-38.
[9] ICC-01/04-01/06-2205 OA15 OA16, para. 90, fn 163: "*In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (I) (a) of the Statute*."
[10] *Prosecutor v. Lubanga,* ICC-01/04-01/06-803-tENG, para. 150; *Prosecutor v. Katanga and Ngudjolo,* ICC-01/04-01/07-648, para. 21; *Prosecutor v. Mutahura et al,* ICC-01/09-02/11-315, para. 12.
[11] *Prosecutor v. Ruto et al,* ICC-01/09-01/11-373, para. 98.
[12] See also the Prosecution's oral submissions at ICC-02/11-01/11-T-14-ENG ET, p. 30, l. 25 to p. 31, l. 18.

8. The Defence requested the Chamber to reject the part of the DCC dealing with the mode of liability pursuant to Article 25(3)(d) "because of the total lack of details as to the law and as to the facts".[13] It also argued that this additional legal characterization amounts to an important and significant change that will require the introduction of new facts and new circumstances.[14]

9. The Prosecution submits that the evidence establishing the mode of liability under 25(3)(a) also establishes the legal requirements under 25(3)(d).[15] It follows that this additional legal characterization of the suspect's conduct does not amount to an amendment of the facts and circumstances of the case since the Prosecution relies on the same facts and circumstances to support this additional mode of liability. Moreover, the addition of the legal characterization pursuant to Article 25(3)(d) does not render the DCC vague or imprecise. Section I and counts 5 to 8 of the DCC[16] specifically refer to the facts that establish the legal elements under Article 25(3)(d). The Prosecution recalls that in its oral presentation on the modes of liability it explained in detail how the legal elements under Article 25(3)(a) and (d) relate to each other and mostly overlap. To the extent that they do not, the Prosecution explained both in the DCC, as well as during the confirmation hearing, how the facts and circumstances included in the DCC relate to the elements of Article 25(3)(d).[17]

10. The Defence argued, in addition, that Article 25(3)(a) and 25(3)(d) are incompatible and submit that the Chamber should not consider the charge under (d) if it is satisfied that the Prosecution met its burden under (a).[18] The Prosecution submits that where the facts establish more than one type of criminal conduct and responsibility – as in this case – it is appropriate for the

[13] ICC-02/11-01/11-T-14-ENG ET, p. 22, l. 4-6.
[14] ICC-02/11-01/11-T-14-ENG ET, p. 20, l. 7 to p. 21, l. 6.
[15] ICC-02/11-01/11-T-14-ENG ET, p. 30, l. 1-24, and p. 32, l. 6-17.
[16] ICC-02/11-01/11-357-Conf-Anx1, p. 51-57.
[17] ICC-02/11-01/11-T-14-ENG ET, p. 32, l. 7-17 and ICC-02/11-01/11-T-17-ENG ET, p. 23, l. 15 to p. 27, l. 4.
[18] ICC-02/11-01/11-T-21-ENG ET, p. 16, l. 3-6.

Pre-Trial Chamber to confirm all the established charges in order to allow the Trial Chamber to consider multiple legal characterisations and to limit the resort to Regulation 55.[19] The Prosecution also submits that the two modes of liability are not incompatible as suggested by the Defence, as set forth in detail in the following section. Where the facts support multiple modes of responsibility, as is the case here, it is in the interest of the Defence to receive notice of all potential modes as early as possible.

The identity of the members of the common plan and physical perpetrators of the crimes

11. The Defence claimed that in the context of the mode of liability pursuant to Article 25(3)(d), "*the Prosecution never identified a specific group, independently of President Gbagbo, which may have had the intention to carry out a criminal undertaking within the competence of the Court*."[20] It further claimed that paragraph 106 of the amended DCC simply defines such a group as "*commanders and members of the pro-Gbagbo forces*", without any further detail as to their identity or their supposed criminal intentions.[21]

12. The Prosecution sufficiently identified the "group of persons acting with a common purpose". Article 25(3)(d) does not require that the individuals belonging to the group be identified by name. It is sufficient that the group as such is defined. In addition, in this case the Prosecution identified many individuals who form that group through its LoE or at least by way of association (in this case association with the pro-Gbagbo forces). This is sufficient, especially bearing in mind that Mr Gbagbo is not alleged to have physically perpetrated the crimes.[22]

[19] See the Prosecution's oral submissions at ICC-02/11-01/11-T-21-ENG ET, p. 15 l. 14 to p. 16, l.17.
[20] ICC-02/11-01/11-T-14-ENG ET, p. 21, l.2-4.
[21] ICC-02/11-01/11-T-14-ENG ET, p. 21, l. 7-22.
[22] See the finding of Pre-Trial Chamber II in the case of *Prosecutor v. Ruto et al,* ICC-01/09-01/11-373, para. 101: in relation to the "alleged defects of the Amended DCC concerning the exclusion of the identities of members, at various levels, of the alleged Network […] the Chamber considers that this information can be

13. The Prosecution, in order to avoid repetition and a lengthy DCC, proceeded by referring, in its courtesy footnoted version of the DCC, to other sections of the DCC that include the relevant facts and evidence. The LoE followed the same model. As stated orally, the DCC and LoE sufficiently identify in detail the members of Mr Gbagbo's inner circle, the specific groups, commanders and members of the pro-Gbagbo forces that were involved in the commission of the crimes charged.[23] In particular, paragraphs 32 to 42 and 61 to 67 of the DCC sufficiently identify the members of the Policy and Common Plan and paragraph 37 specifically sets out that the persons who are associated with the pro-Gbagbo forces and who committed the crimes also espoused the Policy and Common Plan.[24] This shows that the DCC clearly puts forth all the necessary facts to establish that "a group of persons" who committed the crime acted with a common purpose.

14. For these reasons, the Prosecution submits that the Defence's preliminary motion in relation to the DCC should be rejected.

Assessment of the Prosecution's evidence

15. This Court has previously established that, when assessing the Prosecution's evidence, the evidence must be analysed and assessed as a whole.[25] This includes not only the evidence specifically referred to during the oral presentations, but also all the evidence tendered by the Prosecution in its LoE. Rule 63(2) of the Rules of Procedure and Evidence ("Rules") expressly permits a Chamber to "assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with Article 69". Therefore, unless it

clearly detected from the evidence disclosed to the Defence. There is no requirement for the Prosecutor to spell out the exact composition of the Network in order for the Suspects to challenge the allegations against them."
[23] ICC-02/11-01/11-T-14-ENG ET, p. 32, l. 18 to p. 33, l. 2.
[24] The relevant evidence in support of this can be found in footnotes 146 to 150 of the footnoted version of the amended DCC.
[25] ICC-01/04-01/06-803-tEN, para. 39, ICC-01/04-01/07-717, para. 66, ICC-02/05-02/09-243-Red, para. 41.

expressly rules that an item is inadmissible, the Chamber may rely on any evidence provided by the Prosecution on its LoE.[26]

16. The Prosecution recalls that its LoE consists of material obtained from a vast number of sources, both direct and indirect.[27] It includes the statements of 23 insider and crime-based witnesses. The identities and statements of 21 witnesses were disclosed to the Defence. Anonymous summaries were provided for only two out of the 23 Prosecution witnesses.[28] In relation to the probative value of witness statements in general, the Prosecution recalls that Pre-Trial Chamber II concluded that "direct evidence which is relevant and trustworthy has a high probative value".[29] Aside from the 23 witnesses, the Prosecution's LoE also contains documentary evidence (including documents obtained from the Presidential Residence and the Presidential Palace) and video footage. The Prosecution submits that the totality of this evidence, coupled with its oral presentations, "offer[s] concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations", as required by the jurisprudence of this Court.[30]

17. When assessing the relevance and probative value of the evidence in the record, the Prosecution strongly encourages the Pre-Trial Chamber to review the original evidence referred to in the Defence's oral presentations, in order to avoid being misled. A number of specific examples where the Defence's oral presentations were based on misrepresented sources are provided in these observations. The Prosecution invites the Chamber to set aside all allegations that are not supported by any evidence.

[26] ICC-01/04-01/07-717, para. 66.
[27] ICC-02/11-01/11-357-Conf-Anx2.
[28] P-0049 and P-0239.
[29] ICC-01/09-01/11-373, para. 70.
[30] ICC-01/09-01/11-373, para. 40, ICC-01/05-01/08-424, para. 29, ICC-01/04-01/07-717, para. 65, ICC-01/04-01/06-803-tEN, para. 39.

18. The Prosecution recalls that the Appeals Chamber has ruled that a Pre-Trial Chamber's ability to evaluate the evidence before it is limited because of the nature of the confirmation process itself, which allows the Prosecution to rely on documentary and summary evidence, including statements of witnesses.[31] In relation to this fact, the Appeals Chamber expressly noted that "while it may evaluate their credibility, the Pre-Trial Chamber's determinations will necessary be presumptive, and it should take great care in finding that a witness is or is not credible".[32]

The assessment of the credibility of insider witnesses

19. The Defence submitted that the credibility of "insider" witnesses – "[REDACTED]"- should be called into question, on the basis that these individuals [REDACTED]. Without adequately substantiating the claim, the Defence contends that these individuals, particularly witnesses P-9, P-11 and P-46, should not be believed, that they were [REDACTED] and they are "[REDACTED]." In relation to witnesses P-10 and P-69, the Defence contends that their evidence must be regarded with scrutiny since they were "[REDACTED]". The Defence included in this category "[REDACTED]", such as Witness P-44.[33]

20. The Prosecution submits that these allegations are unfounded and should be rejected.

21. The Prosecution submits there is nothing unusual for courts to rely on witnesses who allegedly participated in the commission of crime(s) since these witnesses may be singularly informed, but nevertheless may be deemed credible and reliable. Insider witnesses are able to provide uniquely relevant information which is often only accessible to individuals involved in the crimes themselves

[31] ICC-01/04-01/10-514, para. 47.
[32] ICC-01/04-01/10-514, para. 48.
[33] ICC-02/11-01/11-T-18- ENG ET, p. 33, l. 15- p. 34, l. 8.

and/or who are close to the person charged. Where, as here, the insider witnesses corroborate one another and are corroborated by other evidence, the Chamber should not discount the evidence of the insiders based simply on speculation about possible bias or pressure, particularly where the witnesses themselves have not testified and had an opportunity to address the Defence allegations.

[REDACTED]

22. The Defence submits that witness [REDACTED] […]."[34] While the Prosecution concedes that [REDACTED]. Accordingly, at this stage the Chamber should not discount his evidence based on circumstances that occurred after he provided the evidence. Nevertheless, [REDACTED] does not affect in any way the probative value of the documentary evidence [REDACTED].

Prosecution witnesses alleged to be pro-Ouattara

23. The Defence argues that the rest of the Prosecution witnesses are pro-Ouattara supporters, referring for example to witnesses P-48, P-106, P-107, P-109, P-112, P-117, P-164[35], P-172 and P-184.[36] The Defence once again calls their credibility into question without substantiating its claim. These broad and conclusory allegations should be rejected by the Chamber, particularly since the witnesses have not had an opportunity to address them.

24. In any event, the political affiliations or motivations of a witness do not automatically weaken the reliability of their evidence. As Pre-Trial Chamber II found in the case of the *Prosecutor v. Ruto et al*, the Chamber "does not automatically reject evidence solely because the witness might be politically or otherwise motivated, but assesses the witness' reliability and probative value in

[34] ICC-02/11-01/11-T-18-ENG ET, p. 33, l. 22 - p. 34, l. 2.

[35] ICC-02/11-01/11-T-19- ENG ET, p. 24, l. 20-25.
[36] ICC-02/11-01/11-T-18- ENG ET, p. 34, l. 9-11.

light of the issue to be decided upon and taking into account the totality of the evidence." [37]

P-106

25. The Defence contends that P-106 is "obviously" not credible because he provided video CIV-OTP-0020-0058 to the Prosecutor, a video that was filmed in Kenya and claimed it showed a massacre in Yopougon by agents of the LMP. [38] The Defence's claim is misleading. The Prosecution invites the Chamber to read paragraphs 96 to 103 of the witness' statement at CIV-OTP-0019-0211, pages 0229 to 0230, where P-106 explains in great detail and spontaneously the circumstances under which he obtained the video. He clearly explained that he did not film the video himself but, received it from someone else who had told him that it was filmed in Yopougon. The authenticity of this video therefore has no bearing on the credibility of this witness and on the probative value of the rest of his evidence. The said video was never relied upon by the Prosecution in its two previous Lists of Evidence for the Confirmation of charges Hearing. [39]

Anonymous witnesses

26. As noted above, the Prosecution relies on the evidence of 23 witnesses, out of which only two, P-49 and P-239, were disclosed in the form of anonymous summaries. The Appeals Chamber in *Mbarushimana* reaffirmed that the use of summaries, "even when the identities of witnesses are unknown to the defence and their underlying statements are not fully disclosed, is not necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". [40] In such circumstances the Pre-Trial Chamber will have to consider on a case-by-case basis what steps might need to be taken in order to

[37] ICC-01/09-01/11-373, para. 83.
[38] ICC-02/11-01/11-T-18- ENG ET, p. 34, l. 17-24.
[39] See ICC-02/11-01/11-124-Conf-Anx2 and ICC-02/11-01/11-184-Conf-Anx2.
[40] ICC-01/04-01/10-514, para. 47.

safeguard the rights of the accused, while bearing in mind the character of confirmation of charges hearing.[41] The Prosecution recalls that Pre-Trial Chamber I in *Banda and Jerbo* confirmed the charges against the suspects based on evidence of their complicity in the commission of the crimes that came principally from summaries of evidence from anonymous insider witnesses.[42] The Pre-Trial Chamber II in *Ruto et al,* while acknowledging that anonymous witness statements and summaries may impact the ability of the Defence to challenge the credibility of the source and the probative value of such evidence, nevertheless analyzed the anonymous summaries and evaluated them for the purposes of the confirmation decision, "taking account whether there is corroboration by other evidence".[43] After carefully evaluating their evidence, Pre-Trial Chamber II decided that it will rely on the anonymous summaries of several of these witnesses.[44]

Authenticity of documents

Videos

27. The Defence contends that most of the video clips presented by the Prosecution, most notably the video of the women's demonstration of 3 March 2011, seem to be the result of a montage and argues that by not subjecting the footage to expert review, the Prosecution "left the door open for all sorts of manipulation".[45] The Defence's argument is purely speculative and unsubstantiated by any evidence and contradicted by the record. As already detailed in the Prosecution's oral submissions,[46] allegations that this video is a montage are refuted by the evidence of Prosecution witnesses, notably P-105 and P-184, and by photographs of the dead body of one of the women seen in the video footage.[47] All this evidence corroborates the fact that the women were

[41] *Idem.*
[42] ICC-02/05-03/09-121-Corr-Red, para. 41 and p. 74.
[43] ICC-01/09-01/11-373, para. 78.
[44] ICC-01/09-01/11-373, paras. 88-90.
[45] ICC-02/11-01/11-T-18- ENG ET, p. 32, l. 18-21 and p. 35, l. 8-12.
[46] See ICC-02/11-01/11-T-16- ENG ET, p. 35, l. 5-22.
[47] See CIV-OTP-0037-0114, CIV-OTP-0037-0116 and CIV-OTP-0037-0117.

indeed killed during the demonstration. The reliability and probative value of the video evidence should therefore be evaluated in light of the rest of the Prosecution's evidence.

Documentary evidence

28. The Defence also raised doubts about the authenticity of documents seized at the Presidential Residence in Abidjan.[48] They question the veracity of the report CIV-OTP-0024-0641,[49] which explains the circumstances in which the documents from the Residence were kept and seized. However, the Defence's allegations are once again speculative and not supported by any evidence. The Prosecution recalls that the authenticity of some of the documents seized at the Residence was corroborated by evidence obtained from different and independent sources.[50] The Prosecution therefore invites the Chamber to reject the Defence's arguments and examine the authenticity and probative value of these documents in light of the above-mentioned report, the totality of the evidence on record and the scope of the confirmation hearing.

The Widespread or systematic attack against the civilian population

29. The Defence challenges the existence of a widespread or systematic attack against the civilian population, arguing that the attacks referred to by the Prosecution are based on NGO and media articles[51] and, alternatively, there was instead an armed conflict at the time of the events and consequently there could not be crimes against humanity.[52]

30. First, the Prosecution wishes to emphasize that the four charged incidents alone, in and of themselves, are sufficient to establish the existence of a widespread or systematic attack against the civilian population because, *inter alia*, their

[48] ICC-02/11-01/11-T-18- ENG, p. 35, l. 13 - p. 36, l. 4.
[49] ICC-02/11-01/11-T-18- ENG, p. 35, l. 14-19.
[50] Document CIV-OTP-0018-0564 is a government communiqué that was seized in the bedroom of the bunker where Mr Gbagbo was arrested. This same document, with the additional signature of the government spokesman, was also found among emails seized from P-69's computer – see CIV-OTP-0021-6393.
[51] ICC-02/11-01/11-T-20-CONF-ENG ET, p. 48, l. 1-4.
[52] ICC-02/11-01/11-T-18-CONF-ENG ET, p. 16, l. 18-20.

intensity was very important, they caused an important number of victims, they were spread out over 5 months, there was an organisational policy behind them, they were coordinated by Mr Gbagbo and his inner circle, the FDS were involved, and the victims were targeted.[53]

31. The Defence argument that other attacks are supported only by evidence from NGO and UN reports is inaccurate. The Prosecution relies on various sources, including witness evidence,[54] video material,[55] reports and media articles to corroborate the NGO and UN reports.[56] While not every single detail is supported by these sources, the overall existence of the attack is documented and established by the Prosecution's evidence, bearing in mind 1) that any challenge to hearsay evidence contained in media, NGO or UN reports has to be viewed against the scope and purpose of the confirmation hearing and does not automatically affect the admissibility of such evidence,[57] 2) that some of the reports contain detailed summaries of the account given by witnesses,[58] and 3) that these reports have to be assessed against the totality of the evidence presented at confirmation.

32. Last, the Defence argument that there could not have been a widespread or systematic attack at the relevant time since there was instead an armed conflict, is factually and legally flawed. The evidence on record establishes that, an armed conflict would have started on or about 25 February 2011 in the West of Côte d'Ivoire and reached Abidjan towards the end of March 2011.[59] But more importantly, the Prosecution submits that even if there existed an armed conflict prior to 25 February 2011, this would not have any impact on the charges

[53] The Prosecution refers to the criteria listed in paras. 30-31 of the Document containing the charges, ICC-02/11-01/11-357.
[54] For example P-184, P-107, P-49, P-87.
[55] Video CIV-OTP-0003-0013.
[56] See for example CIV-OTP-0002-0046, CIV-OTP-0002-0647 or CIV-OTP-0004-0072.
[57] See for example ICC-01/04-01/07-717, par. 137 and ICC-01/04-01/06-803-tEN, par 103.
[58] See for example CIV-OTP-0002-0173, p.0176 in relation to the 1 March 2011 incident; see CIV-OTP-0002-0173, p.0176-177 for the rape of 9 women active for Ouattara; see CIV-OTP-0002-0647, p.0671 in relation to the death of a man called "the Guinean".
[59] See DCC, at para.14 and corresponding evidence on the Prosecution's List of Evidence.

included in the DCC. An incident can be legally characterized both as a war crime and a crime against humanity.[60]

Contentions of the Defence in relation to the Common Plan

33. The Defence argues that the Prosecution's evidence does not establish substantial grounds to believe the existence of a common plan. As set forth in more detail below, the Prosecution submits that the Defence analyzed and assessed each piece of evidence in isolation. The Defence's arguments are also based on inaccurate and sometimes misleading interpretations of the evidence. The Defence at times distorts or ignores part of a piece of evidence or cites sources out of context. The Defence similarly relies on sources, such as pro-Gbagbo newspaper articles, which should be afforded little or no weight at all.

The slogan « *on gagne ou on gagne* »

34. The Defence went at great length to challenge the meaning and significance of the campaign slogan « *on gagne ou on gagne* ». It portrayed this slogan as something that was not used by Gbagbo for the Presidential elections[61] but also something that was common.[62] In doing so, the Defence ignored the statements of several Prosecution witnesses that explain its meaning and impact.[63] In particular, the Defence ignored the explanation provided by witness P-44 that « *on gagne ou on gagne* » means « *même si on dit que c'est [le] RHDP qui a gagné, là nous on dit : non, c'est nous, on a gagné*». It means that even if we lose, Mr Gbagbo « *ne va pas partir* ».[64] The Prosecution submits that even if this slogan may have been used previously, including in different circumstances, it does not detract from the context and manner in which it was used and referred to in 2010 by the

[60] See for example ICC-01/04-01/07-717, para. 419 : « Suspects may be tried for conduct under article 7 and article 8 of the Statute, simultaneously ». See also ICTY, The Prosecutor v. Jelisic Case No. IT-95-10-A, Appeals Judgement, 5 July 2001,para. 82; ICTY, The Prosecutor v. Kupreskic et al. Case No. IT-95-16-A, Appeals Judgment, 23 October 2001, para. 388; ICTY, The Prosecutor v. Kunarac, Case No. IT-96-23&23/1, AppealsJudgement, 12 June 2002, para. 176.
[61] ICC-02/11-01/11-T-20-FRA ET, p. 29, l. 25-27.
[62] ICC-02/11-01/11-T-20-FRA ET, pp. 29-30.
[63] P-0049, CIV-OTP-0019-0168, para.15; P-0107, CIV-OTP-0020-0064, para.172; P-0054, CIV-OTP-0007-0283 para.80; P-0106, CIV-OTP-0019-0211, paras. 23-24; P-0164, CIV-OTP-0028-0481, para. 38; P-0184, CIV-OTP-0032-0011, para. 39.
[64] P-44-CIV-OTP-0014-0601, l. 506 à 523, see also CIV-OTP-0018-0464 et 0018-0810, p. 0851.

pro-Gbagbo camp. It exemplifies the intent of Mr Gbagbo and members of his inner circle and was reclaimed to fuel his supporters, including his pro-Gbagbo forces.

Mr Gbagbo's speech at Divo

35. The Prosecution referred during its presentation to a speech given by Mr Gbagbo at Divo in August 2010, which it submitted was aimed at preparing and justifying Mr Gbagbo's subordinates and supporters for an eventual use of force during the elections. The Defence argued that Mr Gbagbo's speech only dealt with « *des malfaiteurs ordinaires* » and that there would be « *aucun lien entre ce discours …, et les événements ultérieurs* » (i.e the elections).[65] The Defence's assertion is misleading: the transcript of this speech clearly states: « *vous avez pour ennemis tous ceux qui sont contre la paix de la Côte d'Ivoire. Vous avez pour ennemis tous ceux qui veulent troubler les élections en Côte d'Ivoire… Quand on dit que la République est menacée, vous apparaissez pour rétablir l'ordre républicain. S'il y a des dégâts, les juges après, rétabliront. [Rires et applaudissements]* ».[66]

Pro-Ouattara supporters were the sole instigators of the post-election violence

36. The Defence also argued that pro-Ouattara supporters were the sole instigators of the post-election violence and whose actions were supposedly carried out with the aim to blame if not to frame Mr Gbagbo for the post-election violence. The Defence referred to a newspaper article which revealed : « *l'existence d'une réunion secrète à Djékanou où les rebelles auraient convenu qu'il fallait provoquer des affrontements sanglants à Abidjan et ailleurs dans le pays, pour en faire de véritables carnages dans le but d'imputer un génocide au régime en place* ».[67] This article was published by the newspaper *Le temps*, which is one of the pro-Gbagbo newspapers (known because of their colour as the "blue" newspapers) that is

[65] ICC-02/11-01/11-T-20-FRA ET, p. 30, l. 19-20 et p. 31, l. 8-10.
[66] CIV-OTP-0019-0007, l. 35-47, underlines added
[67] ICC-02/11-01/11-T-20-FRA ET, p. 26, l. 27 à p. 27, l. 3.

actively advocating for the discharge of Mr Gbagbo from all charges.[68] The other document mentioned by the Defence in that regard appears to be a quote from the same pro-Gbagbo newspaper *Le temps*.[69]

The Youth did not take up arms to attack the civilian population

37. The Defence submits that youths did took up arms, at the end of March 2011, not to attack civilians, but rather to defend themselves against the rebels. "Yes, indeed, some of the youth tried to defend themselves and to defend their loved ones when Abidjan was invaded by rebels at the end of March 2011. They were not recruited for that purpose. They were not even called up for that. They did so spontaneously because they wanted to defend their families and their homes. They did not take up arms to attack the population, but rather to defend themselves against the Forces Nouvelles. And that is not my testimony; it is the testimony of Witness P-11, a Prosecution witness, who says so at 0016-0347, page 0360."[70] The Prosecution submits that the passage referred to is simply wrong; the witness never mentioned that. The Prosecution also notes that after the passage quoted above, the Defence argued in its presentation that Blé Goudé called on the youth to join the army "*in order to contain and channel the activities of the youth*".[71]

38. The Defence seems to be contradicting itself as to when the youth would have integrated into the army. Earlier in its presentation of video CIV-OTP-0003-0010, which shows young people gathered to enroll in the army, the Defence alleged that it was "*a peaceful appeal which was a way of avoiding unrest, if in case young people were left without instructions*".[72] The Defence submitted that it was recorded in January 2011 in Champroux Stadium in Marcoury.[73] The Prosecution submits that in fact, video CIV-OTP-0003-0010 was undoubtedly

[68] During the closing oral arguments the Prosecution did refer to the cover page of *Le Temps* of 24 July 2012 which read « *Les aveux des juges de la CPI* » ICC-02/11-01/11-T-21-FRA ET, p. 6, l. 10-11.
[69] CIV-OTP-0035-0975 : see *in fine* p.0035-0980
[70] ICC-02/11-01/11-T-19-ENG ET, p. 54, l. 22 to p. 55, l. 4.
[71] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 55, l. 19-22.
[72] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 38, l. 12-14.
[73] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 38, l. 6-9.

filmed at the Military headquarters (*Etat-Major des Armées*), on 21 March 2011. Several speakers on the video mention that the meeting is taking place at the Military headquarters.[74] In addition, the journalist refers to the event taking place on a Monday and states that Ivorian youth massively gathered after Blé Goudé had called them to enrol in the army.[75] This call to enroll in the army was [REDACTED] on 19 March 2011 (which was a Saturday). On 19 March 2011, Blé Goudé asked the youth to gather at the Military headquarters the following Monday, i.e. 21 March 2011.[76] In addition, other evidence shows that it was filmed in late March 2011.[77] This enrollment was therefore not a preventive measure taken in January 2011 to avoid troubles with youth, as alleged by Defence.

39. Additionally, the Prosecution submits that the 21 March 2011 gathering was not peaceful and was not part of a usual recruitment process but was instead clearly meant to fight the rebels and foreign occupation. Young patriots are shouting "*libérez* and that, they want "kalash", grenades and tanks.[78] The youth interviewed in the footage explain that they want to fight the rebels and reunify the country.[79] Furthermore, neither Mangou nor Blé Goudé's speeches are meant to channel the activities of the youth but instead are meant to galvanize the youth, by shouting: "*est-ce que je peux compter sur vous pour défendre la souveraineté?*" or "*ils vont faire mordre la poussière, ces jeunes*".[80] When calling this gathering, on 19 March 2011, Blé Goudé shouted repeatedly that "*la récréation est terminée*" and "*Soyez très vigilants dans vos quartiers.*"[81]

On the use of mercenaries as part of pro-Gbagbo forces

[74] CIV-OTP-0003-0010; Transcript CIV-OTP-0007-0220, l. 50, 67-68, 89-94.
[75] CIV-OTP-0003-0010; Transcript CIV-OTP-0007-0220, l. 67, 77-78, 89-91.
[76] [REDACTED]
[77] UNSC, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, CIV-OTP-0002-0010, at 0021; Jeune Afrique, Blé Goudé appelle tous les jeunes de Côte d'Ivoire à s'enrôler dans l'armée dès lundi, 19 March 2011, CIV-OTP-0011-0023, at 0023.
[78] CIV-OTP-0003-0010; Transcript CIV-OTP-0007-0220, l. 56, 89-94, 162,170.
[79] CIV-OTP-0003-0010; Transcript CIV-OTP-0007-0220,l. 47-51, 102-119.
[80] CIV-OTP-0003-0010; Transcript CIV-OTP-0007-0220, l. 57, 131-133, 166.
[81] Video CIV-OTP-0015-0482, at 00:52-02:07; Transcript CIV-OTP-0019-0183, l. 7-23.

40. Contrary to the Defence allegation,[82] the Prosecution submits the evidence on record demonstrates that mercenaries were involved in the post–elections violence. For example, P-109 gave information about the presence of mercenaries (already prior to the elections) and their involvement at roadblocks.[83] According to witness [REDACTED], Colonel Kougougnou (who originates from the same region as Mr Gbagbo) was commanding the mercenaries at Yopougon[84] and witness [REDACTED] saw mercenaries with Simone Ggbagbo's *aide de camp* at the presidential residence on 3 April 2011.[85] Finally, witness P-44 saw mercenaries erect roadblocks by the time the results of the elections were issued and the blockade of the golf hotel was put in place.[86]

Mr Gbagbo had few contacts with his military commanders

41. The Defence argues that « *the Prosecution evidence shows that President Gbagbo had very little contact with the commanders of the armed forces during the post-electoral crisis* ».[87] The Defence adds: « « *we have not found any trace of any [] consultation [of Mangou by Mr Gbagbo] during the post-election crisis*».[88] The Defence further states that the Prosecution did not prove that Mr Gbagbo was informed of the situation on the ground.[89]

42. The Prosecution submits that the evidence on record establishes the opposite. According to witnesses P-10 and P-09, there were regular contacts between Mr Gbagbo and Chief of Staff Mangou, including late in the evening.[90] General Bi Poin and Admiral Faussigneaux also reported to Gbagbo.[91] The Defence also ignores the evidence of witness P-239 which indicates that Mr. Gbagbo had

[82] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 57, l. 12 to p. 58, l. 17.
[83] P-109, CIV-OTP-0020-0335, para. 119-122.
[84] [REDACTED].
[85] [REDACTED].
[86] P-44, CIV-OTP-0014-0768, l. 853-970.
[87] ICC-02/11-01/11-T-20-ENG ET, p. 14, l. 3-5.
[88] ICC-02/11-01/11-T-20-ENG ET, p. 25, l. 3.
[89] ICC-02/11-01/11-T-20-CONF-ENG ET, p.18, l. 17-21.
[90] P-09, CIV-OTP-0011-0395, l. 600-617 and l. 763-766; P-10, CIV-OTP-0016-0065, l. 76-90 and CIV-OTP-0016-0104, l. 580-583 .
[91] P-46, CIV-OTP-0014-0400, l. 1279 to 1284 and P-09, CIV-OTP-0011-0341, l. 568-572.

contact with other units commanders such as Abehi, Colonel Gouanou and Captain Zadi (1st Parachute Battalion).[92]

Mr Gbagbo's admission with regard the use of the armed forces

43. Mr Gbagbo admitted at the end of the confirmation hearing that he had « *signed a decree for all the FDS to be mobilised*». [93] The Prosecution submits that this admission supports its case theory that Mr Gbagbo exercised control over the FDS and mobilized it despite being advised by his Generals that it was not necessary, and that the police, with its conventional weapons, could manage the situation. Despite this advice, Mr Gbagbo insisted on mobilizing the FDS.

Mme Gbagbo's role in the implementation of the common plan

44. During its presentation, the Defence stated that there was no evidence of the involvement of Mme Simone Gbagbo in the implementation of the common plan.[94] The Defence came back on the Prosecution's arguments in relation to the agenda of Mme Gbagbo[95] and stated : "Incitement for the FDC to respond to rebel weapons." Is it strange to try to respond to armed rebels who were attacking President Gbagbo, the Ivorian institutions and the civilian population?" [96] Once more the Defence is being misleading. The agenda clearly states "*incitation à une réplique par les FDS <u>à armes réelles</u>*".[97] There is no reference to any rebels. The fact is that the clear intent of Mme Gbagbo also appears on other pages of the same agenda. For example, see page 0812 which states on 4 November 2010: « *8) attaquer les baoulés pour obtenir leurs votes* » or page 0832 which mentions « *mener une guerre préventive* ».

The lack of serious investigation

[92] P-0239, CIV-OTP-0038-0002, paras. 15-18.
[93] ICC-02/11-01/11-T-21-ENG ET, p. 46, l. 14.
[94] ICC-02/11-01/11-T-20-ENG ET, p. 11, l. 20 onwards.
[95] ICC-02/11-01/11-T-20-ENG ET, p. 16, l. 13-17.
[96] ICC-02/11-01/11-T-20- ENG ET p. 16, l. 14-17.
[97] CIV-OTP-0018-0810, p. 0018-0832.

45. The Prosecution submits that the existence of the common plan can also be inferred from the lack of investigation, by the relevant Ivorian authorities, of the various incidents where pro-Ouattara supporters (or civilians associated to Ouattara) were killed or injured or raped. The Defence attempts to challenge this allegation by stating that the Ivorian authorities did conduct investigations into the post-election violence.[98] The Prosecution recalls that, already before the crisis, Mr Gbagbo indicated to members of his forces, during a speech in Divo, that they should not question the legality of the orders they receive and implied that they would not be prosecuted.

46. To support its claim, the Defence refers to witness P-68 who stated that « *dès qu'il y avait un incident, la gendarmerie était mobilisée pour faire des enquêtes* ».[99] The Prosecution submits that witness P-68 is here referring to investigations of incidents in which *gendarmes* themselves were the victims of attacks.[100]

47. The Defence also submitted that investigations were conducted, as evidenced by witness P-100, into the conduct of the CeCOS. Witness P-100, however, stated that the investigations had been prompted not by the government but by the ONUCI.[101]

48. The alleged conversation between the Prime Minister and Mangou[102] on the woman's demonstration of 3 March 2011 does also not amount to a proper investigation. In fact (the witness relied upon by the Defence states that the woman demonstration "*était une mascarade*"). Moreover, Mr Gbagbo's government persistently denied the existence of the 3 March 2011 incident as

[98] ICC-02/11-01/11-T-20-CONF-ENG ET, p.18, l. 22 and following. [REDACTED].
[99] ICC-02/11-01/11-T-20-CONF-FRA ET, p.18, l. 18-19.
[100] P-68, CIV-OTP-0028-0023, par. 11 : « *Il y a eu beaucoup de rapports de la Gendarmerie pour expliquer qu'il y a eu des civils qui se sont attaqués aux forces de l'ordre à tel ou tel endroit. [REDACTED] affirme que la Gendarmerie détient des rapports sur les incidents qui ont eu lieu pendant la crise parce que dès lors qu'il y en avait un, les gendarmes étaient mobilisés pour faire des enquêtes. Dans certains endroits, les gendarmes n'ont pas pu mener à bien leurs enquêtes parce qu'ils étaient attaqués.* »
[101] P-100, CIV-OTP-0020-0193, pp. 0213-0214, *inter alia* l.738-740 [REDACTED].
[102] CIV-D15-0001-4508, pp. 4510-4511.

recorded in the minutes of the cabinet meeting of 8 March 2011.[103] Defence referred to a Defence witness and stated that Mr Gbagbo "*dispatched officers from the palace to find out what had happened*".[104] The Prosecution submits that the *officiers du Palais* in question were not the competent authorities to conduct such investigation. In any event, Mr Gbagbo quickly came to the conclusion that the 3 March incident was "*une manipulation du RDR*."[105]

49. The Prosecution submits that the investigation request dated 7 March 2011 put forward by the Defence is phrased in general terms and does not specifically mention that alleged crimes committed by the armed forces should be investigated.[106] It must also be read in conjunction with the *Déclaration du Garde des sceaux* dated 11 March 2011 which is, in itself, quite general.[107] The 11 March 2011 report starts with references to incidents where members of the FDS where the victims,[108] while qualifying (in contrast) the incident of the women's demonstration of 3 March 2011 as "*allégations*". Finally, the examples of investigations conducted refer back to 2002.[109]

50. Finally, the 2 page investigation request dated 24 March 2011,[110] sent by the *Commissaire du Gouvernement* to *the Groupe de documentation et de Recherche de la Gendarmerie*, focuses on oil trafficking by the rebels from Abobo and briefly mentions at the end " *qu'il ressort d'information diffusée par une certaine presse internationale, que des femmes… à Abobo, auraient été tuées par les forces de l'ordre,…que des obus ont été tirés par les forces de l'ordre à Abobo* ».[111] The Prosecution submits that the language used in this request raises itself doubts as to the veracity of the events that took place in Abobo. The Prosecution submits

[103] CIV-OTP-0025-0106.
[104] ICC-02/11-01/11-T-20-ENG ET, p. 19, l. 11.
[105] CIV-D15-0001-3724, p. 3731, par. 2.
[106] CIV-OTP-0001-0264.
[107] CIV-OTP-0001-0256.
[108] CIV-OTP-0001-0256, p.0256.
[109] CIV-OTP-0001-0256, p 0258 and p. 0259.
[110] CIV-OTP-0001-0285
[111] CIV-OTP-0001-0285, p. 0286.

that the evidence on record demonstrates that the March incidents in which pro-Ouatarra supporters were victims are either depicted by the authorities as baseless allegations or simply denied.

51. The Prosecution recalls that according to witness P-46, members of the FDS were not the subject of any investigations during the post-election crisis: "*dans une période sensible comme ça, tu ne peux pas punir un chef…. tu punis le chef, ça veut dire que tu as coupé la tête de ton service* ».[112] Witness P-239 reported that Captain Zadi (one of Gbagbo's strong supporters) who shot a mortar in town, was not to the witness's knowledge punished.[113] According again to witness P-239, no inquiries were either conducted regarding the 17 March 2011 market shelling incident, even if the actual perpetrators [REDACTED] were known.[114]

52. Based on the above, the Prosecution submits that whatever action may have been taken by the Ivorian authorities in response to the four incidents charged, they do not amount to investigations that were genuinely intended to establish the facts and to identify and punish the perpetrators.

Other misleading interpretations of the Prosecution's evidence

The video of 24 February 2011 attributed to the 3 March 2011 women's incident

53. The Defence disputed that the women's demonstration of 3 March 2011 was peaceful. To support this allegation, they relied on video CIV-OTP-0021-4087 which purportedly shows the presence of armed demonstrators among the participants of the march.[115] However, following the Prosecution's intervention the Defence acknowledged it had received the disclosure, on 18 February 2013,

[112] P-46, CIV-OTP-0014-0326, l 362-375.
[113] P-239, CIV-OTP-0038-0002, para. 15, 73, 76
[114] P-239, CIV-OTP-0038-0002, para. 86, 91 and 136. See also in that regard P-164, CIV-OTP-0028-0481, paras. 130-143
[115] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 4, l. 5-10.

of the YouTube screen-shot of this video[116] which clearly indicates that the footage was in fact filmed on 24 February 2011[117], one week *prior* to the Abobo women's march. The Defence also argued that the video CIV-OTP-0021-4087 had only been disclosed on 17 January 2013, pursuant to Rule 77 of the Rules of Procedure and Evidence.[118] However, as was also mentioned by the Prosecution[119], the same footage was previously disclosed to the Defence first on 15 May 2012[120] and again, on 18 August 2012.[121] Therefore, the Defence had ample time to analyse the footage prior to the confirmation hearing.

Les blindés

54. During their presentation on the 3 March 2011 incident, Defence also alleged that the *Commando Invisible* was well armed and, more specifically, had "armoured vehicles" at their disposal. In support of this allegation, the Defence relied on the statement of witness P-10, arguing that the witness "asserts that the Invisible Commando was more armed or had more weapons than the army itself. They had armoured vehicles, rocket launchers and mortars".[122] However, witness P-10 does not make any reference to the *Commando Invisible* being in possession of armoured vehicles in the extract cited by the Defence or anywhere else in his statement.[123] Quite the contrary, when speaking about clashes between the *Commando Invisible* and the military stationed at Abobo, P-10 specifies in his statement that the rebels were *not* in armoured vehicles, but on foot.[124] He explicitly states that *« ceux en face, ils ne sont pas dans les engins, et ils*

[116] See the same video at CIV-OTP-0041-0002 and its screen-shot at CIV-OTP-0041-0003. The screen-shot is available at Annex A to the present filing.
[117] This video was uploaded on YouTube on 3 March 2011, but the description of the video provided in the screen-shot reads as follows *« Cote d'Ivoire: 24 fev 2011 les rebelles paradent à Abobo au cour d'une marche qui va se solder par une attaque des Fanci à la gendarmerie et au camp commando d'Abobo! »*; ICC-02/11-01/11-T-19-CONF-ENG, p. 4, line 11-p.5, line 8.
[118] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 4, l. 5-10, 20-25.
[119] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 5, l. 15-21.
[120] CIV-OTP-0002-1069 and CIV-OTP-0018-0003 (at 00:00-00:30).
[121] CIV-OTP-0026-0006 (at 21:14-22:12).
[122] ICC-02/11-01/11-T-18-CONF-ENG, p. 56, l. 22-24.
[123] CIV-OTP-0016-0084, at 0090-0091.
[124] CIV-OTP-0016-0104, l. 258-270.

sont à pied ».[125] In addition, when asked to specify which entities in Abobo had armoured vehicles, witness P-10 states that they belonged to the Republican Guard, the Gendarmerie, the BAE and the army.[126]

NGO report CIV-OTP-0021-0955

55. Another example of the Defence being misleading is in relation to rapes committed in Yopougon. The Defence argued that NGO report CIV-OTP-0021-0955 at paragraph 63 mentions that rapes were "*perpetrated by young people in the neighbourhood without any link to any of the two parties to the conflict*".[127] In fact, the report states the opposite: « *Certaines victimes, notamment celles de la commune de Yopougon qui a enregistré le plus fort taux de viol, déclarent avoir été violées par des miliciens, des FRCI soit pour leur appartenance politique (RHDP), (LMP) ; soit à cause de leur groupe ethnique. Selon les témoignages d'autres victimes, ce sont des jeunes de leurs quartiers qui pour se venger d'elles les auraient violées pour tirer partie d'elles ; à en croire les témoignages de quelques victimes recueillies sur le terrain.*»[128] It is worth noting that in the following paragraphs of this report,[129] the facts reported clearly illustrate that victims were raped on political or ethnic grounds.

Report CIV-OTP-0022-0042

56. The Defence alleged that report CIV-OTP-0022-0042 "r*aises the issue of credibility - of the Prosecutor's credibility - to the extent that it was compiled at the behest of the Prosecutor initially therefore indicated to support the Prosecution case.* "[130] The Prosecution recalls that, as stated in the first page of the report, it was drafted at the request of the Prosecution in May 2012 on the basis of a more general report on post-electoral violence, published in June 2011 and titled « *Violences faites aux femmes durant la période postélectorale, novembre 2010 à mai 2011 Côte d'Ivoire* ».[131] This general report of June 2011 was therefore drafted before the Prosecution

[125] CIV-OTP-0016-0104, l. 265.
[126] CIV-OTP-0016-0104, l. 617-624.
[127] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 36, l. 9-12.
[128] CIV-OTP-0021-0955, para. 63.
[129] CIV-OTP-0021-0955, paras. 65-66.
[130] ICC-02/11-01/11-T-18-CONF-ENG ET, p. 51, l.3-5.
[131] See CIV-OTP-0021-0955.

was authorized to investigate in Ivory Coast.[132] Furthermore, the report CIV-OTP-0021-0955 dealt with violence that was committed against women by both pro-Gbagbo and pro-Ouattara forces.

Perpetrators of the Yopougon Incident

57. The Defence argued that for the Yopougon incident of 12 April 2011, the "*Prosecutor deliberately never distinguishes between the youth wings of the political parties, militias and mercenaries*."[133] As the evidence shows and as stated during the Prosecution's presentation of 21 February 2013,[134] the crimes of murder and other inhuman acts or attempted murders were committed by young militia, elements of the police and pro-Gbagbo mercenaries. The crime of rape was committed by youth militia, including Young Patriots.

The legal elements of Article 25(3(a) and 25(3)(d)

Article 25(3)(a)

58. Article 25(3)(a) does not lay out the precise elements of indirect co-perpetration and different interpretations are possible. The Prosecution advances a position that builds on prior jurisprudence on the matter by this Court,[135] in particular on the findings in the *Lubanga* trial judgment,[136] as well as on an analysis of the sources relied upon in that jurisprudence.[137]

[132] ICC-02/11-14-Corr.
[133] ICC-02/11-01/11-T-19-CONF-ENG ET, p. 37, l. 1-3.
[134] ICC-02/11-01/11-T-16-CONF-ENG ET, p. 53, l. 19 -21 and p. 57, l. 10-12.
[135] *See, e.g.*, ICC-01/09-02/11-382-Red, para. 297; Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 23 February 2012, ICC-01/09-01/11-373, para. 292; Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gadaffi, Saif Al-Islam Gadaffi and Abdullah Al Senussi, 27 June 2011 ICC-01/11-12, para. 69.
[136] ICC-01/04-01/06-2842, paras 976-1018.
[137] The Prosecution notes the Separate Opinion of Judge Adrian Fulford appended to the Lubanga Judgment Pursuant to Article 74 of the Statute (ICC-01/04-01/06-2842). In his opinion, Judge Fulford argues that the text of the Statute does not support the "control of the crime theory" underlying the Pre-Trial Chambers' co-perpetration jurisprudence and proposes an alternate test. While Judge Fulford's opinion certainly articulates a plausible reading of Article 25(3)(a), the Prosecution proceeds on the basis that the basic framework laid down by the Pre-Trial Chambers and the Majority in the Lubanga Trial Judgement will guide this Chamber's interpretation of the law of indirect co-perpetration.

1. Existence of a common plan or agreement

59. The Prosecution must establish the existence of a common plan between two or more persons, including the accused.[138] The Prosecution is not required to prove that the plan was specifically directed at committing a crime. It is sufficient to establish that the common plan included "a critical element of criminality", namely that its implementation would, in the ordinary course of events, lead to the commission of a crime.[139] Moreover, the common plan need not be explicit and can be inferred from circumstantial evidence, such as the subsequent concerted action of the co-perpetrators.[140]

2. Use of another person or an organized and hierarchical apparatus of power

60. Indirect co-perpetrators may commit a crime through one or more persons, or acting through an organized and hierarchical apparatus of power.[141] Under the latter scenario (which is applicable to this case), the Prosecution must establish the existence of an organization that is based on hierarchical relationships between superiors and subordinates.[142] This also requires proof that the implementation of the will of the co-perpetrators cannot be compromised by any particular subordinate's failure to comply because the individual subordinates within the organization were fungible.[143] This can be established through attributes of the organization, such as a large enough size to "provide a sufficient supply of subordinates" in order to replace anyone who refused to act,[144] or through the existence of "intensive, strict, and violent training regimes".[145]

[138] ICC-01/04-01/07-716, para. 522.
[139] ICC-01/04-01/06-2842, para. 984; ICC-01/04-01/06-796, para.344.
[140] ICC-01/04-01/06-2842, para. 984, para 988; Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, para. 345; ICC-01/09-02/11-382-Red, para 399; ICC-01/09-01/11-373, para. 301.
[141] ICC-01/04-01/07-717, paras 495-498; *see also Stefano Manacorda & Chantal Meloni*, 'Indirect Perpetration versus Joint Criminal Enterprise', (2011) 9 Journal of International Criminal Justice 1, at 169-170.
[142] ICC-01/04-01/07-717, paras 511-514.
[143] ICC-01/04-01/07-717, paras 516-517.
[144] ICC-01/04-01/07-717, para. 516.
[145] ICC-01/04-01/07-717, para. 518.

61. However, contrary to the findings of the Pre-Trial Chambers,[146] this element does not necessarily require the Prosecution to establish the subordinates' almost automatic compliance with "orders" of a superior. Compliance with an order may be sufficient to demonstrate that the organization is composed of fungible individuals, but it is not the only way to make that showing. Actions and attributes other than orders, such as those referred to in the previous paragraph, may also be capable of establishing this element.

3. Ability to cause the organization to contribute to the crime

62. This element must be proven only if the accused is alleged to have acted through an organized and hierarchical apparatus of power. The Prosecution submits that to satisfy this element, it must prove that the accused has the ability to cause the organization to contribute to the crime. For example, in the *Katanga* Confirmation Decision, Pre-Trial Chamber I articulated this concept as requiring a showing that the accused "mobilize[d] his authority and power within the organization to secure compliance with his orders".[147] While compliance with orders[148] is one possible manner to establish this element, it is not the only one.[149] It may also be met, for example, by showing that the accused possessed a power of veto within the organization, or that he had the capacity to hire, train, impose discipline and provide resources to the subordinates.[150]

[146] ICC-01/04-01/07-717, paras 515-516, 518 ; ICC-01/09-02/11-Red, para. 297; ICC-01/09-01/11-373-Red, para. 292.
[147] ICC-01/04-01/07-717, paras 511-514. The Prosecution notes that the *Katanga* Confirmation Decision uses the term "control over the organization". Since this element should not be confused with the separate requirement of the collective control over the crime by all co-perpetrators, the Prosecution focuses on the essence of this element, namely the accused's individual ability to use the organization as a tool to contribute to the commission of the crime.
[148] ICC-01/04-01/07-717, paras 497-498, 500-510, 514; Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para 78; *see also* Roxin, C., Straftaten im Rahmen organisatorischer Machtapparate', *Goltdammer's Archiv für Strafrechet* (1963), pages 193-207; Ambos, K., *La parte general del derecho penal internacional* (Montevideo, Temis, 2005), page 240.
[149] *See* Thomas Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept', 9 Journal of International Criminal Justice 1, p. 95-101 (noting that under the theory as originally articulated, the touchstone is the "dominance" enjoyed by the perpetrator behind the perpetrator, not orders as such).
[150] ICC-01/04-01/07-717, para. 513. These examples are not exhaustive, neither are they indicative of the level of participation that is required to establish responsibility for indirect co-perpetration. They only serve the purpose of demonstrating that a person can move an organization to contribute to a crime by ways other than ordering.

4. The accused's individual contribution

63. The Prosecution agrees with the Majority in the *Lubanga* case that co-perpetration under Article 25(3)(a) "requires that the offence be the result of the combined and coordinated contributions of those involved […]. None of the participants exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such. Therefore, the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime; rather, the responsibility of the co-perpetrators for the crimes resulting from the execution of the common plan arises from mutual attribution, based on the joint agreement or common plan".[151]

64. The *Lubanga* Majority also concluded that "the accused [must] provide an essential contribution to the common plan that resulted in the commission of the relevant crimes",[152] but it does not define "essential" in this context. However, given that the accused alone need not exercise control over the crime,[153] "essential" cannot mean that the individual accused must have had the power to stop the crime or frustrate its commission.[154] Instead, the Majority emphasized that "the co-perpetrator's role is to be assessed on a case-by-case basis" and that this assessment "involves a flexible approach, undertaken in the context of a broad inquiry into the overall circumstances of a case".[155]

65. A flexible approach that does not require an accused's individual control over the crime is consistent with the origins of the theory of co-perpetration. For example, Claus Roxin, upon whose scholarship the existent jurisprudence on co-

[151] ICC-01/04-01/06-2842, para. 994.
[152] ICC-01/04-01/06-2842, paras 1006, 1018(ii) (emphasis added).
[153] ICC-01/04-01/06-2842 para.994.
[154] The concept of joint control over the crime is inconsistent with a requirement that each individual co-perpetrator has the power to frustrate its commission. Nevertheless, it should be noted that although Pre-Trial Chamber I required that each co-perpetrator (including the accused) has the ability to frustrate the commission of the crimes by not carrying out the task assigned to him or her (ICC-01/04-01/06-803, para. 342; Decision on the Confirmation of Charges, ICC-01/04-01/07-717, para. 525), it endorsed to some extent the concept of "joint" control over the crime (ICC-01/04-01/07-717, paras 524, 538; ICC-01/04-01/06-803, paras 322, 341-342 and 366). The approach taken by the Majority in the Lubanga judgement resolves this apparent contradiction.
[155] ICC-01/04-01/06-2842, para. 1001.

perpetration draws heavily,[156] explained that in practice it will often not be possible to determine after the fact whether the crime would have been committed absent the contribution of the accused. This analysis would require a hypothetical judgment about how events would have played out without the actor's contribution, which is necessarily a speculative inquiry.[157] For this reason, it may be unhelpful to read into the Statute a requirement that the contribution be "essential". The Prosecution thus agrees with Roxin insofar as, if any qualitative assessment of the contribution is required, it should be enough if the accused's contribution, assessed after the fact, was substantial. This means that the crime may have been possible to commit absent the accused's contribution, but such commission would have been significantly more difficult.[158] However, according to Judge Fulford, even the intermediate position might be excessive. As suggested in his dissenting opinion in the Lubanga Judgment, Article 25(3)(a) does not require any qualitative threshold for the contribution.[159]

66. It is not necessary to establish that the accused provided a contribution to the execution stage of the crime.[160] It is also not necessary to establish that the accused or any other co-perpetrator physically committed any of the elements of the crimes,[161] as long as it is established that "the objective elements of an offence

[156] *See* ICC-01/04-01/06-803 para 348, n.425 and ICC-01/04-01/07-717 para. 482, nn.640 & 642, para. 483, n.645, para. 485, n.647; *see also* ICTY, *Prosecutor v. Milomir Stakic*, Trial Chamber, Trial Judgement, Case No. IT-97-31-T, 31 July 2003, paras 40 and 440, nn.945-948; Judge Schomburg's dissenting opinion in ICTR, *Prosecutor v. Sylvestre Gacumbitsi*, Appeals Chamber Judgement, Appeals Chamber, Case No. ICTR-2001-64-A, 7 July 2006, para. 17, nn.31-33, 37, which are among the main authorities relied upon by the Pre-Trial Chamber in the *Lubanga* and *Katanga* confirmation decisions.

[157] Claus Roxin, *Täterschaft und Tatherrschaft*, Seventh Edition, (Berlin, New York, Walter de Gruyter 2000) ("Roxin"), p. 282-283; *Thomas Weigend*, 'Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges', (2008) 6 Journal of International Criminal Justice 3, at p. 480.

[158] *See* Roxin p. 280, 282-285: Substantial (*wesentlich*), as opposed to essential (*unentbehrlich* or *unerläßlich).* See also Tröndle/Fischer, 54th ed, Art 25, para. 12a; Leipziger Kommentar, Vol. I, 12th ed., Art 25, para. 188: "wesentlich erschwert".

[159] Judge Fulford found that "the use of the word 'commits' [referred to in Article 25(3)(a)] simply requires an operative link between the individual's contribution and the commission of the crime. […] [T]he Prosecution must simply demonstrate that the individual contributed to the crime by committing it with another or others." (ICC-01/04-01/06-2842, Dissenting Opinion Judge Fulford, para.15. Judge Fulford found that the "degree of participation" is one of the factors listed in Rule 145(1)(c) to determine the sentence of a convicted person (para.9). Indeed, the inclusion of that consideration as a sentencing matter confirms that the contribution need not be essential or even substantial.

[160] ICC-01/04-01/07-717, para. 526.

[161] ICC-01/04-01/06-2842, para. 1003; *see also* Roxin page 280; ICTY, *Prosecutor v. Dusko Tadic,* Appeals Chamber, Appeal Judgement, Case No. IT-94-1-A, 15 July 1999, para 196.

are carried out by a plurality of persons acting within the framework of a common plan".[162]

5. The subjective elements of indirect and direct co-perpetration

67. Article 30 provides that individual criminal responsibility arises only if the material elements of a crime are committed with intent and knowledge.

a. The accused acted with intent

68. The Prosecution must prove that the accused meant to engage in the relevant conduct.[163] In relation to a consequence, the Prosecution must show that the accused (a) meant to cause the consequence; or (b) was aware that the consequence would occur in the ordinary course of events.[164]

69. The concept of "awareness that a consequence will occur in the ordinary course of events" means that, based on how events ordinarily develop, the accused anticipated that the consequence would occur in the future.[165] In the context of this case, it is necessary for the Prosecution to establish that the accused was aware that implementing the common plan would, in the ordinary course of events, result in the commission of the crimes charged.[166]

b. The accused had the requisite knowledge

70. The Prosecution must establish that the accused was aware that the circumstances relevant to the underlying crimes existed, or that, in the ordinary course of events, his or her conduct would bring about the objective elements of the crime.[167]

[162] ICC-01/04-01/07-717, paras 495-497. For indirect co-perpetration, the material elements of the crimes are carried out by persons who form part of the organized and hierarchical apparatus of power referred to below.
[163] Article 30(2)(a) of the Statute.
[164] *See* Article 30(2)(b); ICC-01/09-01/11-373, para. 411; ICC-01/04-01/06-803, paras 351-352.
[165] ICC-01/04-01/06-2842, para. 1012.
[166] ICC-01/04-01/07-717, para. 533.
[167] Article 30(3).

71. For indirect co-perpetration through an organized and hierarchical apparatus of power, the Prosecution must establish that the accused was aware (a) that the common plan or agreement involved an element of criminality;[168] (b) of the fundamental features of the organization;[169] and (c) of the factual circumstances that enabled him or her, together with other co-perpetrators, to jointly exercise functional control over the crime.[170]

72. With respect to crimes against humanity, the Prosecution must establish that the accused either knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population[171] and that the conduct was pursuant to or in furtherance of an organizational policy.[172] This element does not require proof that the accused had knowledge of all of the characteristics of the attack or the precise details of the plan or policy of the State or organization. This element may be satisfied if the accused intended to further such an attack.[173]

Article 25(3)(d)

73. Individual criminal responsibility pursuant to Article 25(3)(d) entails the following elements: (i) a crime within the jurisdiction of the Court was attempted or committed; (ii) a group of persons acting with a common purpose attempted to commit or committed this crime; (iii) the accused contributed to the crime, in any way other than those set out in Article 25(3)(a) to (c) of the Statute; (iv) the contribution was intentional; and (v) the contribution was made

[168] *See* ICC-01/04-01/06-803, paras 361-365.
[169] ICC-01/04-01/07-717, para. 534.
[170] ICC-01/04-01/06-803, paras 366-367; ICC-01/04-01/07-717, para. 538.
[171] Elements of Crimes, Articles 7(1)(a)(3); ICC-01/09-02/11-382-Red, para. 417.
[172] There is no explicit reference to knowledge of the policy element. However, as the second paragraph of the Introduction to the Elements of Crimes under Article 7 indicates, it is not required that the perpetrator knew the precise details of the policy. This implies that some awareness of an underlying policy is required, even if it leaves considerable ambiguity as to the extent of that awareness: Robinson D., 'The Elements of Crimes against Humanity',(Transnational Publications, 2001) Lee et al. (ed.), in ICC: Elements of Crimes and Rules of Procedure and Evidence, page 73. Note that Canada and Germany suggested that specific knowledge of the underlying policy should not be required.
[173] Elements of Crimes, Article 7 (Introduction), paragraph 2.

either with the aim of furthering the criminal activity or criminal purpose of the group, or in the knowledge of the intention of the group to commit the crime.[174]

(i) A crime within the jurisdiction of the Court was attempted or committed

74. This element merely requires that any of the crimes under Articles 6, 7 or 8 of the Rome Statute is carried out. It is not necessary that the material elements of the crime have been completed, as long as an attempt to commit a crime pursuant to Article 25(3)(f) was made.

(ii) A group of persons acting with a common purpose attempted to commit or committed this crime

75. As found by Pre-Trial Chamber II, the "concept of 'common plan' is functionally identical to the statutory requirement of Article 25(3)(d) […] that there be a 'group of persons acting with a common purpose'. A common purpose must include an element of criminality, but does not need to be specifically directed at the commission of a crime."[175]

76. The common purpose does not need to be expressed explicitly, and its existence can be inferred from the concerted action of the group of persons.[176] It can also be inferred from the intention of the leader or the leaders of the group, provided they played a major role in that group, such as being significantly involved in creating the group, leading the group, or organizing its criminal activities.[177] Moreover, the common purpose may materialise extemporaneously and does not need to have been previously arranged or formulated.[178]

77. Article 25(3)(d) applies irrespective of whether the accused is a member of the group acting with a common purpose.[179] However, a plain reading of the

[174]ICC-01/09-01/11-373, para.351; ICC-01/09-01/11-1, para.51; ICC-01/09-02/11-1, para.47; ICC-01/04-01/10-465-Red, paras268-289; ICC-01/04-01/10-1-US, para.39, re-classified as public pursuant to ICC-01/04-01/10-7.
[175] ICC-01/04-01/10-465-Red, para.271.
[176] ICC-01/04-01/10-465-Red, para.271; see also *Prosecutor* v. *Duško Tadić* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para.227.
[177] ICC-01/09-01/11-373, para.352.
[178] *Prosecutor* v. *Duško Tadić* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para.227.
[179] ICC-01/04-01/10-465-Red, para.275.

language of Article 25(3)(d)[180] suggests that the persons who physically perform the material elements of the crime or attempt its commission are members of the group and espouse the common purpose.

78. By analogy to the concept of joint criminal enterprise adopted by the UN *ad hoc* Tribunals, the Prosecution submits that the group acting with common purpose need not be organised in a military, political or administrative structure.[181]

(iii) The accused contributed to the crime, in any way other than those set out in Article 25(3)(a) to (c) of the Statute

79. Article 25(3)(d) liability, applies when the accused contributes to the commission or attempted commission of the crime "in any other way" that is not encapsulated under Articles 25(3)(a)-(c).[182] It entails the lowest objective threshold for participation according to article 25 […]".[183] Accordingly, *any contribution to the crime* is sufficient to satisfy this element.[184]

80. This means that Article 25(3)(d) merely requires the existence of a link or *nexus* between the act and conduct of an accused and the commission of a crime by a group of persons acting with common purpose. While it is necessary that the act and conduct of the accused *contributes* to the commission of the crime, *any* such contribution will suffice. The relevant contribution may be linked to a material element of a crime (for instance by facilitating in any way the commission of the material elements of the crime),[185] but it may also be linked to any of the

[180] […] the commission or attempted commission of such crimes by a group of persons acting with a common purpose. […]
[181] *Prosecutor* v. *Duško Tadić* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, para.227.
[182] ICC-01/09-01/11-373, para.354; ICC-01/04-01/10-465-Red, para.278. See also Kai Ambos, "Article 25", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 1999), p.484, [21]; Albin Eser, "Individual Criminal Responsibility", in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court,* Vol. I, (Oxford, Oxford University Press, 2002), p.802-803.
[183] ICC-01/09-01/11-373, para.354. See also Kai Ambos, "Article 25", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck-Hart-Nomos, 1999), p.484, [21]; Albin Eser, "Individual Criminal Responsibility", in Cassese A., Gaeta P., Jones J.R.W.D., *The Rome Statute of the International Criminal Court,* Vol. I, (Oxford, Oxford University Press, 2002), pp.802-803.
[184] ICC-01/09-01/11-373, para.354. This is also corroborated by Judge Fernandez, the only judge from the Appeals Chamber who expressed herself on the merits of the matter (see ICC-01/04-01/10-514 OA4, Dissenting Opintion Judge Fernandez, paras.8-15). See *a contrario*, ICC-01/04-01/10-465-Red, paras 276-285, requiring the level of contribution under Article 25(3)(d) to be "significant".
[185] ICC-01/09-01/11-373, Dissenting Opinion Judge Monageng, para.101.

subjective elements of the crime (for instance, by encouraging troop morale of those who commit the material elements of the crime).[186] Moreover, the wording of Article 25(3)(d) does not require that a contribution is provided directly to the physical perpetrators of a crime. It is sufficient that it is provided to "a group of persons acting with a common purpose", and can therefore be provided to any member of the group, regardless of whether that member commits the material elements of the crime.[187]

81. Where the conduct of an accused is so trivial that no relation between that conduct and any of the elements of the crime can be established, the contribution may be considered to be "neutral",[188] which is insufficient for criminal liability under Article 25(3)(d).

82. Any further qualification of the level of contribution under Article 25(3)(d) is inconsistent with a grammatical interpretation of the provision, as well as its object and purpose as a residual mode of liability, which is to ensure that all contributions to the most serious crimes of international concern are punishable.[189]

83. The contribution can consist in an act or an omission, provided the accused has a duty to act,[190] and does not need to be criminal *per se*.[191] Moreover, an accused can be held liable for contributing to a crime after it has been committed, as long as this contribution had been agreed upon by the relevant group, including the accused, prior to the perpetration of the crime.[192]

(iv) *The contribution was intentional*

[186] ICC-01/09-01/11-373, paras.330, 339; see also Dissenting Opinion Judge Monageng, paras 82, 100.
[187] ICC-01/09-01/11-373, Dissenting Opinion Judge Monageng, para.103; see also paras 86, 78.
[188] ICC-01/04-01/10-514 OA4, Dissenting Opintion Judge Fernandez, para.12.
[189] ICC-01/04-01/06-803-tEN, para.337; ICC-01/04-01/07-1497 OA8, para.79; ICC-01/04-01/06-2205 OA15 OA16, para.77. As the Prosecution has argued previously, the drafting history of Article 25(3)(d) corroborates that "any" contribution suffices to give rise to criminal responsibility (see ICC-01/04-01/10-499-Corr OA 4, paras.59-60).
[190] *Prosecutor* v. *Miroslav Kvočka et al.* (IT-98-30/1-A), Judgement, Appeals Chamber, 28 February 2005, para.187; for the requirement of a duty to act *see Prosecutor* v. *Naser Orić* (IT-03-68-T), Judgement, Trial Chamber II, 30 June 2006, footnote 741.
[191] *Krajišnik* Appeal Judgement, *supra* note 165, paras. 218, 695.
[192] ICC-01/04-01/10-465-Red, para.287.

84. Article 25(3)(d) provides that the accused's "*contribution* shall be intentional".[193] Hence, the definition of intent under Article 30(2) applies only with respect to the accused's conduct which constitutes such contribution, and not to the consequence.[194] Accordingly, the Prosecution must prove that the accused meant to engage in the relevant conduct.[195]

85. Article 25(3)(d) includes additional subjective requirements that in part overlap with,[196] and in part deviate from[197] the normal intent in relation to the consequence as set out in Article 30(2)(b). Article 30(1) clarifies that the provision only applies "unless otherwise provided", which is precisely the case in relation to Article 25(3)(d) liability. Thus, the notion of intent in relation to a consequence enshrined in Article 30(2)(b) is not applicable to establish the relevant *mens rea* under that mode of liability.[198]

(v) The contribution was made either with the aim of furthering the criminal activity or criminal purpose of the group in the knowledge of the intention of the group to commit the crime

86. Under Article 25(3)(d)(i), the Prosecution must establish that the accused acted with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court.

87. Under Article 25(3)(d)(ii), the Prosecution must establish that the accused had knowledge of the intention of the group to commit the crime. However, "it is […] not required for the [accused] to have the intent to commit any specific

[193] Emphasis added.
[194] ICC-01/04-01/10-465-Red, para.288.
[195] Article 30(2)(a).
[196] See Article 25(3)(d)(i) referring to the contribution being made "with the aim of furthering the criminal activity or criminal purpose of the group".
[197] See Article 25(3)(d)(ii) which requires only "knowledge of the intention of the group to commit the crime".
[198] ICC-01/04-01/10-465-Red, para.288. See also Barbara Goy, *Individual Criminal Responsibility before the International Criminal Court – A Comparison with the Ad Hoc Tribunals*, International Criminal Law Review 12 (2012) 1-70, at 68; see also additional authorities quoted at footnote 483.

crime and [it is] not necessary for him or her to satisfy the mental element of the crimes charged".[199]

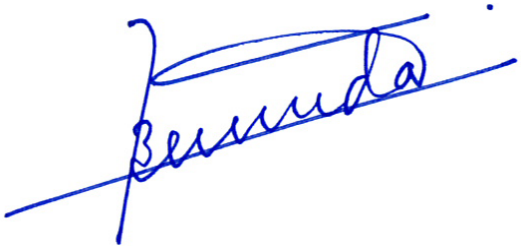
Statement of Mr Gbagbo

88. At the end of the Confirmation Hearing, Mr Gbagbo made a statement. Among other point, he mentioned that "you might have called upon me and I would have been in a position to provide you with information that you could have subsequently checked".[200] The Prosecution would like to submit that as early as 1 November 2011, the Prosecution sought to interview and take a statement from Mr Gbagbo. The Prosecution and the Defence team of Mr. Gbagbo had an exchange of emails on the matter. Unfortunately, on 14 November 2011 and before any interview could be conducted, the Defence set a number of conditions, including that : "*avant tout entretien que vous pourriez avoir avec lui, il est indispensable que : - Vous exigiez des autorités ivoiriennes la libération immédiate du Président Gbagbo*". The Defence's conditions were unreasonable and the interview never took place.[201]

Conclusion

89. The Prosecution submits that the evidence that was presented during the confirmation hearing is sufficient to establish substantial grounds to believe that Mr Gbagbo is criminally responsible for each of the crimes charged. Consequently, the Prosecution requests the Pre-Trial Chamber to confirm the charges as set out in the Document Containing the Charges and to commit Mr Gbagbo to a Trial Chamber for trial on these charges.

[199] ICC-01/04-01/10-465-Red, para.289.
[200] ICC-02/11-01/11-T-21-ENG ET, p. 46, l. 8-11.
[201] The email exchange is on file with the Prosecution and it has no objection to disclose them at the request of the Chamber.



Fatou Bensouda, Prosecutor

Dated this 21st day of March 2013

At The Hague, The Netherlands