

Dissenting Opinion of Judge Christine Van den Wyngaert

1. I am unable to join my colleagues in their decision to confirm the charges against Laurent Gbagbo on the basis of article 25(3)(a),(b) and (d).¹ For the reasons explained in this opinion, I am of the view that the evidence is still insufficient.
2. There is a considerable quantitative increase in evidence submitted by the Prosecutor since the adjournment on 3 June last year.² The several incidents supporting the crimes against humanity allegation are now better supported by evidence. However, despite the request for more and better information as to the number of victims in relation to the alleged incidents, the previously identified problem regarding reliance upon anonymous hearsay remains.³
3. More importantly, I am not convinced that the Prosecutor has proven the alternate modes of liability that are charged in the Amended Document Containing the Charges. I have no principled objection against confirming alternate modes of liability⁴. On the contrary, if alternate modes of liability are supported by the evidence, they should be applied as early as possible in the

¹ “Decision on the confirmation of charges against Laurent Gbagbo” of 12 June 2014, (“Confirmation Decision”).

² See “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, 3 June 2013, ICC-02/11-01/11-432, para. 44(4)(c).

³ ICC-02/11-01/11-432, paras 29 and 36. See also, Pre-Trial Chamber I, *Prosecutor v. Calixte Mbarushimana*, “Decision on the confirmation of charges”, 16 December 2011, ICC-01/04-01/10-465, para. 49.

⁴ However, in my Separate Opinion of 14 February 2014 I have expressed doubts about whether articles 25(3)(b) and 28 of the Statute are properly before the Chamber. In my view, the only legal basis upon which they could have been added to the Amended Document Containing the Charges was through the application of article 61(7)(c)(ii) of the Statute. [See “Separate Opinion of Judge Christine Van den Wyngaert”, 14 February 2014, ICC-02/11-01/11-619-Anx]. It follows that what I will say below in relation to these two forms of criminal responsibility is only relevant on the assumption that I am wrong on this procedural point.

proceedings, if possible at confirmation. This avoids the application of Regulation 55 in later stages of the proceedings.

4. However, charges should only be confirmed if the evidence has a realistic chance of supporting a conviction beyond reasonable doubt. I am, of course, aware that the applicable standard for confirmation is considerably lower than at trial. At the confirmation stage the Prosecutor may even be given the benefit of the doubt when there are questions about the credibility of certain witnesses or the probative value of particular documents. However, there must be at least enough of an evidentiary basis to sustain a possible conviction on the assumption that these questions are resolved in favour of the Prosecutor at trial. If it is clear that, even if the available evidence is taken at its highest, there is a substantial doubt that this will be enough to support a conviction, there is no point in confirming the charges. Based on my understanding of it, I am of the view that the evidence for the charges under article 25(3)(a),(b) and (d) falls below the threshold of article 61(7) of the Statute.
5. With regard to the charges under article 25(3)(a), I am not persuaded by the available evidence that there are substantial grounds to believe that the alleged common plan to maintain Laurent Gbagbo in power either explicitly or implicitly involved the commission of crimes against civilian pro-Ouattara supporters. There is no convincing evidence, in my view, to show that Laurent Gbagbo at any point agreed with his alleged "inner circle" to commit crimes against innocent civilians. Accordingly, I am not persuaded that there was a deliberate effort, on the part of Laurent Gbagbo and his "inner circle", to mentally and materially prepare his supporters to commit crimes against civilians. For example, I do not share my colleagues' interpretation of Laurent

Gbagbo's speech at Divo on 27 August 2010 as sending a signal to his supporters that they would be allowed to commit crimes against pro-Ouattara civilians with impunity⁵. I also do not believe that it was foreseeable that the killing and raping of civilians would occur in the ordinary course of events. The available evidence about a number of isolated violent incidents by Laurent Gbagbo's supporters in previous years is not sufficient, in my view, to show that Laurent Gbagbo knew that the FDS and/or his other supporters would inevitably commit crimes against civilian pro-Ouattara supporters.⁶

6. In addition, I am not persuaded by the available evidence that there are substantial grounds to believe that Laurent Gbagbo, either alone or in concert with one or more members of the alleged "inner circle", used the forces at his disposal to intentionally commit crimes against civilians. There is no specific evidence of any order or instruction emanating from Laurent Gbagbo to this effect, nor can such an order or instruction be inferred from the other available evidence in my view. In particular, I do not believe that it is possible to infer from the fact that Laurent Gbagbo forbade the RTI march, that he implicitly instructed the forces involved in the repression of the march to commit crimes against peaceful civilian protesters.⁷ Similarly, I do not see

⁵ See para. 112 of the Confirmation Decision

⁶ It is noteworthy, in this regard, that paragraph 223 of the Amended Document Containing the Charges states the following: "[Laurent Gbagbo] was aware of the risks that would result from the implementation of such a plan and accepted to take them." According to a number of previous decisions of this Court, the Statute does not include criminal responsibility for the acceptance of a risk that a crime *may* be committed in the execution of an otherwise non-criminal plan. See, Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba*, "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, paras 352-369 and Trial Chamber II, *Prosecutor v. Germain Katanga*, "Jugement rendu en application de l'article 74 du Statut", 7 March 2014, ICC-01/04-01/07-3436, paras 775-776. As explained previously, I agree with this analysis See, *Prosecutor v. Mathieu Ngudjolo*, "Concurring Opinion of Judge Christine Van den Wyngaert", 18 December 2012, ICC-01/04-02/12-4, paras 36-38.

⁷ The Confirmation Decision attaches a lot of importance to Laurent Gbagbo's alleged instruction during a meeting held on 14 December 2010 that the RTI march should not take place (see Confirmation Decision, para. 40). However, this finding relies entirely on the testimony of Witness P-9, who also stated that Laurent Gbagbo did not give any specific instructions as to how this should

how the deployment of armed forces to Abobo, which involved the potential use of mortars, can be characterised as an *instruction* to use those weapons against civilians. It is important to bear in mind, in this regard, that the military was deployed in order to fight a heavily armed insurgency group and that regular law enforcement (police, gendarmerie) were no longer able to handle the situation. Although it might be argued that by sending military units into a densely populated civilian area, Laurent Gbagbo created and accepted a risk that innocent civilians might be harmed (i.e. *dolus eventualis*),⁸ this falls short, in my view, of actively instructing/instigating those troops to deliberately target civilians. I am therefore unable to consider Laurent Gbagbo as an indirect perpetrator in the sense of article 25(3)(a).

7. As far as the charges under article 25(3)(b) are concerned, as just mentioned, I do not see enough evidence to conclude that Laurent Gbagbo would have ordered or otherwise deliberately prompted the commission of any of the crimes against civilians. In terms of implicit inducement, based on the evidence concerning Laurent Gbagbo's public speeches and his alleged instructions and utterances addressed to members of the FDS or "inner circle", I am not persuaded that they show a deliberate effort,⁹ on the part of

be accomplished. There is no other evidence about what was said during this meeting. Following the meeting, the Chief of Staff gave oral instructions to the Commander of the Ground Forces not to shoot at civilians or impartial forces. [See Witness P-9, CIV-OTP-0051-0935 at 0964-0967]. There is also evidence of similar orders by the Chief of Police [See CIV-OTP-0005-0031 at 0031-0032 and Witness P-46, CIV-OTP-0014-0204 at 0209]. As far as the evidence relating to alleged radio intercepts of orders given on the FDS network on the day of the RTI march is concerned, I consider the terminology used ("rentrer dans la foule") ambiguous. It could just as easily refer to an order to push back the crowd with conventional crowd control techniques [see, e.g., CIV-OTP-0010-0028 at 0029 and 0031; CIV-OTP-0045-1413 at 1413]. More importantly, there is no evidence whatsoever showing that any of these intercepted orders emanated from or were approved by Laurent Gbagbo.

⁸ See, on this point, *supra*, note 6.

⁹ Or an awareness that his speeches and utterances would, in the ordinary course of events, exert such an influence.

Laurent Gbagbo, to induce or mentally prepare his supporters to commit crimes against civilians, let alone that they actually had such a direct effect.¹⁰

8. With regard to the charges under article 25(3)(d), I cannot join my colleagues in confirming, because I fail to see sufficient evidence for the existence of a group acting with a common purpose. The Amended Document Containing the Charges does not provide any precise indication as to the composition of such a group.¹¹ Indeed, given that nobody would argue that *all* FDS members, *all* mercenaries, *all* militia members and *all* youth group members constituted one large “group acting with a common purpose”,¹² it is necessary to know who *did* belong to the alleged group acting with a common purpose.
9. The Confirmation Decision considers that the evidence sufficiently demonstrates that “members of the pro-Gbagbo forces” led by Laurent Gbagbo and the inner circle constituted a group within the meaning of article 25(3)(d) of the Statute.¹³ While I agree that it is not necessary to identify each

¹⁰ As said above, I do not share my colleagues’ interpretation of Laurent Gbagbo’s speech at Divo on 27 August 2010 as sending a signal to his supporters that they would be allowed to commit crimes against pro-Ouattara civilians with impunity. See, for the requirement of a direct effect, Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda”, 9 June 2014, ICC-01/04-02-06-309, para. 153.

¹¹ ICC-02/11-01/11-592-Conf-Anx-Corr.2. In the original Document Containing the Charges of 17 January 2013, ICC-02/11-01/11-357-Conf-Anx1, the Prosecutor states merely that “Des commandants et des membres des forces pro-GBAGBO, dont ce dernier et des membres de son entourage immédiate [...] ont agi de concert en vue de lancer des attaques violentes contre son opposant politique [...]” It is impossible to understand from this what the alleged contours of the “group acting with a common purpose” were or, indeed, whether and, if so, how the composition of this alleged group differed from the participants in the alleged common plan under article 25(3)(a). Also in the “Prosecution’s final written submissions on the confirmation of charges proceedings”, 31 March 2014, ICC-02/11-01/11-642-Conf, no more specific information is provided.

¹² Such a position would lump together large numbers of individuals who never intended or committed any crimes against civilians (many of whom defected during the crisis) with a relatively small number of physical perpetrators.

¹³ Confirmation Decision, para. 254.

member of the group¹⁴ and that the composition of the “group acting with a common purpose” can, to some extent, change over time, I do not think it is permissible to include persons in the “group” who never had, let alone shared, the intention to commit any crimes against civilians. This follows from the fact that, as has been pointed out in previous cases,¹⁵ in order to have a group acting with a common purpose in the sense of article 25(3)(d), it is necessary to show the same sort of meeting of the minds between all members of the group, as would be required of a group of co-perpetrators acting according to a common plan in the sense of article 25(3)(a).. Accordingly, only those individuals, who agreed to maintain Laurent Gbagbo in power at all costs and to commit crimes against civilians in order to achieve this goal, can be considered as belonging to the group acting with a common purpose. Although it is probable that there were a number of low-ranking physical perpetrators who were willing to commit crimes against civilians on behalf of Laurent Gbagbo, I do not think the evidence shows substantial grounds to believe that they constituted one or more group(s) acting with a common purpose, because there is no evidence of a mutual agreement between them. At any rate, the Prosecutor provides no clear argument and does not point to any specific evidence concerning the outline and composition of the alleged “group acting with a common purpose.”

10. Moreover, even assuming there existed one or more “group(s) acting with a common purpose”, I would still fail to see sufficient evidence showing that

¹⁴ Trial Chamber II, *Prosecutor v. Germain Katanga*, “Jugement rendu en application de l’article 74 du Statut”, 7 March 2014, ICC-01/04-01/07-3436, para. 1626.

¹⁵ See, e.g., Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, “Decision on the confirmation of charges”, 16 December 2011, ICC-01/04-01/10-465, para. 271; Trial Chamber II, *Prosecutor v. Germain Katanga*, “Jugement rendu en application de l’article 74 du Statut”, 7 March 2014, ICC-01/04-01/07-3436, para. 1629.

the alleged contributions were made by Laurent Gbagbo with knowledge of criminal intent on the part of the alleged group(s). Many of the alleged contributions, e.g. the alleged weapons purchases¹⁶ or the alleged money transfers to several pro-Gbagbo organisations,¹⁷ are either too insignificant or have no obvious link to the alleged crimes against civilians. A highly relevant factor, in this regard, is that the Gbagbo regime faced a potent militarised opponent in several parts of the country, including Abidjan. The purchase and distribution of weapons was thus likely linked to the imminent/escalating armed hostilities.¹⁸

¹⁶ I do not think it is possible to rely on evidence regarding efforts/failed attempts to purchase weapons. Under article 25(3)(d) only *actual* contributions can lead to criminal responsibility, as the Statute does not criminalise *attempted* contributions. As far as evidence for actual weapons purchases is concerned, most of the evidence relates to purchases of non-lethal weapons, such as tear gas grenades, stun grenades and guns to shoot rubber bullets [see, for example, CIV-OTP-0028-0304 and CIV-OTP-0028-0318]. As far as the alleged weapons stock at the presidential palace is concerned, it is not clear from the evidence that these weapons were distributed in the knowledge that those who received them formed a group who intended to kill civilians.

¹⁷ With regard to the evidence of money paid to Charles Blé Goudé, I do not believe that this can be taken into consideration, as these two payments took place in 2004 and 2007, i.e. well before the alleged group acting with a common purpose was formed. As far as money paid to other organisations during the relevant period is concerned, according to the available evidence, the sums involved were rather modest, i.e. the equivalent of a few hundreds of Euros per month per organisation [see, e.g., payments to Serge Koffi : CFA 100,000 on 18 November 2010 (CIV-OTP-0025-0615); CFA 100,000 on 21 January 2011 (CIV-OTP-0025-0634); CFA 100.000 on 4 March 2011 (CIV-OTP-0025-0645); CFA 100,000 on 18 March 2011 (CIV-OTP-0025-0651), totalling +/- EUR 600; payments to Zéguen Touré (on behalf of GPP): CFA 200,000 on 18 November 2010 (CIV-OTP-0025-0616); CFA 200,000 on 5 January 2011 (CIV-OTP-0025-0626); CFA 200,000 on 21 January 2011 (CIV-OTP-0025-0633); CFA 200,000 on 4 March 2011 (CIV-OTP-0025-0644); CFA 200.000 on 18 March 2011 (CIV-OTP-0025-0652), totalling +/- EUR 1,500]. Considering that, according to the available evidence on this point, the price of one AK-47 was said to be around USD 1,200 [CIV-OTP-0021-2640], it is clear that these funds can hardly be considered as “significant” contributions in the sense of article 25(3)(d), even if it were accepted that they were given in support of the criminal activities of the groups involved.

¹⁸ As indicated in the Minority Opinion in the case *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3436-AnxI, para. 287, I am of the view that when contributions are generic in nature (i.e. they can be used for criminal as well as noncriminal purposes) and there is no evidence that the contributor had the aim of furthering the criminal activity of the group acting with a common purpose (i.e. in situations where only article 25(3)(d)(ii) would be applicable), it is particularly important to analyse whether the accused’s assistance is specifically directed towards the criminal or noncriminal activities of the relevant group. The available evidence in this case is too scant, in my view, to conclude that the alleged contributions were aimed at the commission of crimes against civilians.

11. Finally, as far as the charges under article 28 of the Statute are concerned, I consider the evidentiary record to be rather ambiguous. It is quite clear, in my view, that Laurent Gbagbo knew that civilians were being harmed by some FDS units and by other armed groups loyal to him. With regard to the former, there is some evidence showing that Laurent Gbagbo's putative government took a number of steps to have the alleged crimes investigated and prosecuted.¹⁹ However, whether these steps were sufficient to prevent or repress the commission of further crimes - or indeed to investigate and prosecute the perpetrators of the ones already committed - depends to a large extent on the question as to whether they were genuine efforts to stop and/or sanction the violence against civilians. This question cannot be resolved at this stage of the proceedings. Accordingly, given that doubts at the confirmation stage should not automatically work against the Prosecutor,²⁰ I could have, in principle, envisaged confirming the charges on the basis of article 28. However, I would only confirm crimes that were allegedly committed by FDS members or by militia and mercenaries operating within

¹⁹ For example, at the governmental level, there is evidence that Laurent Gbagbo created the so-called *Commission Internationale d'Enquête* in response to events during and after the RTI march. Although the 'report' of the Commission is indeed extremely thin [see CIV-OTP-0045-0379 at 0381], it is noteworthy that the UN did not immediately consider the measure as inadequate or disingenuous [see, e.g. CIV-OTP-0044-0975 at 0978 and CIV-OTP-0044-1341 at 1348]. On 7 March 2011, the then Minister of Justice and Human Rights wrote a letter to Ivorian prosecutors, instructing them to take urgent measures to investigate the post-election violence, to apprehend the perpetrators and to bring them to justice. [CIV-OTP-0001-0264]. The same minister later stated in a public speech that the government was taking preventative measures and that he had ordered criminal investigations without discrimination [CIV-OTP-0001-0256]. There is also some evidence indicating that investigations were ordered at the lower level [see, e.g., CIV-OTP-0045-1413, transmission by police commissioner of a police report concerning the killing of two RHDP supporters by CECOS during the RTI March. The transmission letter indicates that an investigation has been opened; CIV-OTP-0001-0285 at 0286, where the *Commissaire du Gouvernement* instructs the *Groupe de Documentation et de Recherche de la Gendarmerie Nationale à Abidjan* on 24 March 2011 to conduct a full investigation into the women's march and the Abobo mortar shelling.] A number of witnesses also provided evidence that it was not possible to investigate alleged crimes in the Abobo area because of security concerns [see, e.g., Witness P-321, CIV-OTP-0046-1005, at 1006-7].

²⁰ As long as there is a realistic possibility that such doubts can be resolved in favour of the Prosecutor at trial, see para. 4 *supra*.

the FDS command structure. With regard to crimes allegedly committed by other pro-Gbagbo armed groups, who operated outside the FDS command structure, I am not convinced by the available evidence that there are substantial grounds to believe that the members of these groups can be considered as “subordinates under [Laurent Gbagbo’s] effective authority and control” in the sense of article 28(b) of the Statute.

12. As a final point, I want to make it very clear that, while I am not convinced that the evidence in the record suffices to commit Laurent Gbagbo to trial for the charges under article 25(3)(a),(b) and (d), I do not deny that horrendous crimes were committed against civilians by forces loyal to Laurent Gbagbo. However, as a judge of the Pre-Trial Chamber of this Court, it is my duty to assess whether the case against Laurent Gbagbo, as formulated by the Prosecutor in the Amended Document Containing the Charges, is sufficiently strong to go to trial. It is my considered opinion that, at least as far as the charges under article 25(3)(a),(b) and (d) are concerned, it is not.



Judge Christine Van den Wyngaert

Dated this Thursday, 12 June 2014

At The Hague, The Netherlands