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PRE-TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

Response of the Common Legal Representative to the "Prosecution's application for leave to appeal the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute""

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. On 23 November 2011, Pre-Trial Chamber III issued an arrest warrant for Mr Laurent Gbagbo,¹ who was surrendered to the Court on 30 November 2011. During the first appearance of Mr Gbagbo, on 5 December 2011, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.²

2. On 4 June 2012, the Single Judge of Pre-Trial Chamber I (the “Single Judge”) issued a “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”³ by which she granted 139 victims the right to participate at the confirmation of charges hearing and in related proceedings.⁴ Furthermore, the Single Judge appointed a counsel from the Office of Public Counsel for Victims (the “Office”) as the Common legal representative of all the victims admitted to participate in the proceedings (the “Common Legal Representative”).⁵

3. On 12 June 2012, the Single Judge decided to postpone the confirmation of charges hearing to 13 August 2012.⁶

4. On 3 August 2012, the Single Judge decided that the “*commencement of the confirmation of charges hearing is postponed until the issue of Mr Gbagbo’s fitness to take part in the proceedings against him is resolved*”.⁷

¹ See the “Warrant Of Arrest For Laurent Gbagbo” (Pre-Trial Chamber III), No. ICC-02/11-01/11-1, 23 November 2011.

² See the transcripts of the hearing of 5 December 2011, No. ICC-02/11-01/11-T-1-ENG, p. 8.

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.

⁴ *Idem*, p. 25.

⁵ *Ibid.*, p. 26.

⁶ See the “Decision on the ‘Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-152-Red, 12 June 2012.

⁷ See the “Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-201, 3 August 2012 (dated 2 August 2012), p. 8.

5. On 2 November 2012, the Single Judge decided that Mr Gbagbo “*is able to meaningfully exercise his fair trial rights*” and “*is fit to take part in the proceedings against him*”.⁸

6. On 17 December 2012, Pre-Trial Chamber I (the “Chamber”) issued the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto” deciding that the confirmation of charges hearing would commence on 19 February 2013.⁹

7. On 6 February 2013, the Single Judge issued the “Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings”¹⁰ by which she granted to further 60 victims the right to participate at the confirmation of charges hearing and in related proceedings.¹¹

8. From 19 until 28 February 2013, the Chamber held the confirmation of charges hearing in the present case.

9. On 3 June 2013, the Chamber issued a “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, (the “Decision”)¹² wherein it decided, by majority with Judge Fernández de Gurmendi dissenting,¹³ to adjourn the confirmation of charges hearing and to request the

⁸ See the “Public redacted version - Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-286-Red, 2 November 2012, par. 101.

⁹ 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 (dated 14 December 2012).

¹⁰ See the “Corrigendum to 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, 8 February 2013.

¹¹ *Idem*, p. 22-23.

¹² 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 “Decision”).

¹³ See the “Corrigendum - Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute - Dissenting opinion of Judge Silvia Fernández de Gurmendi”, No. ICC-02/11-01/11-432-Anx-Corr, 6 June 2013 (the “Dissenting Opinion”).

Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges.¹⁴

10. On 10 June 2013, the Prosecution submitted a request for leave to appeal the Decision (the “Prosecution’s Request”)¹⁵ with respect to the three following issues:

- *“Whether the Decision correctly interpreted and applied the evidentiary standard under Article 61(7)” (the “First Issue”);*
- *“Whether in this case each “incident underlying the contextual elements” must be established to the standard of proof enshrined in Article 61(7)” (the “Second Issue”); and*
- *“Whether the Pre-Trial Chamber has the power to order the Prosecution to amend the Document Containing the Charges (“DCC”) by including additional facts” (the “Third Issue”).¹⁶*

11. Due to a problem with the Court’s electronic notification system, the Common Legal Representative was notified of the Prosecution’s Request only on 13 June 2013.

12. Consequently, in accordance with regulation 65(3) of the Regulations of the Court, the Common Legal Representative submits today her response to the Prosecution’s Request.

II. RESPONSE BY THE COMMON LEGAL REPRESENTATIVE

13. The Common Legal Representative fully supports the Prosecution’s Request and in particular the Prosecution’s line of reasoning that the three issues as identified arise from the Decision and meet the criteria for granting leave to appeal under article 82(1)(d) of the Rome Statute. Accordingly, the Common Legal Representative fully endorses the arguments of the Prosecution and she will not repeat said argumentation.

¹⁴ See the Decision, *supra* note 12, p. 22.

¹⁵ See the “Prosecution’s application for leave to appeal the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, No. ICC-02/11-01/11-435, 10 June 2013) (the “Prosecution’s Request”).

¹⁶ *Idem*, par. 3.

14. At the same time, the Common Legal Representative observes that each of the issues raised by the Prosecution encompasses a number of specific legal aspects; each of them arising from the Decision and which may, separately or together with others, constitute a distinct issue.

15. In this regard, the Common Legal Representative submits that Chambers of the Court have an inherent power to modify or to reformulate grounds of appeal raised by the parties when needed.¹⁷

16. Consequently, the Common Legal Representative submits that, should leave to appeal be granted, the Chamber might consider triggering its inherent power to modify and/or reformulate appealable issues raised by the Prosecution so as to reflect in a comprehensive manner each of the legal issues arising from the Decision.

1) *Regarding the First Issue*

17. The Common Legal Representative observes that the First Issue as raised by the Prosecution relates to the evidentiary standard to be applied for the purpose of the confirmation of charges stage and encompasses at least two legal sub-issues which might be examined separately.

18. The first sub-issue is whether the Majority erred in law in finding that for the purpose of the confirmation of charges the Prosecutor must “*present all her evidence*” and “*her strongest possible case based on a largely completely investigation*”.¹⁸

19. The Common Legal Representative concurs with the dissenting opinion of Judge Fernández de Gurmendi that by requesting the Prosecutor to present all her

¹⁷ See the “Decision on the prosecution and the defence applications for leave to appeal the “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”” (Trial Chamber I), No. ICC-01/04-01/06-2107, 3 September 2009, paras. 31 and 34.

¹⁸ See the Decision, *supra* note 12, paras. 25 and 37.

evidence and her strongest possible case based on a large and complete investigation, the Majority adopts an “*expansive interpretation of the applicable evidentiary standard at the confirmation of charges stage that exceeds what is required and indeed allowed by the Statute*” and places on the Prosecution a burden of proof which goes beyond the very limited scope of the confirmation of charges hearing and has no support within the legal framework of the Court.¹⁹ The Common Legal Representative also concurs with the Prosecutor that said requirement affects the fairness of the proceedings by touching upon the Prosecution’s opportunity under article 61(8) of the Rome Statute to offer additional evidence at a later stage of the proceedings, as well as, more generally, the Prosecution’s ability to present its case in due manner.²⁰

20. The Common Legal Representative submits in this regard that pursuant to article 61 of the Rome Statute “*the Prosecutor must only produce [for the purpose of the confirmation of charges proceedings] sufficient evidence to establish substantial grounds to believe that the person committed the crimes charged*”.²¹ Therefore said provision falls short from constituting a justification to compel the Prosecutor to provide “*all her evidence*” or, for that matter of fact, even the “*strongest possible*” evidence. Moreover, this hardening of the burden of proof goes against the principle according to which “*the threshold for the confirmation of charges [...] is lower than for conviction*”.²²

21. Furthermore, as emphasised by Judge Fernández de Gurmendi,²³ the current jurisprudence of the Court clearly states that “[t]he Prosecutor’s investigation may be

¹⁹ See the Dissenting Opinion, *supra* note 13, paras. 3 and 12-18.

²⁰ See the Prosecution’s Request, *supra* note 15, paras. 15-16.

²¹ See the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”” (Appeals Chamber), No. ICC-01/04-01/10-514 OA4, 30 May 2012, par. 47.

²² See 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 OA 3, 13 October 2006, par. 56. See also 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 OA, 3 February 2010, paras. 30-31

²³ See the Dissenting Opinion, *supra* note 13, paras. 14-16.

continued beyond the confirmation hearing”²⁴ notwithstanding the fact that the Appeals Chamber noted that “*ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing*”.²⁵ In a recent decision, the Single Judge of Pre-Trial Chamber II reiterated said jurisprudence in the following terms:

*“The Single Judge reiterates that the Prosecutor is not barred from continuing her investigations post confirmation of charges hearing when there is a genuine need to pursue certain investigative activities crucial for her case and for the principal goal of determining the truth. [...] As the Appeals Chamber has stated ‘[t]he duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth’”.*²⁶

22. The second sub-issue is whether the Majority erred in law in requesting the Prosecution to present, for the limited purpose of the confirmation of charges, specific types of evidence in addition to the ones explicitly referred to in article 61(5) of the Rome Statute, *i.e.* documentary and summary evidence.²⁷

23. The Common Legal Representative concurs with the dissenting opinion of Judge Fernández de Gurmendi that the Majority’s approach in this regard “*is particularly problematic at the confirmation hearing, both in light of article 61(5) of the Statute, which clearly states that the Prosecutor may rely exclusively on documentary and summary evidence, and, more generally, in light of the limited purpose of the confirmation hearing*”.²⁸ Furthermore, presenting additional evidence beyond the threshold required for purpose of confirmation hearing would, inevitably, have a significant impact on the expeditiousness of the proceedings²⁹ and may endanger the safety and

²⁴ See 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’”, *supra* note 22, par. 2.

²⁵ *Idem*, par. 54 (we underline).

²⁶ 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 (dated 21 March 2013), par. 35.

²⁷ See the Decision, *supra* note 12, paras. 26-35.

²⁸ See the Dissenting Opinion, *supra* note 13, paras. 14-16.

²⁹ See the “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision on the confirmation of charges’” (Pre-Trial Chamber I), No. ICC-01/04-01/10-487, 1 March 2012, par. 12. See

well-being of victims, witnesses or other persons at risk on account of the activities of the Court.³⁰

24. Consequently, the Common Legal Representative respectfully requests the Chamber to grant the Prosecution's Request with respect to the First Issue.

2) *Regarding the Second Issue*

25. The Common Legal Representative observes that the Second Issue as raised by the Prosecution relates to the interpretation of the term "attack" under article 7(2)(a) of the Rome Statute and encompasses at least three legal sub-issues which might be examined separately.

26. The first sub-issue is whether the Majority erred in law in interpreting the term 'attack' under article 7(2)(a) of the Rome Statute as encompassing a certain number of "incidents", rather than a course of conduct involving a multiple commission of acts.³¹

27. The Common Legal Representative submits in this regard that article 7(2)(a) of the Rome Statute clearly provides that an "[a]ttack 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". In its jurisprudence, the Court has clarified that "[t]he commission of the acts referred to in article 7(1) of the Statute constitute the

also the "Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (Pre-Trial Chamber I), No. ICC-02/05-01/09-21, 24 June 2009, p. 8.

³⁰ See the Dissenting Opinion, *supra* note 13, par. 18.

³¹ See the Decision, *supra* note 12, par. 21.

*'attack' itself and, besides the commission of the acts, no additional requirement for the existence of an 'attack' should be proven".*³²

28. The Common Legal Representative concurs with the dissenting opinion of Judge Fernández de Gurmendi that *"Chambers of this Court have never understood the 'attack' as comprising a number of 'incidents' that need to be proven separately. They have correctly appreciated the need that all relevant acts be considered together with all other available evidence in order to substantiate as a whole the existence of an attack or course of conduct",*³³ which has been defined in the constant jurisprudence of the Court as a *"campaign or operation carried out against the civilian population",*³⁴ and finds support in the corresponding preparatory works of the Rome Statute.³⁵

29. The international jurisprudence developed by the International Criminal Tribunal for the former Yugoslavia (the "ICTY") follows the same line of reasoning. In particular, in the *Tadić* case, the ICTY Trial Chamber found that *"[t]he very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that they be 'directed against any civilian population', ensures that what is to be alleged will not be one particular act but, instead, a course of conduct".*³⁶ In the *Kunarac*

³² 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, par. 75.

³³ See the Dissenting Opinion, *supra* note 13, par. 45.

³⁴ See 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, par. 164; 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. 31; the "Corrigendum to 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, par. 80; 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 32, par. 75.

³⁵ See the Proposal submitted by Canada and Germany on article 7, UN Doc. PCNICC/1999/WGEC/DP.36, 23 November 1999; the Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity, UN Doc. PCNICC/1999/WGEC/DP.39, 3 December 1999.

³⁶ See ICTY, *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, par. 11.

case, the ICTY Trial Chamber further found that “[t]he underlying offence does not need to constitute the attack but only to form a part of the attack or, as it was put by the Appeals Chamber, to ‘comprise[s] part of a pattern of widespread and systematic crimes directed against a civilian population.’ [...] It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity”.³⁷ In the *Naletilić and Martinović* case, the ICTY Trial Chamber stressed that “[t]he attack has been defined as a course of conduct involving the commission of acts of violence”.³⁸

30. The second sub-issue is whether the Majority erred in law in specifically requesting the Prosecutor to present additional evidence to establish that each separate “incident” occurred pursuant to or in furtherance of the “policy” under article 7(2)(a) of the Rome Statute.³⁹

31. The Common Legal Representative observes that the second sub-issue is closely interrelated with, and derives from, the first sub-issue.

32. Therefore, provided that, as demonstrated *supra*, article 7(2)(a) of the Rome Statute requires establishing the existence of an attack or a course of conduct involving the multiplicity of acts, rather than separate acts or “incidents”, the Common Legal Representative submits, concurring with the dissenting opinion of Judge Fernández de Gurmendi,⁴⁰ that requiring the Prosecutor to present additional evidence to establish that each separate “incident” – a term which is legally inexistent⁴¹ – occurred would be burdensome, not relevant and simply unnecessary.

³⁷ See ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23 & IT-96-23/1-T, Judgement, 22 February 2001, paras. 417 and 419.

³⁸ See ICTY, *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, Judgement, 31 March 2003, par. 233.

³⁹ See the Decision, *supra* note 12, paras. 22-23, 36, 44(4).

⁴⁰ See the Dissenting Opinion, *supra* note 13, paras. 46-48.

⁴¹ *Idem*, par. 47.

33. The third sub-issue is whether the Majority erred in fact and in law in finding that *“the individual incidents alleged by the Prosecutor in support of her allegation that there was an ‘attack directed against any civilian population’ are part of the facts and circumstances for the purposes of article 74(2) of the Statute and therefore must be proved to the requisite threshold of ‘substantial grounds to believe’”*.⁴²

34. The Common Legal Representative observes that the third sub-issue is closely interrelated with the first and second ones, and derives from, the first one. Therefore, regarding the Majority’s finding according to which *“the individual incidents alleged by the Prosecutor in support of her allegation that there was an ‘attack directed against any civilian population’ [...] must be proved to the requisite threshold of ‘substantial grounds to believe’”*, considerations submitted *supra* should apply in this regard,⁴³ in concurrence with the dissenting opinion of Judge Fernández de Gurmendi.⁴⁴

35. Regarding the Majority’s finding according to which *“the individual incidents alleged by the Prosecutor in support of her allegation that there was an ‘attack directed against any civilian population’ are part of the facts and circumstances for the purposes of article 74(2) of the Statute”*,⁴⁵ the Common Legal Representative concurs with both the dissenting opinion of Judge Fernández de Gurmendi and the Prosecution that *“‘facts and circumstances described in the charges’ do not refer to all facts that are contained in the narrative of the DCC or discussed in some way at the confirmation of charges hearing [and] must in particular be distinguished from the facts which are not described in the charges, but from which the facts and circumstances of the charges can be inferred”*.⁴⁶ Accordingly, the 41 “incidents” in question are “subsidiary facts” and do not relate to “facts and circumstances” forming “charges” set out in sections H and I of the DCC.⁴⁷

⁴² See the Decision, *supra* note 12, par. 21.

⁴³ See *supra* par. 32.

⁴⁴ See the Dissenting Opinion, *supra* note 13, paras. 36-48.

⁴⁵ See the Decision, *supra* note 12, par. 21.

⁴⁶ *Idem*, paras. 33-34. See also the Prosecution’s Request, *supra* note 15, par. 9.

⁴⁷ See the Prosecution’s Request, *supra* note 15, par. 10. See also the Dissenting Opinion, *supra* note 13, par. 34, footnote 39.

36. In this regard, the Appeals Chamber clearly stated that

*“the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged”.*⁴⁸

37. The decision by the Majority to request the Prosecutor to present further evidence to establish each separate “incident” regarding the contextual elements of the alleged crimes against humanity will increase the risks to the safety of victims and witness, thereby affecting the fairness of the proceedings as indicated *supra*.⁴⁹ Moreover, the presentation of additional evidence will unavoidably affect the expeditiousness of the proceedings. In this regard, the Chamber must take into account that victims in this case have been waiting too long for a decision on the confirmation of the charges and the eventual start of the trial.

38. Consequently, the Common Legal Representative respectfully requests the Chamber to grant the Prosecution’s Request with respect to the Second Issue.

3) *Regarding the Third Issue*

39. The Common Legal Representative observes that the Third Issue raised by the Prosecution relates to the scope of the mandate vested with a Pre-Trial Chamber and encompasses at least two legal sub-issues which might be examined separately.

40. The first sub-issue is whether the Majority exceeded the mandate vested with a Pre-Trial Chamber in shaping the factual allegations of the charges and in

⁴⁸ 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 OA15 OA16, 8 December 2009, footnote 163.

⁴⁹ See *supra* par. 23.

requesting the Prosecutor to reframe the charges in order to adapt them to its understanding of the case.⁵⁰

41. The Common Legal Representative concurs with the dissenting opinion of Judge Fernández de Gurmendi in so far as the legal texts of the Court do not allow a Pre-Trial Chamber to have a say in the Prosecution's selection of which facts to charge and that "*it is for the Prosecutor and not for the Chamber to select her case and its factual parameters*".⁵¹

42. In this regard, the Common Legal Representative submits that during the preparatory works leading to the adoption of the current text of article 61(7)(c)(i) of the Rome Statute, the negotiators expressly dismissed proposals by Australia and The Netherlands, France, and Argentina aimed at endowing the judges with the power to "*require the Prosecutor to present additional material in support of any count*",⁵² to "*ask the Prosecutor to conduct a further investigation [on particular issues]*",⁵³ and even to amend the charges directly.⁵⁴ Instead, they adopted a proposal submitted by

⁵⁰ See the Decision, *supra* note 12, paras. 44-45.

⁵¹ See the Dissenting Opinion, *supra* note 13, par. 51.

⁵² See the Draft Set of Rules of Procedure and Evidence for the International Criminal Court: Working Paper Submitted by Australia and The Netherlands, UN doc. [A/AC.249/L.2](#), 26 July 1996, rule 61(A) and the corresponding reading of rule 73; and the Rules of Procedure: Working Paper Submitted by Argentina, UN doc. [A/AC.249/L.6](#), 13 August 1996, rule 61(A); and the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II, Compilation of Proposals, UN doc. [A/51/22\[VOL.II\]\(SUPP\)](#), 13 September 1996, p. 121, item A.i, p. 121.

⁵³ See the Draft Statute of the International Criminal Court: Working Paper Submitted by France, UN doc. [A/AC.249/L.3](#), 6 August 1996, article 46(1) and (2); the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II, Compilation of Proposals, UN doc. [A/51/22\[VOL.II\]\(SUPP\)](#), 13 September 1996, p. 124, item A.1; the Revised Abbreviated Compilation: Article 27, UN doc. [A/AC.249/1997/WG.4/CRP.6](#), 14 August 1997, article 27(2 *ter*)(c); the Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, UN doc. [A/AC.249/1997/L.8/Rev.1](#), 14 August 1997, Annex II, article 27(2 *ter*)(c); the Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands: Preparatory Committee on the Establishment of an International Criminal Court, UN doc. [A/AC.249/1998/L.13](#), 4 February 1998, article 51[27](2 *ter*)(c); and the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN doc. [A/CONF.183/2/Add.1](#), 14 April 1998, article 58(4)(c).

⁵⁴ See the Draft Statute of the International Criminal Court: Working Paper Submitted by France, UN doc. [A/AC.249/L.3](#), 6 August 1996, article 48(5)(b); the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II, Compilation of Proposals, UN doc. [A/51/22\[VOL.II\]\(SUPP\)](#), 13 September 1996, p. 123, item 5 and p. 125, items 4 and B.5; the Revised

22 States (including the four previously mentioned) whereby judges would not enjoy said powers.⁵⁵ The ultimate reason for the approach finally adopted was the concern to ensure the Prosecutor's independence *vis-à-vis* the Chamber while ensuring the suspect's rights.⁵⁶ Consistent with the provision under article 61(7)(c)(i), article 61(4) of the Rome Statute does not require judicial authorisation regarding amendments of the charges before the hearing; whereas article 61(9) of the Rome Statute indeed requires such authorisation after the charges are confirmed and before the start of the trial.

Abbreviated Compilation: Article 27, UN doc. [A/AC.249/1997/WG.4/CRP.6](#), 14 August 1997, article 27(2 *ter*)(b) and (4); the Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, UN doc. [A/AC.249/1997/L.8/Rev.1](#), 14 August 1997, Annex II, article 27(2 *ter*)(b) and (4); the Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands: Preparatory Committee on the Establishment of an International Criminal Court, UN doc. [A/AC.249/1998/L.13](#), 4 February 1998, articles 51[27](2 *ter*)(b) and 4(option 1); and the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN doc. [A/CONF.183/2/Add.1](#), 14 April 1998, article 58(4)(b) and 7(option 1).

⁵⁵ See the Proposal [on the Establishment of the International Criminal Court] Submitted by the Delegations of Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Japan, Lesotho, Malawi, Mexico, The Netherlands, New Zealand, Norway, the Republic of Korea, Singapore, South Africa, Sweden, the United Kingdom and the United States, UN doc. [A/AC.249/1998/WG.4/DP.40](#), 1 April 1998, article 54(6)(c)(i); the Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, UN doc. [A/CONF.183/2/Add.1](#), 14 April 1998, further option for articles 58 to 61, article 61(6)(c)(i); the Report of the Working Group on Procedural Matters, UN doc. [A/CONF.183/C.1/WGPM/L.2](#), 24 June 1998, article 61(6)(c)(i); the Summary Record of the 17th Meeting, Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 25 June 1998: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998, Committee of the Whole, UN doc. [A/CONF.183/C.1/SR.17](#), 20 November 1998, paras. 1-7; the Draft Statute for the International Criminal Court: Compendium of Draft Articles Referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998, UN doc. [A/CONF.183/C.1/L.58](#), 9 July 1998, article 61(6)(c)(i); the Report of the Drafting Committee to the Committee of the Whole: Part 5. Investigation and Prosecution, UN doc. [A/CONF.183/C.1/L.87](#), 15 July 1998, article 61(7)(c)(i); the Draft Statute for the International Criminal Court: Part 5, Investigation and Prosecution, UN doc. [A/CONF.183/C.1/L.76/Add.5](#), 16 July 1998, article 61(7)(c)(i); and Rome Statute of the International Criminal Court, UN doc. [A/CONF.183/9](#), 17 July 1998, article 61(7)(c)(i).

⁵⁶ See the Report of the International Law Commission on the Work of Its Forty-Sixth Session (1994): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the Secretariat Addendum, UN doc. [A/CN.4/464/Add.1](#), 22 February 1995, paras. 128 and 133; the Summary of the Proceedings of the *Ad Hoc* Committee during the Period 3-13 April 1995: *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN doc. [A/AC.244/2](#), 21 April 1995, paras. 69-70; and the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN doc. [A/50/22\(SUPP\)](#), 6 September 1995, paras. 140, 143, 144 and 167.

43. The second sub-issue is whether the Majority erred in law in requesting the Prosecutor to submit a new *“Amended DCC setting out in detail and with precision the facts of the case, including all incidents forming the contextual elements of crimes against humanity”*.⁵⁷

44. The Common Legal Representative observes that the second sub-issue is closely interrelated with, and derives from, the first sub-issue as well as the third sub-issue of the Second Issue as raised by the Prosecution.

45. Therefore, provided that, as demonstrated *supra*, on the one hand, the “incidents” do not constitute the contextual elements of the crimes charged and, on the other hand, the Pre-Trial Chamber is not vested with the power to shape factual allegations as presented by the Prosecution, the Common Legal Representative submits, in concurrence with the dissenting opinion of Judge Fernández de Gurmendi,⁵⁸ that the imposition on the Prosecutor of the obligation to present a new amended DCC setting out, in details, the factual allegations would be burdensome and not relevant and/or *ultra vires*.

46. Consequently, the Common Legal Representative respectfully requests the Chamber to grant the Prosecution’s Request with respect to the Third Issue.

⁵⁷ See the Decision, *supra* note 12, par. 45.

⁵⁸ See the Dissenting Opinion, *supra* note 13, paras. 49-52.

For the foregoing reasons, the Common Legal Representative respectfully requests the Pre-Trial Chamber

- To grant the Prosecution leave to appeal the Decision with respect to the three appealable issues; and
- Should leave be granted, to consider modifying and/or reformulating appealable issues raised by the Prosecution in the way suggested in the present Response, so as to reflect in a comprehensive manner each of the legal issues arising from the Decision.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line underneath.

**Paolina Massidda
Principal Counsel**

Dated this 17th day of June 2013

At The Hague, The Netherlands