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PRE-TRIAL CHAMBER I

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

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

**Final written submissions of the Common Legal Representative of Victims
following the confirmation of charges hearing**

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

1. From 19 until 28 February 2013, Pre-Trial Chamber I (the “Chamber”) held the confirmation of charges hearing in the case of *The Prosecutor v. Laurent Gbagbo*.

2. On 28 February 2013, the Chamber invited the Prosecution and the Common Legal Representative of Victims to submit final written observations on matters discussed during the confirmation of charges hearing not later than 14 March 2013.¹ The Chamber also invited the Defence to file its final written submissions by 28 March 2013.²

3. Accordingly, the Principal Counsel of the Office of Public Counsel for Victims, acting as Common Legal Representative of Victims (the “Common Legal Representative”) admitted to participate in the case,³ presents the following written submissions to the Chamber.

II. SUBMISSIONS ON MATTERS RELATED TO THE CONFIRMATION OF CHARGES HEARING

4. The Common Legal Representative reiterates her oral arguments made during the confirmation of charges hearing,⁴ and she will develop in the present written submissions only matters completing her oral presentation.

¹ See the transcript of the confirmation of charges hearing session held on 28 February 2013, No. ICC-02/11-01/11-T-21-ENG, p. 50, lines 21-25.

² *Idem*.

³ See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012, pp. 25-26. See also the “Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384-Corr, 6 February 2013, pp. 22-23.

⁴ See the transcript of the confirmation of charges hearing session held on 20 February 2013, No. ICC-02/11-01/11-T-15-Red-ENG WT, pp. 3, lines 3-25 to p. 14, lines 1-10 and the transcript of the confirmation of charges hearing session held on 28 February 2013, No. ICC-02/11-01/11-T-21-ENG, p. 18, lines 5-25 to p. 27, lines 1-8.

1. Contextual elements of crimes against humanity

5. The relevant provisions of the legal texts governing the Court related to crimes against humanity read as follows:

Article 7(1) of the Rome Statute

"1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]"

Article 7(2) (a) of the Rome Statute

"2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack"

Article 7 Introduction (3) of the Elements of Crimes

"Introduction

3. "Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population [Footnote 6: A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.]"

6. In accordance with the jurisprudence of the Court, in order to constitute crimes against humanity, the alleged conduct has to fulfil five contextual elements: (i) there must have been an attack directed against any civilian population; (ii) following a State or organizational policy; (iii) said attack has to be of a widespread

or systematic nature; (iv) a nexus must exist between the individual act and the attack; and (v) the perpetrator must have knowledge of the attack.⁵

7. The Common Legal Representative contends that said requirements are met in the present case and that the evidence adduced at the confirmation of charges hearing is sufficient at this stage of the proceedings to commit the suspect for trial.

8. In particular, concerning the legal requirements established by the *chapeau* of article 7(1) of the Rome Statute, an ‘attack directed against any civilian population’ is not restricted to a ‘military attack’⁶ and refers to “a campaign or operation carried out against the civilian population”,⁷ which involves the multiple commission of acts referred to in article 7(1) of the Statute against the whole population “of any nationality, ethnicity or with another common distinguishing feature”,⁸ including its

⁵ See the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya” (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 31 March 2010, par. 79. See also, the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charge of the Prosecutor Against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II), No. ICC-01/05-01/08-424, 15 June 2009, paras. 73-88; and the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire” (Pre-Trial Chamber III), No. ICC-02/11-14-Corr, 3 October 2011, par. 29. In particular, in its decision, Pre-Trial Chamber III provided an analysis of the requirement of a State or organizational policy within the context of “attack directed against any civilian population” by reference to Pre-Trial Chamber II’s decision in the Kenya situation.

⁶ See the Elements of Crimes, Introduction to article 7 of the Statute, par. 3.

⁷ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II), No. ICC-01/05-01/08-424, 15 June 2009 (the “Bemba Confirmation Decision”), par. 75; the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya” (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 31 March 2010, par. 80; the “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’” (Pre-Trial Chamber III), No. ICC-02/11-14-Corr, 14 November 2011, par. 31; the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. ICC-01/09-01/11-373, 23 January 2012 (the “Ruto *et al.* Confirmation Decision”), paras. 162 and 164; and the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. ICC-01/09-02/11-382-Red, 23 January 2012 (the “Muthaura *et al.* Confirmation Decision”), par. 109.

⁸ See the “Bemba Confirmation Decision”, *supra* note 7, par. 76, and the “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’”, *supra* note 7, par. 32. See also the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 30 September 2008 (the “Katanga and Ngudjolo Confirmation Decision”), par. 399; the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of

(perceived) political affiliation.⁹ Accordingly, the existence of an armed conflict is not necessary to determine the commission of a crime against humanity under the Rome Statute.¹⁰ Similarly, the terms 'civilian population' in article 7 of the Rome Statute refers to "*all persons who are civilians, as opposed to members of armed forces and other legitimate combatants*".¹¹

9. The Common Legal Representative submits that the evidence presented during the confirmation of charges hearing does not support the Defence conclusion that an armed conflict existed during the whole timeframe referred to in the charges.¹² The Court has already determined that for the existence of an armed conflict of a non-international character, resort to violence must be "*protracted*" and "*reach a certain level of intensity which exceeds that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature*",¹³ between a State and "*organized armed groups*" under a responsible command capable

Kenya", *supra* note 7, par. 81; the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 162; and the "Muthaura *et al.* Confirmation Decision", *supra* note 7, par. 110.

⁹ See the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 164, and the "Muthaura *et al.* Confirmation Decision", *supra* note 7, par. 110.

¹⁰ See the "Bemba Confirmation Decision", *supra* note 7, par. 75.

¹¹ *Idem*, par. 78. See also the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 7, par. 82; the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 162; and the "Muthaura *et al.* Confirmation Decision", *supra* note 7, par. 109.

¹² See the transcript of the confirmation of charges hearing sessions held on 22 February 2013, No. ICC-02/11-01/11-T-17-CONF-ENG, p. 42, lines 24-25 to p. 45, lines 1-18 (submissions presented in open session); and on 25 February 2013, No. ICC-02/11-01/11-T-18-CONF-ENG, p. 13, lines 7-25 to p. 16, lines 1-6; p. 17, lines 5-12 (submissions presented in open session).

¹³ See the "Bemba Confirmation Decision", *supra* note 7, paras. 225, 231 and 235. See also the "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (Pre-Trial Chamber I), No. ICC-01/04-02/06-20-Anx2, 10 February 2006, par. 97; the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tENG (the "Lubanga Confirmation Decision"), par. 232; the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga" (Pre-Trial Chamber I), No. ICC-01/04-01/07-55, 6 July 2007, par. 29; the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui" (Pre-Trial Chamber I), No. ICC-01/04-01/07-262, 6 July 2007, par. 30; the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo" (Pre-Trial Chamber III), No. ICC-01/05-01/08-14-tENG, 10 June 2008, par. 53; the "Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (Pre-Trial Chamber I), No. ICC-02/05-01/09-3, 4 March 2009, par. 59; the "Decision on the Prosecutor's Application under Article 58" (Pre-Trial Chamber I), No. ICC-02/05-02/09-1, 7 May 2009, par. 9; and the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/10-465-Red, 16 December 2011 (the "Mbarushimana Confirmation Decision"), par. 103.

of imposing discipline, which have the ability to plan and carry out military operations for a prolonged period of time, for instance by their control of a part of the territory.¹⁴

10. The Common Legal Representative contends that the Defence provided no evidence that such level of organisation and control were present in Côte d'Ivoire before February 2011. As reflected by the victims' account of events, there was increased tension and multiple episodes of violence in Abidjan and its surroundings before and after the 2010 elections, but the groups that were involved with the support of the State apparatus did not have a clear hierarchy nor did they exercise the required level of control over all parts of Abidjan or elsewhere to maintain their activities during a long period of time.

11. In any event, the Common Legal Representative submits that the victims participating in the present case were not active in any armed conflict that may have been raging in Côte d'Ivoire during the whole timeframe referred to in the charges. As impliedly conceded by the Defence,¹⁵ the victims were not "*combatants*" because they were not involved in any hostilities. The victims participating in this case were instead part of a "*civilian population*" and not members of the armed forces or other legitimate combatants. This is true for all the victims currently participating in the

¹⁴ See the "Bemba Confirmation Decision", *supra* note 7, paras. 233-234 and 236. See also the "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", *supra* note 13, par. 97; the "Lubanga Confirmation Decision", *supra* note 13, par. 232; the "Decision on the Prosecution Application under Article 58(7) of the Statute" (Pre-Trial Chamber I), No. ICC-02/05-01/07-1-Corr, 27 April 2007, paras. 34-35; the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", *supra* note 13, par. 29; the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui", *supra* note 13, par. 30; the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", *supra* note 13, par. 54; the "Katanga and Ngudjolo Confirmation Decision", *supra* note 8, par. 239; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 13, paras. 59-60; the "Decision on the Prosecutor's Application under Article 58", *supra* note 13, par. 9; the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" (Pre-Trial Chamber I), No. ICC-01/04-01/10-1, 20 September 2010, paras. 17-18; and the "Mbarushimana Confirmation Decision", *supra* note 13, par. 103.

¹⁵ See the transcript of the confirmation of charges hearing session held on 25 February 2013, No. ICC-02/11-01/11-T-18-CONF-ENG, p. 17, lines 5-17 (submissions presented in open session).

proceedings and even more for many women victimised by the crimes charged against Mr. Gbagbo. The victims' account of events reveals that they were unarmed men, women and children who were attacked by violent armed forces during their peaceful march to the *Radiodiffusion Télévision Ivoirienne* ("RTI") on 16 December 2010,¹⁶ during their non-violent demonstration in Abobo on 3 March 2011,¹⁷ and as a result of the indiscriminate shelling of the Abobo market on 17 March 2011¹⁸ and the violent incidents in Yopougon neighbourhood on or around 12 April 2011.¹⁹ In any event, the victims cannot be seen either as legitimate "*collateral damage*" of any armed conflict considering the broad temporal and geographical scope of their victimisation.

12. In this regard, the Common Legal Representative recalls the ICTY Trial Chamber's judgement in the *Tadić* case, according to which "*civilian population*" means distinguishing civilians and combatants and showing that the civilian character cannot be understood as a homogeneous status, while the reference to population indicates that the attack shall be directed against the group, not against specific individuals.²⁰

¹⁶ See victims' collective application for participation a/20101/12. See also, the evidence presented by the Prosecution at the confirmation of charges hearing and in particular the statements of witnesses P-106, P-107, P-112, P-117 and P-184. See the transcript of the confirmation of charges hearing session held on 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG WT, pp. 11-26.

¹⁷ See victims' collective application for participation a/20030/12 and a/20046/12. See also, the evidence presented by the Prosecution at the confirmation of charges hearing and in particular the statements of witnesses P-112, P-117 and P-184. See also the transcript of the confirmation of charges hearing session held on 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG WT, pp. 27-38.

¹⁸ See victims' collective application for participation a/20005/12 and a/20067/12. See also, the evidence presented by the Prosecution at the confirmation of charges hearing and in particular the statements of witnesses P-105, P-106 and P-184. See also the transcript of the confirmation of charges hearing session held on 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG WT, pp. 39-50.

¹⁹ See victims' collective application for participation a/20085/12. See also, the evidence presented by the Prosecution at the confirmation of charges hearing and in particular the statements of witnesses P-109, and P-185. See also the transcript of the confirmation of charges hearing session held on 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG WT, pp. 51-59. In particular, witness P-185 refers that during the night of 11 and 12 April 2011 she heard Kalashnikov fire in Mami Faitai neighbourhood and how on the next morning she saw 17 bodies (Emphasis added). See also CIV-OTP-0029-0670, paras. 66-67 and the transcript of the confirmation of charges hearing session held on 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG WT, p. 54, lines 9 and 10.

²⁰ See ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement (Trial Chamber), 7 May 1997, paras. 636-644.

13. Such statement of law was re-affirmed by the Trial Chamber of the ICTR in the *Semanza* judgement, as follows:

*“A civilian population must be the primary object of the attack. A population remains civilian in nature even if there are individuals within it who are not civilians and even if the members of the population at one time bore arms, so long as the population is ‘predominantly civilian’. The term ‘population’ does not require that crimes against humanity be directed against the entire population of a geographic territory or area. The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack”.*²¹

14. This element is therefore clarified as referring to a group of non-combatants collectively targeted by the attack in its widespread or systematic context.

15. The *chapeau* of article 7(1) of the Rome Statute also requires that the attack against a civilian population be “widespread or systematic”, in the sense of the attack being “massive, frequent, carried out collectively with considerable seriousness”²² and “directed against a multiplicity of victims”,²³ or involving patterns of crimes, in the sense of “non-accidental repetition of similar criminal conduct on a regular basis”.²⁴ On this basis, the Common Legal Representative wishes to highlight that, contrary to the Defence’s

²¹ See ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement (Trial Chamber), 15 May 2003, par. 330.

²² See the “Bemba Confirmation Decision”, *supra* note 7, par. 83; the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, *supra* note 7, par. 95; and the “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’”, *supra* note 7, par. 53.

²³ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 396; the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, *supra* note 7, par. 95; and the “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’”, *supra* note 7, par. 53.

²⁴ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 397; the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, *supra* note 7, par. 96; and the “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’”, *supra* note 7, par. 54.

contentions,²⁵ an attack may be widespread without the need to have all its victims identified.²⁶

16. The Common Legal Representative submits that in the present case the attacks were both widespread and systematic. The broad geographical spread of the victimisation and the large number of victims participating in this case confirm the wide scope of the attack. Families and communities of all ages and genders suffered crimes in all the neighbourhoods of Abidjan, including Abobo and Yopougon, and in other parts of Côte d'Ivoire. The Common Legal Representative therefore agrees with the Prosecution that the four incidents mentioned in the document containing the charges are only examples of the broad victimisation produced in relation to the post-election violence in 2010-2011.²⁷

17. Moreover, the victims' account of events reveals that the crimes they suffered from were not spontaneous or isolated acts of violence, but were rather part of a planned, directed and organised attack against them, on the basis of their national, religious, political or ethnic features. The participating victims corroborate the evidence put forward by the Prosecution during the confirmation of charges hearing since they were attacked because of their support for Mr. Gbagbo's political opponents or for their perceived support for Mr. Ouattara on the basis of their origin, ethnic group, religion or place or residence. In fact, in many instances the victims know who their offenders were, and even today they are forced to live with them in the same neighbourhood.

18. However, the Common Legal Representative wishes to point out that the places identified by the Prosecution as well as the temporal timeframe of certain events referred to in the document containing the charges do not reflect the truly

²⁵ See the transcript of the confirmation of charges hearing session held on 26 February 2013, No. ICC-02/11-01/11-T-19-CONF-ENG, p. 10, lines 4-7 (submissions presented in open session).

²⁶ See for instance the "Bemba Confirmation Decision", *supra* note 7, par. 134.

²⁷ See the transcript of the confirmation of charges hearing sessions held on 19 February 2013, No. ICC-02/11-01/11-T-14-ENG, p. 50, line 12; and on 28 February 2013, No. ICC-02/11-01/11-T-21-ENG, p. 23, lines 17-18.

systematic nature of the violence. Many victims explain in their applications for participation that the attacks in Yopougon, for instance, commenced “*on the day of Mr. Gbagbo’s arrest*”, namely 11 April 2011, and continued thereafter, whereas the Prosecution appears to limit these attacks to 12 April 2011.²⁸ Similarly, the Prosecution only makes reference to the attacks on the mosques of Grand Bassam, Abobo and Williamsville on 17 and 18 December 2010,²⁹ and the attack against the mosque in Yopougon on 25 February 2011.³⁰ However, it is generally known that attacks were perpetrated on many other mosques between 17 December 2010 and 9 March 2011, including the Andokoi 3, Bougouniquin and Fitya mosques in Abobo; the Lem, Sideci Market, Banco and Kouté mosques in Yopougon; the Dabré mosque in Alépé; the Grand Mosque in Koumassi; and the Blauckauss mosque in Cocody.³¹

19. Those temporal and geographical limitations in the document containing the charges may have an impact on the scope of the participatory rights of some victims in the present case. However, being said events notorious the Chamber may nevertheless take them into account for the purpose of establishing the contextual elements of the charged crimes at this stage of the proceedings.³²

20. Lastly, the Common Legal Representative notes that the Rome Statute does not provide definitions for the terms ‘*policy*’ or ‘*organizational*’ used in article 7(2)(a),

²⁸ See the “*Soumission de l’Accusation du Document amendé de notification des charges, de l’Inventaire amendé des éléments de preuve à charge et des Tableaux amendés des éléments constitutifs des crimes*”, No. ICC-02/11-01/11-357-Conf-Anx1, 17 January 2013, paras. 28 and 56. See also the declaration of witness P-185 quoted *supra* note 19.

²⁹ *Idem*, par. 48.

³⁰ *Ibid.*, par. 25.

³¹ See Human Rights Watch, « *Ils les ont tués comme si de rien n’était* », Octobre 2011, pp. 55-60. See also, « *Attaques répétées contre les mosquées : la Déclaration du club Union Africain* », available at <http://news.abidjan.net/h/394766.html>, last visited 11 March 2013 ; D. Konate, « *Bloléquin – Les miliciens de Gbagbo tuent l’imam et son fils* », *Le Patriote*, 11 March 2011 ; « *Le COSIM aux Musulmans : ‘Ne tombez pas dans le piège’* », *Le Patriote*, 18 mars 2011 ; Marco Chown Oved, Associated Press, “*Muslims face growing attacks in Ivory Coast crisis*”, 25 March 2011 ; M. Tié Traoré, « *Décès de l’Imam Diabaté Moussa – Sa famille et le Cosim dénoncent un ‘assassinat’* », *L’Intelligent d’Abidjan*, 16 March 2011.

³² See for instance the acceptance of referring to events prior to those charged by the Prosecutor for a better consideration of the contextual elements of the crimes in the “*Lubanga Confirmation Decision*”, *supra* note 13, par. 152; and in the “*Katanga and Ngudjolo Confirmation Decision*”, *supra* note 8, par. 228.

but that the Pre-Trial Chambers of the Court have already established that the term ‘policy’ implies that crimes against humanity i) must be thoroughly organised and follow a regular pattern; ii) must be conducted in furtherance of a common policy involving public or private resources; iii) can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population; and iv) need not be explicitly defined or formalised.³³ Consequently, the Common Legal Representative cannot see any merit in the Defence’s contention that the Prosecution does not allege that the crimes were committed pursuant to a State policy.³⁴ On the contrary, on the basis of the victims’ representations, the Common Legal Representative submits that the policy behind the crimes dates back to Mr. Gbagbo’s arrival to power in October 2000 and his political application of the idea of “*true Ivorian origins*”,³⁵ whereby Mr. Gbagbo intended to stay in power at all costs by using not only State resources but also private ones.

21. Moreover, the Pre-Trial Chambers of the Court have identified some factors that may be taken into account in order to determine the existence of an ‘organisation’ under article 7(2)(a) of the Rome Statute, namely i) whether the group is under a responsible command, or has an established hierarchy; ii) whether the group possesses the means to carry out a widespread or systematic attack against a civilian population; iii) whether the group exercises control over part of the territory of the State; iv) whether the group directed its criminal activities against the civilian population as a primary purpose; v) whether the group articulates, explicitly or

³³ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 396; the “Bemba Confirmation Decision”, *supra* note 7, par. 81; the “Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, *supra* note 7, par. 86; the “Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’”, *supra* note 7, par. 43; the “Ruto *et al.* Confirmation Decision”, *supra* note 7, par. 210; and the “Muthaura *et al.* Confirmation Decision”, *supra* note 7, paras. 109 and 111.

³⁴ See the transcript of the confirmation of charges hearing session held on 27 February 2013, No. ICC-02/11-01/11-T-20-CONF-ENG, p. 51, lines 8-24 (submissions presented in open session).

³⁵ See the transcript of the confirmation of charges hearing session held on 20 February 2013, No. ICC-02/11-01/11-T-15-Red-ENG WT, p. 9, lines 2-13.

otherwise, an intention to attack a civilian population; and vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.³⁶

22. Again, in this regard, the victims' account of events reveals the existence of violent patterns of similar nature carried out through State structures, thereby corroborating the Prosecution's allegation that Mr. Gbagbo and his inner circle used State resources to implement a common plan or policy to commit crimes against humanity.³⁷

23. Finally, concerning the knowledge of the attack by the perpetrator, the evidence adduced at the confirmation of charges hearing shows that the suspect was aware of sufficient objective circumstances to indicate the commission of multiple prohibited acts direct against a civilian population.³⁸ This requirement should be read in conjunction with article 30(1) of the Rome Statute and the international jurisprudence has provided some guidance on what such knowledge means.

24. In the *Tadić* case, the Trial Chamber of the ICTY provided in its judgement the following analysis:

"[...] in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his act occurs.

[...]

Regarding the first aspect, the knowledge by the accused of the wider context in which his act occurs, the approach taken by the majority in R. v. Finta in Canada is instructive. In that case the majority decided that '[t]he mental element

³⁶ See the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 7, par. 93; the "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", *supra* note 7, par. 46; the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 185; and the "Muthaura *et al.* Confirmation Decision", *supra* note 7, par. 114.

³⁷ See the transcript of the confirmation of charges hearing session held on 19 February 2013, No. ICC-02/11-01/11-T-14-ENG, p. 47, lines 4-24.

³⁸ See, in this sense, the Preparatory Commission for the International Criminal Court, Working Group on Elements of Crimes, Proposal submitted by Canada and Germany on article 7, U.N. Doc. PCNICC/1999/WGEC/DP.36.

required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within crimes against humanity. However, it would not be necessary to establish that the accused knew that his actions were inhumane.’ While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances. Several cases arising under German penal law following the Second World War are relevant in this regard. In a case decided by the Spruchgericht at Stade, Germany, the accused, who had been stationed near the concentration camp at Buchenwald, was assumed to have known that numerous persons were deprived of their liberty there on political grounds. In addition, it is not necessary that the perpetrator has knowledge of exactly what will happen to the victims and several German cases stressed the fact that denunciations, without more, constitute crimes against humanity. One case in particular is relevant. In that case two accused in 1944 informed the police that the director of the company for which they both worked had criticised Hitler. After the denouncement the director was arrested, temporarily released and then arrested again and brought to a concentration camp. Both of the accused were acquitted due to a lack of ‘mens rea’ as they had not had either a concrete idea of the consequences of their action or an ‘abominable attitude’. However, the Obersten Gerichtshofes (‘OGH’) remanded the case to the trial court, finding that a crime against humanity does not require either a concrete idea of the consequences or an “abominable attitude”.³⁹

25. The evidence submitted during the confirmation of charges hearing indicate that Mr. Gbagbo had knowledge of the attack, as further explained *infra* under Section 3 of the present submission.

2. Constitutive elements of the crimes alleged in the document containing the charges

26. The charges brought against the suspect relate to the crimes of murder, rape, other forms of sexual violence, persecution and other inhumane acts.

27. Concerning the legal requirements established by article 7(1) and (2) of the Rome Statute for each of the crimes contained in the charges, different Chambers of the Court have already clarified that the conduct of ‘causing death’ to one or more

³⁹ See ICTY, *The Prosecutor v. Duško Tadić*, *supra* note 20, paras. 656-657.

persons required by article 7(1)(a) may take place by different means,⁴⁰ and that acts considered as ‘*other inhumane acts*’ pursuant to article 7(1)(k) require the intentional infliction of “*great suffering, or serious injury to body or to mental or physical health*”,⁴¹ specifying that “*none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as another inhumane act encompassed by article 7(1)(k) of the Statute*”,⁴² “*even in its attempted form*”.⁴³

28. The Pre-Trial Chambers of the Court have also considered that the crime of rape is committed where the coercive corporal invasion of a victim’s body contemplated in article 7(1)(g) of the Rome Statute takes place by physical force or by taking advantage of a “*coercive environment*” inherent in certain circumstances, such as the presence of armed forces.⁴⁴ By contrast, the crime against humanity of “*other form of sexual violence*” envisaged in article 7(1)(g) of the Rome Statute has still not been examined in depth by the jurisprudence of the Court.⁴⁵ However, the Common Legal Representative submits that the sexual incidents different from rape discussed during the confirmation of charges hearing are forms of sexual violence, since they were unconsented acts of a sexual and very grave nature.⁴⁶

⁴⁰ See for instance the “Bemba Confirmation Decision”, *supra* note 7, par. 132.

⁴¹ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 453; and the “Muthaura *et al.* Confirmation Decision”, *supra* note 7, par. 269. See also ICTY, *The Prosecutor v. Milan Lukić and Sredoje Lukić*, “Judgement”, No. IT-98-32/1-T, 20 July 2009, paras. 960-962; *The Prosecutor v. Vlastimir Đorđević*, “Public Judgement with Confidential Annex”, No. IT-05-87/1-T, 23 February 2011, paras. 1610-1612. See also ICTR, *The Prosecutor v. Juvénal Kajelijeli*, “Judgement and Sentence”, No. ICTR-98-44A-T, 1 December 2003, paras. 932-933; *The Prosecutor v. Jean de Dieu Kamuhanda*, “Judgement”, No. ICTR-95-54A-T, 22 January 2004, paras. 717-718. See also SCSL, *The Prosecutor v. Alex Tamba Brima et al.*, “Judgement”, No. SCSL-2004-16-A, 22 February 2008, par. 198. See also ECCC, *Case 001*, “Judgement”, No. E188, 26 July 2010, paras. 367-371.

⁴² See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 452. See also the “Muthaura *et al.* Confirmation Decision”, *supra* note 7, par. 269.

⁴³ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 461.

⁴⁴ *Idem*, par. 440. See also the “Bemba Confirmation Decision”, *supra* note 7, par. 162.

⁴⁵ See the “Muthaura *et al.* Confirmation Decision”, *supra* note 7, paras. 264-265; and the “Decision on the Prosecutor’s Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo” (Pre-Trial Chamber III), No. ICC-02/11-01/11-9-Red, 30 November 2011, par. 59.

⁴⁶ See the transcript of the confirmation of charges hearing session held on 26 February 2013, No. ICC-02/11-01/11-T-19-CONF-ENG, p. 36, lines 1-3 (submissions presented in open session).

29. Furthermore, the Common Legal Representative notes that previous decisions of the Pre-Trial Chambers of the Court have clarified that the commission of a crime of persecution envisaged in article 7(1)(h) of the Rome Statute requires the infliction of serious bodily or mental harm amounting to an *“intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity [...] committed against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3 [of Article 7 of the Rome Statute], or other grounds that are universally recognized as impermissible under international law, in connection with any acts referred to in this paragraph or any crime within the jurisdiction of the Court”*.⁴⁷

30. The Common Legal Representative submits that all the victims participating in the confirmation of charges hearing suffered harm of the nature described *supra*. They were civilians injured or arrested when they were taking part in peaceful demonstrations, sometimes tortured and detained without charges for weeks in police stations or detention centres. Their loved ones were killed during attacks launched against them or against religious places, in public spaces or at their homes, and many victims died in front of the eyes of their family members. Many victims were raped or subjected to other forms of sexual violence, and all of them were persecuted by reason of their family name, their perceived political affiliation, their country of origin or their place of residence.

31. The evidence provided by the Prosecution during the confirmation of charges hearing regarding the incidents referred to in the document containing the charges is therefore confirmed by the victims participating in the current proceedings. Accordingly, the Common Legal Representative submits that all the allegations

⁴⁷ See the *“Ruto et al. Confirmation Decision”*, *supra* note 7, par. 269; and the *“Muthaura et al. Confirmation Decision”*, *supra* note 7, par. 282. In this regard, according to C. BASSIOUNI, the crime of persecution is committed when the harm to the victim is committed *inter alia* “because of the victim’s beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.)” See BASSIOUNI (C.), *Crimes against Humanity in International Criminal Law*, Martinus Nijhoff Publishers: the Netherlands, 1992, p. 317.

contained in the document containing the charges must be cumulatively confirmed since each of the crimes referred to in requires proof of “*materially distinct elements*” not required by the other crimes.⁴⁸

32. Moreover, the victims participating in the current proceedings are identified. Accordingly, the Common Legal Representative sees no merit in the Defence contentions that “*victims are unknown*”,⁴⁹ and especially that the women raped during the march to the RTI on 16 December 2010, those killed during the peaceful march in Abobo on 3 March 2011, the persons who died as a consequence of the shelling of the Abobo market on 17 March 2011, and the women who were raped as a consequence of the Yopougon incidents on or around 12 April 2011 are not sufficiently identified and cannot therefore support the allegations that the terrible crimes they suffered were indeed committed.⁵⁰

3. Modes of criminal liability pursuant to article 25 of the Rome Statute

33. Articles 25(1) and (2) of the Rome Statute confirm the universal acceptance of the principle of individual criminal responsibility as recognized by the International Military Tribunal of Nuremberg⁵¹ and reaffirmed by the ICTY in the *Tadić*

⁴⁸ See for instance the “*Ruto et al. Confirmation Decision*”, *supra* note 7, par. 281. For an implied application of this reasoning, see the “*Muthaura et al. Confirmation Decision*”, *supra* note 7, paras. 283 and 428.

⁴⁹ See the transcript of the confirmation of charges hearing session held on 25 February 2013, No. ICC-02/11-01/11-T-18-CONF-ENG, p. 23, lines 5-10 (submissions presented in open session).

⁵⁰ See respectively the transcript of the confirmation of charges hearing sessions held on 28 February 2013, No. ICC-02/11-01/11-T-21-ENG, p. 37, lines 6-9; and on 26 February 2013, No. ICC-02/11-01/11-T-19-CONF-ENG, p. 20, lines 14-25; p. 21, lines 2-5; and p. 36, lines 14-16 (submissions presented in open session).

⁵¹ See the Judgment of the International Military Tribunal, in *The Trial of the Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, H. M. Attorney General by H. M.’s Stationery Office, London 1950, Part 22, par. 447, where it was held that individual criminal responsibility has “*long been recognized*” and further stated: “*enough has been said to show that individuals can be punished for violations of International Law. Crimes against International Law are committed not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced*”. Available at: <http://werle.rewi.hu-berlin.de/IMTJudgment.pdf>, last visited 11 March 2013.

jurisdictional decision⁵² with regard to individual criminal responsibility for violations of common article 3 of the Geneva Conventions.

34. Subparagraphs (a) to (c) of article 25(3) of the Rome Statute establish the basic concept of individual criminal attribution. This approach confirms the general tendency in comparative criminal law to reject a pure unitary concept of perpetration and to distinguish between different forms of participation in the commission of the crimes.⁵³ It must not be overlooked, however, that criminal attribution in international criminal law has to be distinguished from attribution in national criminal law: while in the latter case normally a concrete criminal result caused by a person's individual act is punished, international criminal law establishes liability for acts committed in a collective context and systematic manner; consequently the individual's own contribution to the harmful result is not always readily apparent.⁵⁴

35. In particular, article 25(3)(a) of the Rome Statute refers to three forms of perpetration: direct or immediate perpetration ("as an individual"), co-perpetration ("jointly with another") and perpetration by means ("through another person"). The basic form of criminal liability set out in article 25(3)(a) consists of commission: "*if that person: (a) Commits such a crime [...]*". The term "*commission*" is usually interpreted to be synonymous with "*perpetration*".⁵⁵

⁵² See ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR 72, Decision on the Defence motion for interlocutory appeal on jurisdiction (Appeals Chamber), 2 October 2005, paras. 128-137.

⁵³ In this sense, see AMBOS (K.), "Article 25 – Individual Criminal Responsibility", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 2nd Edition, C. H. Beck oHG, 2008, p. 745; MANTOVANI (F.), "The General Principles of International Criminal Law: The viewpoint of a national criminal lawyer", *Journal of International Criminal Justice*, vol. 1, Issue 1, Oxford University Press, 2003, pp. 26-38; OLÁSULO (H.), *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, Hart Publishing, 2009, pp. 23-27.

⁵⁴ In this sense, see ESER (A.), HUBER (B.) and CORNILS (K.), *Einzelverantwortung und Mitverantwortung im Strafrecht*, European Colloquium on Individual Participatory and Collective Responsibility in Criminal Law, Freiburg i. Br.: Ed. Iuscrim, 1998, S. [3] - 9, [345] – 347, available at: http://www.freidok.unifreiburg.de/volltexte/4023/pdf/Eser_Einzelverantwortung_und_Mitverantwortung_Eroeffnung.pdf.

⁵⁵ In this sense, see CRYER (R.), FRIMAN (H.), ROBISON (D.) and WILMSHURST (E.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, p. 302. In particular, in the course of the negotiations held within the Preparatory Committee, other forms of commission of

36. The concept of “*jointly with another*” or “*co-perpetration*” appears to be a novelty introduced by the Rome Statute which departs from the forms of individual criminal responsibility provided for in the statutes of other international courts. Indeed, due to this new formulation, “[c]o-perpetration is no longer included in the complicity concept but recognized as an autonomous form of perpetration”.⁵⁶ According to one commentator, the terms “[c]ommits such a crime’ in subparagraph 25(3)(a) extends to perpetration ‘jointly with another’ and introduces another new concept, joint perpetration as an autonomous head of perpetration”.⁵⁷ Therefore, “[a]rticle 25(3)(a) of the ICC Statute marks the ‘emancipation’ of the concept of co-perpetration from participation to perpetration, from a secondary party to a principal. It has developed into a separate head of responsibility and is no longer subsumed under complicity”.⁵⁸

37. As for the elements of such co-perpetration, it was noted that “[t]o commit jointly with another person seems to express no more than two requirements: first, there must be more than one person committing crime, and secondly, they must work together”.⁵⁹ In other words, “the co-perpetrators must have a common plan, design or purpose which

crimes separated from ‘committing’ emerged, particularly, through the introduction of the terms “*jointly with others*” or “*through another person*” in a separate article proposed by the delegations of Canada, Germany, The Netherlands and the United Kingdom. See the Working paper submitted by Canada, Germany, Netherlands and the United Kingdom - Paper on criminal responsibility submitted by informal group representing various legal systems, Working Group on General Principles of Criminal Law and Penalties of the Preparatory Committee, UN Doc. A/AC.249/1997/WG.2/DP.1, 14 February 1997, p. 1. In particular, this working paper proposed the following: “*INDIVIDUAL RESPONSIBILITY A person is criminally responsible and liable for punishment for a crime defined [in Article 20] [in this Statute] if that person: (a) commits such a crime, whether as an individual, jointly with another, or through a person who is not criminally responsible [...]*”, p. 1 (Emphasis added). This proposal was later integrated into the “Chairman’s Text”, Working Group on General Principles of Criminal Law and Penalties of the Preparatory Committee, UN Doc. A/AC.249/1997/WG.2/CRP.2/Add.2, 19 February 1997. The Chairman’s Text stated the following: “*Individual criminal responsibility [Subject to the provisions of articles C, G and H,] a person is criminally responsible and liable for punishment for a crime defined [in article 20] [in this Statute] if that person: (a) commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible [...]*”, p. 1. (Emphasis added).

⁵⁶ See CRYER (R.), FRIMAN (H.), ROBISON (D.) and WILMSHURST (E.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, p. 479.

⁵⁷ See SLIEDREGT (E.V.), *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Asser Press, The Hague, 2003, pp. 71-72.

⁵⁸ *Idem*, p. 76.

⁵⁹ See ESER (A.), A.), “Individual Criminal Responsibility (art. 25)”, in CASSESE (A.) et al. (eds.), *The Rome Statute of the ICC: A Commentary*, Oxford University Press, 2002, p. 789.

*amounts to or involves the commission of a crime provided for in the Statute” and “the co-perpetrators must participate in the common design whereby this participation ‘may take the form of assistance in, or a contribution to, the execution of the common plan or purpose’”.*⁶⁰

38. Accordingly, it has been argued that co-perpetration is “characterized by a functional division of the criminal tasks between the different (at least two) perpetrators, who are normally interrelated by a common plan or agreement. Every co-perpetrator fulfils a certain task which contributes to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution of the different contributions holding every co-perpetrator responsible for the whole crime”.⁶¹ Moreover, another commentator agreed that “co-perpetration connotes two or more perpetrators who each contribute to the commission of the crime. Their co-operation must be close as their contribution are mutually attributed, holding each co-perpetrator responsible for the whole crime”.⁶²

39. As for the mental element of co-perpetration, the commentators also share similar positions. Article 30 of the Rome Statute states that “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.” Since said article is formulated in general terms, a commentator noted that “[t]hese various modes of criminal responsibility [such as ‘commits’, ‘jointly with another’] must, by virtue of article 30, be committed with intent or knowledge in order for a person to be criminally responsible and liable for punishment”.⁶³

⁶⁰ *Idem*, p. 791.

⁶¹ See AMBOS (K.), Article 25 – Individual Criminal Responsibility”, in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, 2nd Edition, C. H. Beck oHG, 2008, p. 479.

⁶² See SLIEDREGT (E.V.), *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, Asser Press, The Hague, 2003, p. 72.

⁶³ See PIRAGOFF (D.K.), “Article 30 Mental Element” in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, 2nd Edition, C. H. Beck oHG, 2008, p. 855.

40. Indeed, the term “committed” as stipulated in article 30 of the Rome Statute “clearly refers to the mode of participation in crime that is described in subparagraph 3(a) of article 25”⁶⁴ which includes co-perpetration. Another commentator also stressed that the requirement of possessing “intent and knowledge” is applicable to all participants in the crime or, in other words, the mental element of a co-perpetrator is “neither higher nor lower than those for” the other co-perpetrator(s).⁶⁵ Thus, a co-perpetrator must have “a ‘double intent’ both with regard to his own conduct and with regard to the intent and knowledge of the [other co-perpetrator(s)]”.⁶⁶

41. The Common Legal Representative notes that different Chambers of the Court have consistently found that a suspect may be responsible as a “co-perpetrator” pursuant to article 25(3)(a) of the Rome Statute where i) the suspect got into an agreement or common plan with other person(s) (the other co-perpetrator(s)),⁶⁷ ii) the suspect and the other co-perpetrators made a coordinated essential contribution resulting in the objective elements of a crime,⁶⁸ iii) the suspect and the other co-perpetrators carried out the subjective elements of the crimes charged,⁶⁹ iv) the suspect and the other co-perpetrators were mutually aware and mutually accepted

⁶⁴ *Idem*, p. 529.

⁶⁵ See ESER (A.), “Mental Elements-Mistake of Fact and Mistake of Law”, in CASSESE (A.), GAETA (P.) & JONES (J.R.W.D) (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 933.

⁶⁶ *Idem*.

⁶⁷ See the “Lubanga Confirmation Decision”, *supra* note 13, paras. 343-345; the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, paras. 522-523; the “Bemba Confirmation Decision”, *supra* note 7, par. 350; the “Decision on the Confirmation of Charges” (Pre-Trial Chamber I), No. ICC-02/05-02/09-243-Red, 8 February 2010 (“Abu Garda Confirmation Decision”), par. 160; the “Corrigendum to the ‘Decision on the Confirmation of Charges’” (Pre-Trial Chamber I), No. ICC-02/05-03/09-121-Corr-Red (“Banda and Jerbo Confirmation Decision”), 7 March 2011, par. 129; and the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012, paras. 1006 and 1018(i).

⁶⁸ See the “Lubanga Confirmation Decision”, *supra* note 13, paras. 346-348; the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, paras. 524-525; the “Bemba Confirmation Decision”, *supra* note 7, par. 350; the “Abu Garda Confirmation Decision”, *supra* note 67, par. 160; the “Banda and Jerbo Confirmation Decision”, *supra* note 67, par. 136; and the “Judgment pursuant to Article 74 of the Statute”, *supra* note 67, paras. 1006 and 1018(ii).

⁶⁹ See the “Lubanga Confirmation Decision”, *supra* note 13, par. 349; the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 527; the “Bemba Confirmation Decision”, *supra* note 7, par. 351; the “Abu Garda Confirmation Decision”, *supra* note 67, par. 161; the “Banda and Jerbo Confirmation Decision”, *supra* note 67, par. 151; and the “Judgment pursuant to Article 74 of the Statute”, *supra* note 67, paras. 1012 and 1018(iii).

that implementing their common plan would result in the realisation of the objective elements of the crimes,⁷⁰ and v) the suspect was aware of the factual circumstances enabling him or her to control the crimes jointly with the other co-perpetrator(s).⁷¹

42. As indicated by the Defence,⁷² different Chambers of the Court have also been consistent in finding that a “*co-perpetrator*” who did not physically commit the crimes but who had the crimes committed through another person may be responsible as an “*indirect co-perpetrator*” where i) instead of being aware of his or her direct joint control over the crimes, the suspect was aware of the factual circumstances enabling him or her to exercise, jointly with another, control over the commission of the crime through another person(s),⁷³ and *in addition* to the first four circumstances identified in the previous paragraph,⁷⁴ ii) the suspect had control over an organisation,⁷⁵ iii) the organisation under the suspect’s control was an organised and hierarchical apparatus

⁷⁰ See the “Lubanga Confirmation Decision”, *supra* note 13, paras. 361-364; the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 533; the “Bemba Confirmation Decision”, *supra* note 7, paras. 351 and 370; the “Abu Garda Confirmation Decision”, *supra* note 67, par. 161; the “Banda and Jerbo Confirmation Decision”, *supra* note 67, par. 150 ; and the “Judgment pursuant to Article 74 of the Statute”, *supra* note 67, par. 1012.

⁷¹ See the “Lubanga Confirmation Decision”, *supra* note 13, paras. 366-367; the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 538; the “Bemba Confirmation Decision”, *supra* note 7, paras. 351 and 371; the “Abu Garda Confirmation Decision”, *supra* note 67, par. 161; the “Banda and Jerbo Confirmation Decision”, *supra* note 67, par. 160.

⁷² See the transcript of the confirmation of charges hearing session held on 26 February 2013, No. ICC-02/11-01/11-T-19-CONF-ENG, p. 42, lines 6-13 (submissions presented in open session).

⁷³ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 538; the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, *supra* note 13, par. 223, with Separate and Partly Dissenting Opinion of Judge Anita Ušacka, par. 104; the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI’” (Pre-Trial Chamber I), No. ICC-01/11-12, 27 June 2011, par. 69; the “Ruto *et al.* Confirmation Decision”, *supra* note 7, par. 292; and the “Muthaura *et al.* Confirmation Decision”, *supra* note 7, par. 297.

⁷⁴ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, paras. 522, 525, 527 and 534; the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI’”, *supra* note 73, par. 69; the “Ruto *et al.* Confirmation Decision”, *supra* note 7, par. 292; and the “Muthaura *et al.* Confirmation Decision”, *supra* note 7, par. 297.

⁷⁵ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 500; the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, *supra* note 13, par. 223; the “Abu Garda Confirmation Decision”, *supra* note 67, note 246; the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI’”, *supra* note 73, par. 69; the “Ruto *et al.* Confirmation Decision”, *supra* note 7, par. 292; and the “Muthaura *et al.* Confirmation Decision”, *supra* note 7, par. 297.

of power,⁷⁶ and iv) the execution of the crimes was secured by an almost automatic compliance with the suspect's orders.⁷⁷

43. The Common Legal Representative submits that all the elements required to form criminal responsibility for "*indirect co-perpetration*" under article 25(3)(a) of the Rome Statute are fulfilled to the relevant evidentiary threshold by the evidence submitted by the Prosecution during the confirmation of charges hearing. Indeed, the evidence discussed during the hearing shows that Mr. Gbagbo exercised joint control, together with at least the Minister of Defence, the Minister of Interior, the head of the Armed Forces and Mrs. Simone Gbagbo, over the *Forces de défense et de sécurité ivoiriennes*, the *Galaxie patriotique* and the mercenaries.⁷⁸ The evidence also shows that Mr. Gbagbo acted pursuant to a common plan to retain power at all costs⁷⁹ and with the knowledge that carrying out this plan would result in the commission of the crimes listed in the document containing the charges.⁸⁰ The groups involved in the commission of the crimes formed large structures with sufficient levels of hierarchy, especially those integrated into State structures,⁸¹ and most of them followed the orders issued by Mr. Gbagbo and other co-perpetrators, whether

⁷⁶ See the "Katanga and Ngudjolo Confirmation Decision", *supra* note 8, paras. 511-514; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 13, par. 223; the "Abu Garda Confirmation Decision", *supra* note 67, note 246; the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'", *supra* note 73, par. 69; the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 292; and the "Muthaura *et al.* Confirmation Decision", *supra* note 7, par. 297.

⁷⁷ See the "Katanga and Ngudjolo Confirmation Decision", *supra* note 8, paras. 515-518; the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", *supra* note 13, par. 223; the "Abu Garda Confirmation Decision", *supra* note 67, note 246; the "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'", *supra* note 73, par. 69; the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 292; and the "Muthaura *et al.* Confirmation Decision", *supra* note 7, par. 297.

⁷⁸ See the charts titled "*FDS Chaîne de commandement et présence de miliciens*" and "*Liens des jeunes miliciens avec la Présidence*" submitted by the Prosecution during the hearing held on 28 February 2013.

⁷⁹ See the transcript of the confirmation of charges hearing session held on 20 February 2013, No. ICC-02/11-01/11-T-15-Red-ENG WT, p. 49, lines 1-25 to p. 53, lines 1-18, listing Mr. Gbagbo's contributions to the implementation of the common plan.

⁸⁰ See the transcript of the confirmation of charges hearing session held on 27 February 2013, No. ICC-02/11-01/11-T-20-CONF-ENG, p. 18, lines 22-25 and p. 19, lines 1-25 (submissions presented in open session), implying that Mr. Gbagbo was aware of the commission of the crimes.

⁸¹ See *supra* note 78.

de jure or *de facto*.⁸² In particular, the evidence shows that Mr. Gbagbo gave orders to General M'bia Bredou, to the Minister for Youth Blé Goudé, that he also gave orders to recruit soldiers and to buy weapons during the post-electoral violence,⁸³ and that he instructed commanders in the field of operations.⁸⁴ Moreover, the evidence also shows that Mr. Gbagbo was informed of and went along with the commission of the crimes pursuant to the common plan and knew that he could exercise control over such commission by means of other persons.⁸⁵

44. Consequently, the Common Legal Representative submits that there are substantial grounds to believe that a common plan directed at the commission of the crimes was shared by Mr. Gbagbo and members of his inner circle, who had control over organisations or armed groups of a hierarchical and interchangeable nature and who used these structures in a coordinated and essential manner to jointly implement the common plan.

45. The Common Legal Representative submits that articles 25(3)(b), 25(3)(c) and 25(3)(d) of the Rome Statute refer to forms of secondary criminal responsibility as accessory. Hence, they can only be taken into account if the Chamber decides that the suspect cannot be considered as the principal to the crime charged to him as co-perpetrator.⁸⁶

⁸² See for instance transcript of the confirmation of charges hearing session held on 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG WT, p. 8, lines 7-10, referring to Mr. Gbagbo's instructions to the armed forces.

⁸³ See the transcript of the confirmation of charges hearing session held on 22 February 2013, No. ICC-02/11-01/11-T-17-CONF-ENG, p. 4, lines 24-25 and p. 5, lines 1-3 and 17-20 (submissions presented in open session).

⁸⁴ *Idem*, p. 4, lines 24-25 and p. 5, lines 1-3 and 6-7 (submissions presented in open session).

⁸⁵ See the transcript of the confirmation of charges hearing session held on 21 February 2013, No. ICC-02/11-01/11-T-16-Red-ENG WT, p. 6, lines 10-24, referring to Mr. Gbagbo's meetings with ministers and party leaders; and the transcript of the confirmation of charges hearing session held on 22 February 2013, No. ICC-02/11-01/11-T-17-CONF-ENG, p. 9, lines 17-18 (submissions presented in open session), referring to witness P-10 stating that the president was aware of what was happening in the field.

⁸⁶ See for instance the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", *supra* note 13, par. 60. See also, the "Katanga and Ngudjolo Confirmation Decision", *supra* note 10, par. 467; the "Bemba Confirmation Decision", *supra* note 10, paras. 342 and 402.

46. In the event that the Chamber finds that the evidence submitted during the confirmation of charges hearing is not sufficient to establish substantial grounds to believe that Mr. Gbagbo was an indirect co-perpetrator of the crimes contained in the document containing the charges, the Common Legal Representative submits that the evidence suffices to conclude at this stage of the proceedings that Mr. Gbagbo contributed to the commission of the crimes by a group of persons acting with a common purpose, pursuant to article 25(3)(d) of the Rome Statute.

47. Contrary to the Defence's arguments,⁸⁷ the Common Legal Representative contends that the evidence presented during the confirmation of charges hearing identifies a group of persons acting with a common purpose, including, *inter alia*, Mrs. Simone Gbagbo and Mr. Charles Blé Goudé, who shared the purpose of maintaining Mr. Gbagbo in power even if the commission of crimes against humanity was necessary to achieve this goal.⁸⁸ The evidence discussed during the confirmation of charges hearing also shows that Mr. Gbagbo was a member of this group, had knowledge of the elements of criminality included in their common purpose, and contributed to it.⁸⁹

48. Lastly, the Common Legal Representative cannot share the concern raised by the Defence concerning the incompatibility of allegations of criminal responsibility under article 25(3)(a) and article 25(3)(d) of the Rome Statute.⁹⁰ As already established by the Chambers of the Court, these articles respectively refer to principals and

⁸⁷ See the transcript of the confirmation of charges hearing session held on 27 February 2013, No. ICC-02/11-01/11-T-20-CONF-ENG, p. 4, lines 11-25 to p. 8, lines 1-18 (submissions presented in open session).

⁸⁸ See the transcript of the confirmation of charges hearing session held on 20 February 2013, No. ICC-02/11-01/11-T-15-Red-ENG WT, p. 51, lines 14-20, p. 54, lines 2-25 and p. 55, lines 1-25.

⁸⁹ *Idem*, p. 52, lines 12-25 and p. 53, lines 1-18.

⁹⁰ See the transcript of the confirmation of charges hearing session held on 27 February 2013, No. ICC-02/11-01/11-T-20-CONF-ENG, p. 39, lines 20-25 and p. 40, lines 1-16 (submissions presented in open session).

accessories to a crime.⁹¹ Consequently, no difficulty is likely to arise if both modes of liability are considered in the alternative.

4. Evidentiary threshold required for the confirmation of the charges

49. The Common Legal Representative submits that the Defence's arguments presented during the confirmation of charges hearing appear to attempt to bring into the current stage of the proceedings the evidentiary threshold only applicable at trial, namely that the Chamber must be convinced of Mr. Gbagbo's responsibility beyond reasonable doubt.⁹² The Defence's contention appears to be that some of the evidence tendered against Mr. Gbagbo can be reasonably read not only in an incriminatory manner and that consequently the charges against him should not be confirmed. However, the Pre-Trial Chambers of the Court have consistently understood the evidentiary threshold established in article 61(7) of the Rome Statute as requiring the Prosecution to merely offer "*concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations*".⁹³

50. The evidentiary threshold for the confirmation of the charges is admittedly higher than the one required for the issuance of a warrant of arrest or a summons to appear in order to protect the suspect against wrongful prosecution and ensure judicial economy.⁹⁴ Nonetheless, the Common Legal Representative submits that the

⁹¹ See the "Lubanga Confirmation Decision", *supra* note 13, par. 320; the "Katanga and Ngudjolo Confirmation Decision", *supra* note 8, paras. 466-467 and 471; the "Bemba Confirmation Decision", *supra* note 7, paras. 346-347; the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 284; and the "Judgment pursuant to Article 74 of the Statute", *supra* note 67, par. 999.

⁹² See for instance *supra* notes 49 and 50.

⁹³ See the "Lubanga Confirmation Decision", *supra* note 13, par. 39; the "Katanga and Ngudjolo Confirmation Decision", *supra* note 8, par. 65; the "Bemba Confirmation Decision", *supra* note 7, par. 29; the "Abu Garda Confirmation Decision", *supra* note 67, par. 37; the "Banda and Jerbo Confirmation Decision", *supra* note 67, par. 30; the "Mbarushimana Confirmation Decision", *supra* note 13, par. 40; the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 40; and the "Muthaura *et al.* Confirmation Decision", *supra* note 7, par. 52.

⁹⁴ See the "Lubanga Confirmation Decision", *supra* note 13, par. 37; the "Katanga and Ngudjolo Confirmation Decision", *supra* note 8, par. 63; the "Bemba Confirmation Decision", *supra* note 7, par. 28; the "Banda and Jerbo Confirmation Decision", *supra* note 67, par. 31; the "Mbarushimana

threshold for the confirmation of the charges cannot and should not be as high as the one applicable at trial.

51. In this regard, Pre-Trial Chamber III stated that “[t]he nature of these evidentiary thresholds depends on the different stages of the proceedings and is also consistent with the foreseeable impact of the relevant decisions on the fundamental human rights of the person charged”.⁹⁵ Consistent with this approach, Pre-Trial Chamber I has determined that “[t]he evidentiary threshold to be met for the purposes of the confirmation hearing cannot exceed the standard of ‘substantial grounds to believe’, as provided for in article 61(7) of the Statute”,⁹⁶ and that “at no point should Pre-Trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction. Such a high standard is not compatible with the standard under article 61(7) of the Statute.”⁹⁷

52. The Common Legal Representative notes that the Appeals Chamber has confirmed the existence of different and progressively higher evidentiary thresholds applicable at successive stages of the proceedings, by clarifying that “the evidentiary threshold of ‘reasonable grounds to believe’ for the issuance of a warrant of arrest must be distinguished from the threshold required for the confirmation of charges (‘substantial grounds to believe’, article 61 (7) of the Statute) and the threshold for a conviction (‘beyond reasonable doubt’, article 66 (3) of the Statute). It is evident from the wording of the provisions that the standards of ‘substantial grounds to believe’ and ‘beyond reasonable doubt’ are higher standards of proof than ‘reasonable grounds to believe’. [...] Certainty as to the commission of the crime is required only at the trial stage of the proceedings (see article 66(3) of the Statute), when the Prosecutor has had a chance to submit more evidence”.⁹⁸

Confirmation Decision”, *supra* note 13, par. 41; the “Ruto *et al.* Confirmation Decision”, *supra* note 7, par. 40; and the “Muthaura *et al.* Confirmation Decision”, *supra* note 7, par. 52.

⁹⁵ See the “Bemba Confirmation Decision”, *supra* note 7, par. 27.

⁹⁶ See the “Katanga and Ngudjolo Confirmation Decision”, *supra* note 8, par. 62.

⁹⁷ See the “Abu Garda Confirmation Decision”, *supra* note 67, par. 40.

⁹⁸ See the “Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” (Appeals Chamber), No. ICC-02/05-01/09-73, 3 February 2010, paras. 30-31. See also the “Bemba Confirmation Decision”, *supra*

53. In light of the jurisprudence of the Court quoted above, the Common Legal Representative submits that the Defence's assertions that the Prosecution has failed to meet the required evidentiary threshold ought to be dismissed. At the present stage of the proceedings, the Chamber is not meant to determine Mr. Gbagbo's criminal responsibility or lack thereof. Instead, at this stage the Chamber is meant to assess, like in many national jurisdictions,⁹⁹ whether sufficient evidence has been put forward to commit Mr. Gbagbo for trial. During the trial proceedings, all relevant evidence will be introduced and thoroughly considered, and the principle of *in dubio pro reo* will be fully applicable. Accordingly, the Defence's contentions regarding the unidentified character of *some* victims, the alleged contradictory nature of *some* pieces of evidence, and the insufficient probative value of *some* pieces of Prosecution evidence to sustain a conviction are not sufficient or relevant at the present stage to discontinue the proceedings against Mr. Gbagbo.

54. Moreover, the Common Legal Representative wishes to highlight that whereas the Defence alleges that some of the evidence relied upon by the Prosecution has a low probative value because of its very nature,¹⁰⁰ the Defence itself often relies on materials of the same nature, such as news bulletins, public reports by non-governmental organisations and an anonymous book,¹⁰¹ in order to sustain its alternative hypotheses.¹⁰²

note 7, par. 27; the "Ruto *et al.* Confirmation Decision", *supra* note 7, par. 40; and the "Muthaura *et al.* Confirmation Decision", *supra* note 7, par. 52.

⁹⁹ See for instance the German Code of Criminal Procedure (*Strafprozeßordnung*), 1 February 1877, ss. 201 and 203; the Russian Criminal Procedure Code (*Ugolovno-protsessual'nyi kodeks Rossiiskoi Federatsii*), 18 December 2001, arts. 228 and 236; the Magistrates' Courts Act 1980 (c. 43), 1 August 1980, ss. 4 and 6; and the US Federal Rules of Criminal Procedure, 21 March 1946, rule 5.1.

¹⁰⁰ See the transcript of the confirmation of charges hearing session held on 25 February 2013, No. ICC-02/11-01/11-T-18-CONF-ENG, p. 31, lines 17-20 and p. 32, lines 10-11 and 18-21 (submissions presented in open session).

¹⁰¹ See for instance the transcript of the confirmation of charges hearing sessions held on 25 February 2013, No. ICC-02/11-01/11-T-18-CONF-ENG, p. 8, lines 16-25 and p. 9, lines 1-25 (submissions presented in open session); and on 26 February 2013, No. ICC-02/11-01/11-T-19-CONF-ENG, p. 11, lines 8-25 and p. 12, lines 1-5 (submissions presented in open session).

¹⁰² See for instance the transcript of the confirmation of charges hearing session held on 26 February 2013, No. ICC-02/11-01/11-T-19-CONF-ENG, p. 25, lines 21-25 to p. 28, lines 1-11 (submissions presented in open session), where the Defence lists several hypotheses supporting the allegedly lawful character of the shelling of the Abobo market.

55. In conclusion, considering the evidence presented by the Prosecution and the corroboration thereof by the accounts of the participating victims, the Common Legal Representative submits that there is sufficient evidence to establish substantial grounds to believe that Mr. Gbagbo committed the crimes alleged against him, reaching the standard of proof required by article 61(5) of the Rome Statute.

56. In this regard, the Common Legal Representative contends that there is sufficient evidence to believe that:

- Mr. Gbagbo implemented a common plan to stay in power at all costs with the assistance of members of his inner circle and the armed forces;
- Mr. Gbagbo is a co-perpetrator of the crimes committed as part of the attacks carried out against his opponents, his opponents' actual supporters, and those who, by reason of their origin, nationality or religion, were perceived to support his opponents;
- Mr. Gbagbo had knowledge of the widespread and systematic character of the attacks directed against the civilian population on basis of their ethnic origin (Dioula, Mossi, Senoufo, Baoulé), religious affiliation (Muslims), or nationality (nationals of West African countries such as Mali, Burkina Faso, and Niger);
- Severe deprivations of fundamental rights contrary to international law took place during said attacks, such as murders, rapes and inhumane acts;
- Said events constitute a crime of persecution perpetrated against a large number of victims on political, national, ethnical and religious grounds.

FOR THE ABOVEMENTIONED REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber to confirm all the charges against Mr. Laurent Gbagbo, and commit him for trial.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style and is underlined with a single horizontal line.

Paolina Massidda
Principal Counsel

Dated this 14th day of March 2013

At The Hague, The Netherlands