

Separate Opinion of Judge Christine Van den Wyngaert

1. Although I agree in principle that it would be preferable to allow the Prosecutor to add the new incidents in relation to the contextual elements of crimes against humanity as well as to add the charges under articles 25(3)(b) and 28, I do not agree with my colleagues about the legal basis for doing so.

2. In relation to the new incidents, I am of the view that their addition constitutes an amendment to the 'facts and circumstances' of the charges. However, considering the nature of the current procedural phase and especially the fact that the Chamber specifically invited the Prosecutor to conduct further investigations; considering also that the new incidents relate to the contextual elements, that they are situated in the same temporal and geographic zone, and that they involve conduct that is very similar to the 45 incidents originally charged, I do not think that this addition changes the 'facts and circumstances' so fundamentally that it would be unfair to the Defence, as long as the latter is given adequate notice and time to respond to the new charges.

3. As regards the inclusion of charges under articles 25(3)(b) and 28(a) and (b), I believe that it is only possible to introduce these new charges on the basis of article 61(7)(c)(ii) of the Statute, because this would be a fundamental change to the 'facts and circumstances'. I do not believe that "judicial economy and the interests of justice" can constitute a legal basis for allowing the addition of new charges. However, as there is no legal obstacle to the application of article 61(7)(c)(ii) at this stage, it would have been possible, in my view, to permit the Prosecutor to include article 25(3)(b) and 28 in the charges on this basis, provided that the 'facts and circumstances' underpinning each form of criminal responsibility are clearly spelled out in the amended document

containing the charges, that the Defence is given adequate time to prepare its response, and that this does not cause undue delay.

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a horizontal line, positioned above a solid horizontal line.

Judge Christine Van den Wyngaert

Dated this Friday, 14 February 2014

At The Hague, The Netherlands