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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

Redacted version of the "Response to the "Corrigendum de la « Requête afin que soit déclaré irrecevable au fond le Document Contenant les Charges (ICC-02/11-01/11-592-Conf-Anx2-Corr2) déposé par le Procureur le 20 janvier 2014 »"

Source: Office of Public Counsel for Victims

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I. PROCEDURAL BACKGROUND

1. On 3 June 2013, the majority of Pre-Trial Chamber I (the “Chamber”), Judge Fernández de Gurmendi dissenting,¹ issued the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Adjournment Decision”), whereby the Chamber decided to adjourn the confirmation of charges hearing and requested the Prosecution to consider providing further evidence or conducting further investigation with respect to all charges.² The Chamber also ordered the Prosecution to submit by no later than 15 November 2013 an amended document containing the charges, an amended list of evidence and an updated consolidated Element Based Chart.³

2. On 8 November 2013, the Chamber suspended the calendar established in the Adjournment Decision considering the significance of the Prosecution’s appeal against the Adjournment Decision pending at that time.⁴

3. On 16 December 2013, the Appeals Chamber dismissed the Prosecution’s appeal against the Adjournment Decision, confirming the latter.⁵

4. On 17 December 2013, the Chamber ordered the Prosecution to submit by 13 January 2014 an amended document containing the charges, an amended list of evidence and an updated consolidated Element Based Chart.⁶ The Office of Public

¹ See the “Dissenting opinion of Judge Silvia Fernández de Gurmendi”, No. ICC-02/11-01/11-432-Anx-Corr, 6 June 2013.

² See the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-432, 3 June 2013 (the “Adjournment Decision”), p. 22.

³ *Idem*, p. 23.

⁴ See the “Decision on the ‘Prosecution’s request pursuant to Regulation 35 for variation of time limit to file updated document containing the charges, list of evidence and consolidated elements-based chart’” (Pre-Trial Chamber I), No. ICC-02/11-01/11-557, 8 November 2013, paras. 12-13.

⁵ See the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’” (Appeals Chamber), No. ICC-02/11-01/11-572 OA5, 16 December 2013.

⁶ See the “Decision establishing a calendar for further proceedings” (Pre-Trial Chamber I), No. ICC-02/11-01/11-576, 17 December 2013, p. 6.

Counsel for Victims (the “Office” or “OPCV”) acting as common legal representative of the victims authorised to participate in the proceedings was granted the possibility to file final written submissions in response to the Defence’s observations on the Prosecution’s evidence by 27 February 2014.⁷

5. On 13 January 2014, the Prosecution filed its *Document amendé de notification des charges*, the *Inventaire amendé des éléments de preuve à charge*, and the *Tableau amendé des éléments constitutifs des crimes*.⁸ The Prosecution filed *corrigenda* for some of these documents one day later.⁹

6. On 20 January 2014, the Prosecution filed a second corrected version of the *Document amendé de notification des charges*, with footnotes (the “Amended DCC”).¹⁰

7. On 27 January 2014, the Single Judge rejected the Defence’s request to declare inadmissible the Amended DCC on formal grounds.¹¹

8. On 30 January 2014, the Defence filed a request to hold a status conference to urgently discuss a number of issues related to the adjournment of the confirmation of charges hearing, the rights of the Defence and the Amended DCC (the “Status Conference Request”).¹²

⁷ *Idem*.

⁸ See the “Prosecution’s Submission of *Document amendé de notification des charges*, *l’Inventaire amendé des éléments de preuve à charge*, and *le Tableau amendé des éléments constitutifs des crimes*, and Response to issues raised by Pre-Trial Chamber I”, No. ICC-02/11-01/11-592, 13 January 2014, with eight annexes, including “Annexe 1 : Document amendé de notification des charges”, No. ICC-02/11-01/11-592-Anx1, 13 January 2014.

⁹ See the « Annexe 2 », No. ICC-02/11-01/11-592-Conf-Anx2-Corr, 14 January 2014; the « Annexe 3 », No. ICC-02/11-01/11-592-Conf-Anx3-Corr, 14 January 2014; the « Annexe 4 », No. ICC-02/11-01/11-592-Conf-Anx4-Corr, 14 January 2014; and the « [REDACTED] », No. ICC-02/11-01/11-592-Conf-Anx6-Corr, 14 January 2014.

¹⁰ See the « Annexe 2 - Version publique expurgée de ICC-02/11-01/11-592-Conf-Anx2-Corr2 : Document amendé de notification des charges avec notes de bas de page », No. ICC-02/11-01/11-592-Anx2-Corr2-Red, 4 February 2014 (the “Amended DCC”).

¹¹ See the “Decision on the ‘*Requête afin que le « Document amendé de notification des charges » déposé par le Procureur le 13 janvier 2014 et les documents afférents soient déclarés irrecevables et écartés par la Chambre préliminaire.*” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-595, 27 January 2014.

¹² See the “Corrigendum de la « Requête urgente aux fins d’organisation d’une Conférence de mise en état »”, No. ICC-02/11-01/11-597-Corr, 30 January 2014 (the “Status Conference Request”).

9. On 31 January 2014, the Defence filed a request for the inadmissibility of the Amended DCC on substantive grounds (the “Request”),¹³ accompanied by a confidential annex (the “Annex to the Request”).¹⁴

10. On 3 February 2014, the Single Judge granted the Common Legal Representative access to the confidential version of the Request, including the Annex to the Request, and authorised her to submit a response to this document by 7 February 2014.¹⁵

11. On 5 February 2014, the Pre-Trial Chamber rejected the Status Conference Request, upon finding, *inter alia*, that the Defence has filed written requests dealing with most of the issues proposed for discussion at the status conference, which together with any responses by the Prosecution and by the OPCV will be sufficient for the Chamber to decide.¹⁶

12. Accordingly, the Principal Counsel of the OPCV, acting as Common Legal Representative of Victims (the “Common Legal Representative”),¹⁷ submits the following response to the Request.

¹³ See the “Corrigendum de la « Requête afin que soit déclaré irrecevable au fond le document contenant les charges (ICC-02/11-01/11-592-Conf-Anx2-Corr2) déposé par le Procureur le 20 janvier 2014 », No. ICC-02/11-01/11-598-Corr-Red, 31 January 2014 (the “Request”).

¹⁴ See the « [REDACTED] », No. ICC-02/11-01/11-598-Conf-Anx, 30 January 2014 (the “Annex to the Request”).

¹⁵ See the e-mail message received from the Senior Legal Adviser to the Pre-Trial Division on 3 February 2014 at 16:56 h.

¹⁶ See the “Decision on a Defence request for a status conference” (Pre-Trial Chamber I), No. ICC-02/11-01/11-604, 5 February 2014, paras. 9-10.

¹⁷ 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.

II. SUBMISSIONS

1. On the adjudication *in limine* of the Request

13. The Common Legal Representative submits that the Request should not be adjudicated *in limine* as pleaded by the Defence,¹⁸ but decided upon together with the examination of the charges and the evidence pursuant to rule 122(6) of the Rules of Procedure and Evidence.

14. As noted by the Defence,¹⁹ one year ago the Chamber decided orally to settle a similar preliminary request by ruling to examine it with the charges and evidence brought by the Prosecution and therefore joining it with the eventual decision concerning the merits of the document containing the charges (the “Joinder of Issues Decision”).²⁰ Consequently, it seems that the Defence’s pleading for an *in limine* ruling on the Request is actually a motion for reconsideration of the Joinder of Issues Decision.

15. In this regard, the Common Legal Representative notes that Chambers have already clarified in numerous occasions that a motion for reconsideration is not a legal remedy foreseen in the legal texts of the Court and, consequently, they have dismissed *in limine* many such requests.²¹

¹⁸ See the Request, *supra* note 13, paras. 54 and 57.

¹⁹ *Idem*, par. 53.

²⁰ See the oral decision in the transcript of the hearing of 19 February 2013, No. ICC-02/11-01/11-T-14-ENG ET, p. 42, lines 23-24, referring to the Defence’s oral motion submitted earlier in the same hearing alleging lack of precision in the essential elements underpinning the charges. *Idem*, p. 20, lines 3-6.

²¹ See the “Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification” (Pre-Trial Chamber II), No. ICC-02/04-01/05-60, 28 October 2005, paras. 18 and 21; the “Decision on the Prosecution Motion for Reconsideration” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-123, 23 May 2006, p. 3; the “Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/06-166, 23 June 2006, par. 10; and the “Decision on the « *Requête de la Défense aux fins d’obtenir de la Chambre de Première Instance III des décisions appropriées avant l’ouverture du Procès prévue pour le 22 Novembre 2010* »” (Trial Chamber III), No. ICC-01/05-01/08-1010, 16 November 2010, par. 9

16. A limited number of motions for reconsideration have been exceptionally entertained. However, said motions have mostly concerned formal issues and have been evaluated against a very strict test, namely that “[i]rregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory”.²²

17. The Common Legal Representative submits that the Request, if not dismissed *in limine* by the Chamber, cannot be granted because it does not meet the applicable test for reconsideration quoted in the preceding paragraph. The decision actually targeted by the Request, namely the Joinder of Issues Decision, cannot be said to be “manifestly unsound” and giving rise to “manifestly unsatisfactory” consequences.

18. The Common Legal Representative submits that the Joinder of Issues Decision is perfectly sound. The allegation by the Defence that the Amended DCC contains amended charges that are not sufficiently precise can only be ruled upon after examining the Amended DCC in detail, together with the additional evidence submitted by the Prosecution in support of said charges.²³ It would run against judicial economy for the Chamber to conduct a cursory review of the Amended DCC and the considerable amount of additional evidence submitted by the Prosecution in order to rule on the Request alone, prior to considering the evidence scheduled for subsequent submission by the Defence and the possible observations eventually filed by the parties and the participants.²⁴

19. Moreover, the Common Legal Representative submits that the Joinder of Issues Decision will not give rise to manifestly unsatisfactory consequences because

²² See the “Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010” (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, par. 18 (“[i]rregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory”). See also the “Decision on the request to present views and concerns of victims on their legal representation at the trial phase” (Trial Chamber V), No. ICC-01/09-01/11-511, 13 December 2012, par. 6.

²³ See the “Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute” (Pre-Trial Chamber III), No. ICC-01/05-01/08-388, 4 March 2009 (dated 3 March 2009), par. 17 (“*Under subparagraph (ii) [of article 61(7), referring to the request to the Prosecutor to consider amending a charge], no further evidence is required. [...] a complete and in-depth analysis of all the evidence is unwarranted during this limited examination*”).

²⁴ See the “Decision establishing a calendar for further proceedings”, *supra* note 6, p. 6.

it will not prevent the Chamber from eventually adjudicating on the Request. Moreover, contrary to the Defence's contention,²⁵ it will not limit the Defence's capacity to focus on the evidence submitted by the Prosecution in its eventual response to the Amended DCC.

20. In this regard, the Common Legal Representative notes the Defence's request to be granted more time to submit its observations on the Prosecution's evidence and to file its amended list of evidence.²⁶ The Common Legal Representative does not oppose granting a limited extension of the deadline for this purpose,²⁷ but underlines that an extension of this deadline will render moot the Defence's only argument supporting the adjudication *in limine* of the Request, namely the lack of time to respond to the Prosecution's allegations and evidence.²⁸

2. On the substance of the Request

21. In the event that the Chamber decides to adjudicate separately the Request, the Common Legal Representative submits that, contrary to the Defence's contention, the charges in the Amended DCC have not been amended and they are defined with the precision required by the legal instruments of the Court. Consequently, the remedy requested by the Defence, namely to declare the Amended DCC inadmissible, cannot be warranted.

i. The charges in the Amended DCC have not been amended

²⁵ See the Request, *supra* note 13, par. 56.

²⁶ See the "Demande de prorogation des délais fixés par la Chambre préliminaire le 17 décembre 2013 afin de permettre à la défense de déposer des observations écrites sur la preuve du Procureur", No. ICC-02/11-01/11-603, 4 February 2014, par. 50.

²⁷ See the "Response to the Defence's « Demande de prorogation des délais fixés par la Chambre préliminaire le 17 décembre 2013 afin de permettre à la défense de déposer des observations écrites sur la preuve du Procureur »", No. ICC-02/11-01/11-610, 6 February 2014, par. 9, notified on 7 February 2014.

²⁸ See the Request, *supra* note 13, paras. 55-56.

22. The Common Legal Representative submits that the Amended DCC discloses that the Prosecution has strictly followed the Chamber's request to consider providing further evidence or conducting further investigation with respect to the existing charges in the original document containing the charges, mindful of all the questions identified by the Chamber in the Adjournment Decision.²⁹ As stated by the Prosecution,³⁰ the Amended DCC only provides further factual details and additional evidence on the charges discussed during the confirmation hearing.

23. The Amended DCC is not "*materially and substantially different*"³¹ to the document containing the charges filed on 17 January 2013. In this regard and contrary to the Defence's contention,³² the common plan was already alleged by the Prosecution to have originated *before* 2010 in the document containing the charges filed on 17 January 2013,³³ a fact expressly clarified in the Amended DCC by indicating that it originated in 2000.³⁴

²⁹ See the "Adjournment Decision", *supra* note 2, par. 44 and p. 22.

³⁰ See the "Prosecution's Submission of *Document amendé de notification des charges, l'Inventaire amendé des éléments de preuve à charge, and le Tableau amendé des éléments constitutifs des crimes*, and Response to issues raised by Pre-Trial Chamber I'", *supra* note 8, paras. 7-8.

³¹ See the "Decision on the 'Defence request to exclude the Prosecution's amended document containing the charges and amended list of evidence'" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-306, 22 July 2011, p. 5.

³² See the "Demande de prorogation des délais fixés par la Chambre préliminaire le 17 décembre 2013 afin de permettre à la défense de déposer des observations écrites sur la preuve du Procureur", *supra* note 26, par. 49.

³³ See the « Annexe 1 : Version publique expurgée du Document amendé de notification des charges », No. ICC-02/11-01/11-357-Anx1-Red, 25 January 2013, par. 1 (« *La présente affaire porte sur la responsabilité pénale de Laurent GBAGBO (GBAGBO) pour avoir élaboré et mis en œuvre une politique visant à le maintenir au pouvoir par tous les moyens, en qualité de Président de la Côte d'Ivoire, notamment au travers d'attaques soutenues, minutieusement planifiées, meurtrières, généralisées et systématiques, lancées contre les civils qui s'opposaient à lui. [...] De la période antérieure à novembre 2010 [le commencement du second tour de l'élection présidentielle] à son arrestation le 11 avril 2011, GBAGBO a conçu cette politique et a planifié, organisé, ordonné, encouragé, autorisé et permis diverses mesures et actions précises dans le cadre de sa mise en œuvre.* »)

³⁴ See the Amended DCC, *supra* note 10, par. 2 (« *Dès son accession à la Présidence en 2000, GBAGBO a eu pour objectif de se maintenir au pouvoir, y compris en réprimant ou en attaquant violemment ceux qui constituaient une menace pour son régime. Sachant l'élection présidentielle inévitable, GBAGBO a, conjointement avec son entourage immédiat, conçu et mis en œuvre un Plan commun afin de se maintenir à la Présidence par tous les moyens nécessaires.* »)

24. Moreover, the four specific incidents for which Mr. Gbagbo's responsibility is alleged remain unchanged,³⁵ namely (i) the violence during and after the demonstrations before the seat of the *Radiotélévision ivoirienne* in Abidjan on 16 December 2010,³⁶ (ii) the attack against a women's demonstration in Abobo on 3 March 2011,³⁷ (iii) the shelling of a market and its surroundings in Abobo on 17 March 2011,³⁸ and (iv) the violence in Yopougon around 12 April 2011.³⁹ As recently noted by the Single Judge, these incidents are known to the Defence since at least 17 January 2013.⁴⁰

25. Regarding the changes alleged by the Defence in the other incidents supporting the contextual elements of the alleged crimes against humanity,⁴¹ the Common Legal Representative submits that the factual scope of the charges presented in the Amended DCC remains the same as the one envisaged in the document containing the charges filed on 17 January 2013. As indicated by the Chamber,⁴² the Prosecution has merely provided "further factual details" regarding the particular incidents pointed out by the Defence in the Annex to the Request. Accordingly, contrary to the Defence's contention,⁴³ the "facts and circumstances" of the case have not changed in the Amended DCC.

26. The Common Legal Representatives notes that the Appeals Chamber has still not determined how narrowly or broadly the expression "*facts and circumstances*"

³⁵ See the Amended DCC, *supra* note 10, par. 221.

³⁶ See the Amended DCC, *supra* note 10, paras. 99-118, 217(i), 218(i) and 219(i). See also [REDACTED].

³⁷ See the Amended DCC, *supra* note 10, paras. 119-121, 217(ii) and 219(ii). See also [REDACTED].

³⁸ See the Amended DCC, *supra* note 10, paras. 122-125, 217(iii) and 219(iii). See also [REDACTED].

³⁹ See the Amended DCC, *supra* note 10, paras. 126-128, 217(iv), 218(ii) and 219(iii). See also [REDACTED].

⁴⁰ See the "Decision on the Defence request for extension of time" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-589, 10 January 2014, par. 12.

⁴¹ See the Request, *supra* note 13, par. 34. See also the "Demande de prorogation des délais fixés par la Chambre préliminaire le 17 décembre 2013 afin de permettre à la défense de déposer des observations écrites sur la preuve du Procureur", *supra* note 26, par. 48.

⁴² See the "Decision on the Defence request for extension of time", *supra* note 40, par. 12.

⁴³ See the Request, *supra* note 13, par. 35.

described in the charges” should be understood,⁴⁴ but has already defined its content as *“the factual allegations which support each of the legal elements of the crime charged”*.⁴⁵ In this case, the Pre-Trial Chamber, following the approach of the *ad hoc* tribunals, has found that the “facts and circumstances” of an “attack” as a contextual element of a crime against humanity under article 7 of the Rome Statute may not be each individual and particularized incident as such, but *“a series of inhumane acts or [...] an inhumane act of extraordinary magnitude”*.⁴⁶

27. On this basis, the Common Legal Representative submits that the variations pointed out by the Defence regarding the particular dates, times or exact number of victims in particular locations within the same areas of a limited territory and within the same period of time envisaged in the document containing the charges filed on 17 January 2013 are not changes to the “facts and circumstances” of this case. These variations are mere changes in the evidence supporting the same “facts and circumstances”, *i.e.* the series of inhumane acts alleged by the Prosecution.

28. The possibility for the Prosecution to clarify the charges during the adjournment of the confirmation hearing is reinforced by several decisions adopted

⁴⁴ See the “Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’” (Appeals Chamber), No. ICC-01/04-01/07-3363 OA13, 27 March 2013, par. 50.

⁴⁵ See the “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’” (Appeals Chamber), No. ICC-01/04-01/06-2205, 8 December 2009, par. 90, footnote 163.

⁴⁶ See the “Public redacted version of ‘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, 20 December 2011, par. 49 (emphasis added). See also 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, 15 November 2011, par. 53; 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, 1 April 2010 (dated 31 March 2010), par. 95; 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, par. 83; ICTY, *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgment, 17 December 2004, par. 94; and ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, par. 101.

by Chambers regarding clarifications made before the start of the trial to *charges already confirmed*. Even in that scenario, potentially subsequent to the current one, several Pre-Trial Chambers have admitted the possibility for the Prosecution to clarify the alleged number of victims and the material scope of the charges upon finding that no prejudice ensues for the Defence.

29. In the *Kenyatta* case, the Trial Chamber held that changes to the number of victims in the charging document similar to the ones identified in the Request do not constitute *per se* an amendment to the charges if the Pre-Trial Chamber has not already rejected or drawn conclusions on the numbers alleged in the original document containing the charges.⁴⁷ Moreover, it was held that the silence of a Pre-Trial Chamber on a statement of fact in its decision on a document containing the charges must not be read as a negative finding regarding the corresponding allegation.⁴⁸

30. In the same case, the Pre-Trial Chamber subsequently granted authorisation to add a factual allegation to the confirmed charges on the basis of the Prosecution's possibility to continue the investigations even beyond the confirmation hearing "*if this is necessary in order to establish the truth*",⁴⁹ and upon finding that the Prosecution did not deliberately refrain from presenting evidence which was available prior to the confirmation hearing.⁵⁰

31. Considering the *rationale* of the abovementioned decisions, the Common Legal Representative submits that the clarifications made by the Prosecution in the

⁴⁷ See the "Decision on the content of the updated document containing the charges" (Trial Chamber V), No. ICC-01/09-02/11-584, 28 December 2012, par. 50.

⁴⁸ *Idem*.

⁴⁹ See the "Corrigendum to 'Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'" (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-02/11-700-Corr, 22 March 2013, par. 35, referring to the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/04-01/06-568, 13 October 2006, par. 52.

⁵⁰ See the "Corrigendum to 'Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", *supra* note 49, par. 41.

Amended DCC are not inconsistent with the Adjournment Decision. The Adjournment Decision did not make any findings on the number of victims alleged by the Prosecution,⁵¹ and nowhere in the Request there are allegations that the additional evidence submitted with the Amended DCC was available to the Prosecution prior to the confirmation hearing.

32. Moreover, article 61(7)(c)(ii) of the Rome Statute cannot be argued to be a limit to the Amended DCC in this case. This provision is meant to address “*a problem as to the legal characterisation of the facts presented because the evidence submitted ‘appears to establish a different crime’*”,⁵² whereas the crimes against humanity alleged in the Amended DCC are exactly the same as those in the original document containing the charges, namely murder (article 7(1) of the Rome Statute),⁵³ rape (article 7(1)(g) of the Rome Statute),⁵⁴ other inhumane acts (article 7(1)(k) of Rome the Statute),⁵⁵ and persecution (article 7(1)h) of the Rome Statute).⁵⁶

33. In conclusion, the Common Legal Representative submits that the variations identified by the Defence in the incidents supporting the contextual elements of the crimes against humanity alleged by the Prosecution do not amount to an amendment of the charges but reflect clarifications and evidentiary changes compliant with the terms of the Adjournment Decision.

34. Lastly, the Common Legal Representative notes that the modes of liability alleged against Mr. Gbagbo were mentioned *in toto* by the Prosecution during the confirmation of charges hearing⁵⁷ and were elaborated upon in its subsequent written

⁵¹ See the “Adjournment Decision”, *supra* note 2, paras. 36 and 44(4)(c).

⁵² See the “Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute”, *supra* note 23, par. 17.

⁵³ See the Amended DCC, *supra* note 10, par. 232.

⁵⁴ *Idem*, par. 233.

⁵⁵ *Ibid.*, par. 234.

⁵⁶ *Ibid.*, par. 235.

⁵⁷ See the transcript of the hearing of 22 February 2013, No. ICC-02/11-01/11-T-17-Red-ENG, p. 28, lines 10-25 to p. 29, lines 1-9.

submissions,⁵⁸ where a further explanation was also provided regarding the alleged responsibility under article 28 of the Rome Statute.⁵⁹

35. Against this background, the Common Legal Representative disagrees with the Defence's allegation that additional modes of liability have been introduced in the Amended DCC.⁶⁰ The modes of liability alleged by the Prosecution have not been amended pursuant to article 61(7)(c)(ii) of the Rome Statute in the Amended DCC; they have just been clarified and made more precise pursuant to the Pre-Trial Chamber's questions during the confirmation hearing⁶¹ and the Pre-Trial Chamber's request for further evidence under article 61(7)(c)(i) of the Rome Statute after the hearing.⁶²

36. In the Amended DCC, the Prosecution only reiterates with further evidentiary support that the same facts can give rise to criminal responsibility under articles 25(3)(a), (b), (d) and 28(a) or (b) of the Rome Statute. This clarification by the Prosecution is consistent with Mr. Gbagbo's right to be informed "*in detail*" of the nature, cause and content of the charges, pursuant to article 67(1)(a) of the Rome Statute.

ii. The charges in the Amended DCC are sufficiently precise

37. The Common Legal Representative submits that the charges in the Amended DCC are defined with the degree of precision required by the legal texts of the Court.

⁵⁸ See the "Public Redacted Version of Prosecution's submission on issues discussed during the Confirmation Hearing", No. ICC-02/11-01/11-420-Red, 21 March 2013, paras. 5-9.

⁵⁹ See the Amended DCC, *supra* note 10, paras. 130, 204, 211, 227.

⁶⁰ See the Request, *supra* note 13, paras. 24 and 28-29.

⁶¹ See the transcript of the hearing of 22 February 2013, No. ICC-02/11-01/11-T-17-Red-ENG, p. 27, lines 17-24.

⁶² See the "Adjournment Decision", *supra* note 2, par. 44(2), (4) and (5).

38. Contrary to the assumption supporting the Defence's arguments,⁶³ a document containing the charges which does not explain at length the Prosecution's understanding of the legal requirements envisaged in the Rome Statute is not *per se* vague and imprecise.

39. Pursuant to regulation 52 of the Regulations of the Court, the legal component of the document containing the charges is limited to "*a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28*".⁶⁴ Rule 121 of the Rules of Procedure and Evidence further provides for "*a detailed description of the charges*".⁶⁵ Said "legal characterisation" and "detailed description" are fulfilled by indicating the particular legal provisions which the Prosecution deems to have been breached by the alleged conduct of a suspect.⁶⁶

40. The Defence appears to confuse the document containing the charges, which is filed *before* the confirmation hearing pursuant to article 61(3)(a) of the Rome Statute, with the "pre-trial briefs" submitted by the parties *before* the start of trial and with the "concluding observations" or "closing briefs" usually requested from the parties and participants *after* the completion of the submission of evidence during the trial. It is only in the "pre-trial" and "closing" briefs where the parties and participants are expressly requested to state in detail their understanding of the legal requirements to be met under the Rome Statute.⁶⁷

⁶³ See the Request, *supra* note 13, paras. 48 and 52. See also the "Demande de prorogation des délais fixés par la Chambre préliminaire le 17 décembre 2013 afin de permettre à la défense de déposer des observations écrites sur la preuve du Procureur", *supra* note 26, par. 47.

⁶⁴ See regulation 52(c) of the Regulations of the Court.

⁶⁵ See rule 121(3) of the Rules of Procedure and Evidence.

⁶⁶ See the "Decision on the date of the confirmation of charges hearing and proceedings leading thereto" (Pre-Trial Chamber I), No. ICC-02/11-01/11-325, 17 December 2012, par. 29.

⁶⁷ See for instance the "Order on the timetable for closing submissions" (Trial Chamber I), No. ICC-01/04-01/06-2722, 12 April 2011, par. 4(v) ("*The final submissions shall address all the relevant legal and factual issues arising in the case. These should include, inter alia: [...] What does the prosecution need to establish in this case under Article 25(3)(a) of the Statute?*"); the "Decision on the schedule leading up to trial" (Trial Chamber V), No. ICC-01/09-01/11-440, 9 July 2012, par. 15 ("*The prosecution shall provide a document explaining its case with reference to the evidence it intends to rely on at trial. [...] The pre-trial brief [...] shall clearly explain how the evidence relates to the charges*"); and the "Public redacted version of

41. The Common Legal Representative submits that the abovementioned approach is consistent with the practice of Pre-Trial Chambers regarding the provision by the Prosecution of lists or charts linking the evidence to the legal element(s) they are meant to support, also known as “in-depth analysis charts” or “element based charts”.⁶⁸ The judicial requests for the Prosecution to submit this sort of documents are not accompanied by requests for the Prosecution to explain its understanding of the legal elements of the modes of liability envisaged in the lists or charts.

42. Judicial requests for “in-depth analysis charts” or “element based charts” are just accompanied by a template reflecting *verbatim* expressions from article 25(3) of the Rome Statute.⁶⁹ In the practice of the Court, the provision of additional information on the evidence on which the Prosecution intends to rely upon during the confirmation hearing, such as the particular element of a mode of liability to which the evidence relates, is not required by Pre-Trial Chambers.⁷⁰

43. Lastly, the Common Legal Representative contends that the legal texts of the Court do not oblige the Prosecution to choose just one mode of liability where the evidence suggests that the suspect may be responsible under more than one mode of liability *for a conduct comprising several incidents*.⁷¹

Order on the arrangements for the submission of the written and oral closing statements (regulation 54 of the Regulations of the Court) (ICC-01/04-01/07-3218-Conf) (Trial Chamber II), No. ICC-01/04-01/07-3218-Red-tENG, 27 November 2012, par. 10 (“*In respect of the content of the [closing] briefs, the Chamber instructs the parties and participants to set out their legal and factual submissions concerning the contextual elements of the crimes against humanity and war crimes, the elements of the crimes contained in the decision on the confirmation of charges, and the criminal responsibility of the Accused*”).

⁶⁸ Pre-Trial Chamber II has recently found that this type of documents is not compulsory under the Statute or the Rules of Procedure and Evidence. See the “Decision on the ‘Defence request for an in-depth analysis chart’ submitted by the Defence for Mr Jean-Pierre Bemba Gombo” (Pre-Trial Chamber II, Single Judge), No. ICC-01/05-01/13-134, 28 January 2014, paras. 5-6.

⁶⁹ See for instance the “Annex to the Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence” (Pre-Trial Chamber III), No. ICC-01/05-01/08-232-Anx, 10 November 2008, p. 9.

⁷⁰ See for instance the “Decision on issues relating to disclosure” (Pre-Trial Chamber I), No. ICC-01/04-01/10-87, 30 March 2011, par. 13.

⁷¹ See the Request, *supra* note 13, par. 49.

44. As concluded by Pre-Trial Chamber II in the *Bemba* case, “as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges”.⁷² Pursuant to this approach, the enumeration of article 25(3)(a) of the Rome Statute as the first provision for which Mr. Gbagbo’s responsibility is alleged in the Amended DCC clearly points out that indirect co-perpetration is the mode of liability generally alleged for the four particular incidents.⁷³

45. As explained by the Prosecution,⁷⁴ the reference made to other modes of liability is subsidiary and for the purpose of ensuring Mr. Gbagbo’s rights under article 67(1)(a) of the Rome Statute.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber:

To reject *in limine* the Defence’s Request;

Or, in the alternative, to dismiss the Defence’s Request as unfounded.



Paolina Massidda
Principal Counsel

Dated this 19th day of February 2014

At The Hague, The Netherlands

⁷² 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”, *supra* note 46, par. 202.

⁷³ See the Amended DCC, *supra* note 10, paras. 129 and 211.

⁷⁴ See the transcript of the hearing of 22 February 2013, No. ICC-02/11-01/11-T-17-Red-ENG, p. 27, lines 9-10; and the transcript of the hearing of 28 February 2013, ICC-02/11-01/11-T-21-ENG ET, p. 16, lines 10-17.