

Confirmation of Charges Hearing

(Open Session)

ICC-02/11-01/11

1 International Criminal Court

2 Pre-Trial Chamber I - Courtroom 1

3 Situation: Republic of Côte d'Ivoire

4 In the case of The Prosecutor v. Laurent Gbagbo - ICC-02/11-01/11

5 Presiding Judge Silvia Fernández de Gurmendi, Judge Hans-Peter Kaul and Judge

6 Christine Van den Wyngaert

7 Confirmation of Charges Hearing

8 Tuesday, 19 February 2013

9 (The hearing starts in open session at 2.32 p.m.)

10 THE COURT USHER: All rise.

11 The International Criminal Court is now in session.

12 Please be seated.

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Court is in
14 session.

15 Court officer, please call the case.

16 THE COURT OFFICER: (Interpretation) Yes, Madam President. Situation in Ivory
17 Coast, in the case The Prosecutor versus Laurent Gbagbo, case number ICC-02/11-01/11.

18 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I would like to
19 welcome you all and I would call upon the parties and participants to introduce
20 themselves. First of all I would turn to the Office of the Prosecutor.

21 MS BENSOUA: Madam President, Honourable Judges, the Office of the Prosecutor is
22 today represented by: Mr Eric MacDonald, senior trial lawyer; Gilles Dutertre, trial
23 lawyer; Reinhold Gallmetzer, legal officer; Pascal Turlan, international co-operation
24 adviser; and Sandra Schoeters, case manager. I am Fatou Bensouda, Prosecutor.

25 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I thank you.

1 Defence, please.

2 MR ALTIT: (Interpretation) Yes, thank you, Madam President.

3 Madam President, your Honours, you are already acquainted with Maître Baroan, who
4 works at the Côte d'Ivoire Bar and is a former member of the Constitutional Council; and
5 behind me we have seated Maître Fauveau Ivanovic, who works for the Paris Bar; to my
6 side we have Jennifer Naouri, who is our legal assistant; and beside -- behind me Gaëlle
7 Buchet, who is the case manager; and I would like to introduce myself -- also introduce
8 Professor Jacobs at the Leiden University; and I am lead counsel, Emmanuel Altit, for the
9 Defence.

10 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you very
11 much.

12 And the Legal Representatives of Victims, please?

13 MS MASSIDDA: (Interpretation) Good afternoon, Madam President, your Honours.
14 The Office of Public Counsel for Victims is represented by my side Sarah Pellet, counsel;
15 behind me Enrique Carnero Rojo, who is a legal officer; and I am Paolina Massidda, who
16 is lead counsel.

17 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I thank you.
18 Madam Registrar?

19 MS ARBIA: Good afternoon, Madam President, your Honours. Madam Silvana Arbia,
20 Registrar of the Court; and with the assistance by my side of Madam Isabelle Oseredczuk,
21 who is a legal adviser. And I thank you.

22 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you,
23 Madam Arbia.

24 I would like to now introduce the Chamber. To my right Judge Hans-Peter Kaul and to
25 my left Judge Christine Van den Wyngaert. I am Silvia Fernández, Presiding Judge in

1 this Pre-Trial Chamber.

2 I would now call upon the court officer to read a summary of the charges as presented by
3 the Prosecution.

4 Court officer, please, you may address the Court.

5 THE COURT OFFICER: (Interpretation) Yes, Madam President. The charges
6 presented by the Prosecution are contained in Sections H and I of the Amended
7 Document Containing the Charges, document ICC-02/11-01/11-357-Conf-Anx1, notified to
8 the Defence on 17 January 2013.

9 In light of the facts and circumstances presented in paragraphs 92 to 100 of the Amended
10 Document Containing the Charges, the Prosecution alleges that Laurent Gbagbo
11 committed crimes against humanity during the following four events:

12 Between 16 and 19 December 2010 in Abidjan during and after a demonstration by
13 pro-Ouattara supporters who were on their way to the RTI, the Radiodiffusion-Télévision
14 Ivoirienne, headquarters.

15 On 3 March 2011 during a demonstration by pro-Ouattara supporters in Abobo.

16 On 17 March 2011 in or near Abobo market by shelling a densely populated area.

17 On 12 April 2011 in Yopougon.

18 The Prosecution alleges that Laurent Gbagbo committed as an indirect co-perpetrator the
19 following crimes against humanity:

20 Count 1: Murder constituting a crime against humanity of at least 166 persons in
21 violation of Articles 7(1)(a) and 25(3)(a) of the Statute during the above-mentioned four
22 events.

23 Count 2: Rape constituting a crime against humanity of at least 34 persons in violation of
24 Article 7(1)(g) and 25(3)(a) of the Statute during the events which unfolded between 16
25 and 19 December 2010 as well as on 12 April 2011.

1 Count 3: Inhumane acts constituting a crime against humanity, notably acts causing
2 serious bodily injury and great suffering, against at least 94 persons in violation of Articles
3 7(1)(k) and 25(3)(a) of the Statute or, in the alternative, attempted murder constituting a
4 crime against humanity in violation of Articles 7(1)(a) and 25(3)(f) of the Statute during
5 the four above-mentioned events.

6 Count 4: Persecution constituting a crime against humanity on political, national, ethnic
7 or religious grounds against at least 294 individuals in violation of Articles 7(1)(h) and
8 25(3)(a) of the Statute during the four above-mentioned events.

9 Furthermore, the Prosecution relies on the same facts and circumstances in paragraphs
10 101 to 108 of the Amended Document Containing the Charges to allege that Laurent
11 Gbagbo is responsible for crimes against humanity -- for the following crimes against
12 humanity by pro-Gbagbo forces.

13 Count 5: Murder constituting a crime against humanity against at least 166 persons
14 under Articles 7(1)(a) and 25(3)(d) of the Statute during the four above-mentioned events.

15 Count 6: Rape constituting a crime against humanity against at least 34 persons under
16 Articles 7(1)(g) and 25(3)(d) of the Statute during the events which unfolded between 16
17 and 19 December 2010 as well as on 12 April 2011.

18 Count 7: Inhumane acts constituting a crime against humanity, notably acts causing
19 serious bodily injury and great suffering, against at least 94 persons under Articles 7(1)(k)
20 and 25(3)(d) of the Statute or, in the alternative, attempted murder constituting a crime
21 against humanity against at least 94 persons under Articles 7(1)(a) and 25(3)(f) of the
22 Statute during the four previously mentioned events.

23 Count 8: Persecution constituting a crime against humanity for political, national, ethnic
24 and religious grounds against at least 294 persons under Articles 7(1)(k) and 25(3)(d) of
25 the Statute during the four previously mentioned events.

1 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.
2 I would like to remind you that the aim of this hearing, and pursuant to Article 61(7) of
3 the Statute, is to enable the Chamber to determine whether there is sufficient evidence to
4 establish substantial grounds to believe that Mr Laurent Gbagbo committed each of the
5 crimes charged.
6 As a result, I would like to emphasise the fact that this hearing is not a trial as such. This
7 Trial Chamber is not required -- this Chamber is not required to make a finding on the
8 guilt or innocence of Mr Gbagbo, but only to decide whether this case should be referred
9 to the Trial Chamber for judgment.
10 During the hearing, the Prosecution must support each charge with sufficient evidence to
11 enable its confirmation. The Defence may challenge the charges, may challenge the
12 evidence produced by the Prosecution, and may present its own evidence.
13 Also, pursuant to Article 68(3) of the Statutes, the victims who have been admitted to
14 participate in the proceedings can air their views and concerns via their common legal
15 representative, Madam Massidda, from the Office of Public Counsel for Victims. In this
16 case Madam Massidda has been authorised to attend all of the public sessions of the
17 Confirmation of Charges hearing, as well has been authorised to make a short statement
18 at the beginning and the end of the hearing. It is also possible for the legal representative
19 to intervene at other times, with the authorisation of the Chamber.
20 The parties and participants shall make their representations whilst respecting the
21 allocated time slots and following the order and conditions set forth in decision number
22 397, dated 12 February 2013.
23 Also, in compliance with this decision, the parties and participants shall be authorised to
24 present their written submissions subsequent to the hearing within a time frame to be
25 determined in due course.

1 I will remind you that this hearing is public. When referring to confidential evidence,
2 please do not reveal any information which might jeopardise the requirements of
3 confidentiality. In exceptional circumstances, some parts of the hearing may be
4 conducted in closed or private session.

5 The Chamber will be mindful of the practical arrangements made to allow Mr Gbagbo to
6 participate fully in the hearings. To this end, the Chamber has planned for a three-hour
7 hearing every day during the afternoon, with each session not exceeding one hour in
8 duration. Facilities have been placed at Mr Gbagbo's disposal for him to be able to rest
9 during the breaks.

10 The Chamber hopes that these arrangements will allow Mr Gbagbo to be present
11 throughout these sessions. I would like to emphasise that Mr Gbagbo should not
12 hesitate to inform the Chamber if any problem or issue arises.

13 I would like to now move on to the first point on the agenda today: The Defence
14 observations regarding on the one hand the admissibility of the case and, on the other,
15 any questions associated with due process prior to this hearing.

16 The Chamber notes that on Friday, 15 February, the Defence filed its application on the
17 admissibility of the case in compliance with Articles 19 and 17 of the Statute.

18 Although the parties and participants are authorised to make observations on this matter
19 today, if they so wish, the Chamber will also authorise written submissions in compliance
20 with Rules 58(3) and 59(3) of the Rules of Procedure and Evidence.

21 In accordance with Rule 59(1)(b), the Chamber would like to underscore that during the
22 part of the proceedings given over to challenging admissibility, the Common Legal
23 Representative shall be representing not only the victims admitted to participate in the
24 proceedings, but also all victims who have already communicated with the Court within
25 the context of this case.

1 As a result, the Chamber shall give the Prosecution and the legal representatives the
2 opportunity to respond to the challenge to the admissibility by Thursday, 28 March 2013,
3 at the latest.

4 Maître Altit, you may now address the Court on the issue of the admissibility of the case
5 and due process of proceedings. Please be mindful that we need to take a break at 3.30,
6 but you will be authorised to continue after the break, and I would call upon you and
7 other parties and participants in the proceedings to speak slowly and to observe sufficient
8 pauses to enable the interpretation.

9 Maître Altit, please address the Court.

10 MR ALTIT: (Interpretation) Thank you, your Honour.

11 The observations of the Defence concerning admissibility and issues related to the proper
12 conduct of the proceedings will be made by Professor Jacobs.

13 MR JACOBS: (Interpretation) Madam President, your Honours, behind all judicial
14 proceedings is a story, a story of dates, places and events, the story of one man, President
15 Gbagbo, who was arrested, suspected and accused, but before everything else he is a man
16 who is presumed to be innocent and will remain so irrespective of the outcome of the
17 confirmation hearings. This is a man at the heart of the proceedings and the safeguard of
18 his rights is at the heart of the proceedings also.

19 In international proceedings, it is also history with a capital "H" that is being written. In
20 fact, the situations in which the Court must intervene require it to take on board historical,
21 sociological and political context without which the case cannot be fully understood. It is
22 also a history of a country, a region and a people and its sufferings that is being written.
23 The preliminary observations that we will present will constitute an opportunity for the
24 Defence to underscore a few contextual elements surrounding this case, but before
25 everything else these observations will make it possible for us to mention the authors and

1 protagonists of the proceedings: The Prosecutor; the UN; Ivorian authorities; the French
2 government; and the representative of victims in this proceedings; as well as President
3 Gbagbo; and the Judges.

4 To this end, the Defence will begin by presenting submissions relating to the admissibility
5 of the case before moving on to a certain number of preliminary issues which must be
6 taken into account from the very outset of this confirmation of hearings.

7 I will begin with admissibility. The principle of complementarity lies at the very heart of
8 the issue of admissibility. This principle sets out the relationship between the Court and
9 national authorities and gives primacy to the national authorities. In fact, the principle of
10 complementarity must be understood side-by-side on the part -- with the obligation on
11 the part of the States to prosecute perpetrators of international crimes.

12 This obligation is in fact enshrined in the preamble of the Rome Statute in the same way as
13 the principle of complementarity. In other words complementarity cannot be
14 understood as a choice granted to national jurisdictions to carry on prosecutions, but
15 rather as an obligation to be the prime initiator of proceedings.

16 It is in light of this obligation that the litmus test for complementarity must be understood.
17 The Defence would like to point out that pursuant to Article 17 of the Statute a case is
18 inadmissible if, and I quote, "... it is being investigated or prosecuted by a State which has
19 jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the
20 investigation or prosecution."

21 There are therefore two aspects related to the complementarity test: Firstly is there an
22 ongoing investigation or prosecution at a national level and, secondly, is the State unable
23 or unwilling to prosecute?

24 The Defence has filed an admissibility challenge and the Defence urges the parties to refer
25 to that document for details. In the meantime, we will highlight a few essential points.

1 Let us begin by the existence of proceedings at the national level. The Defence would
2 like to point out that President Gbagbo was arrested on 11 April 2011 by forces loyal to
3 Alassane Ouattara, with the support of ONUCI and the French forces, and as the
4 Prosecutor states -- and this is what the Prosecutor himself states in paragraph 15 of the
5 Document Containing the Charges. He was detained for almost eight months in
6 Korhogo, in the north of the country, without a detention order and without a warrant of
7 arrest until his transfer to The Hague on 29 November 2011.
8 During that period there was a certain lack of clarity on the part of Ivorian authorities
9 regarding the reasons for his detention, but there is no doubt that there are proceedings
10 going on against President Gbagbo and this is confirmed by his indictment on 18
11 August 2011.
12 Nothing today indicates that those proceedings have been brought to an end. In fact the
13 Prosecutor himself has confirmed the existence of those proceedings in June 2012 during
14 the provisional release proceedings, when he stated that if the Pre-Trial Chamber had to
15 grant provisional release then President Gbagbo should be sent back to Ivorian
16 jurisdictions to be prosecuted.
17 The Defence hereby notes with interest the support provided by the Office of the
18 Prosecutor and quite early on in the proceedings to the admissibility challenge.
19 Once the existence of proceedings have been established, then it must be determined
20 whether those proceedings relate to a great extent to the same charges, and this is
21 according to a ruling of an Appeals -- of the Appeals Chamber.
22 The Defence is of the opinion that the acts to be taken into account are the acts relating to
23 the context within which the crimes are supposed to have been perpetrated, rather than
24 the acts relating to the commission of the crimes themselves.
25 In fact after reading the document concerning the charges it is clear that what is at the

1 heart of the charges against President Gbagbo is not the specific events chosen by the
2 Prosecutor to rely on, but rather the so-called implementation of a general policy by
3 Mr Gbagbo to stay in power at all costs, and yet this is precisely the allegation made
4 against him in the proceedings in Côte d'Ivoire.

5 To this end, the Defence calls on the Chamber not to merely note that President Gbagbo is
6 being prosecuted only for economic crimes in Côte d'Ivoire. This is window-dressing
7 designed to conceal a far more complex reality, as attested by the documents filed by the
8 Defence to the Chamber in support of its admissibility challenge.

9 These documents show quite clearly that the charges against President Gbagbo relate to
10 his acts during the post-electoral crisis in the implementation of a policy to remain in
11 power, and this is reflected almost on a point-by-point basis in the Document Containing
12 the Charges.

13 In the same vein, the numerous investigations carried out in Côte d'Ivoire against the
14 former collaborators of President Gbagbo necessarily concern President Gbagbo himself.
15 In fact, no serious prosecutor can claim to be investigating suspected perpetrators of
16 alleged crimes without investigating the person who is supposed to have ordered those
17 crimes. There is no doubt that it is substantially the same acts that are the subject of
18 investigations in Côte d'Ivoire and which form the basis for the proceedings initiated
19 against President Gbagbo at the ICC.

20 So, pursuant to Article 17 of the Statute, the Defence urges the Chamber to declare this
21 case inadmissible, more so because Côte d'Ivoire is neither unable or unwilling to
22 prosecute President Gbagbo, as we will develop shortly.

23 Before looking into this issue, the Defence would like to draw the attention of the
24 Chamber to the formulation of the Rome Statute in this area. Based on the Rome Statute,
25 willingness and capacity are not attributes that must be absolutely proven for the case to

1 be declared inadmissible. The formulation is negative. The case is admissible, that is
2 unless the State lacks capacity or willingness. In fact, what must be proved is not the
3 capacity or the willingness of the State but its incapacity or lack of willingness.
4 This shows clearly that the burden of proof must rest with the party that invokes that
5 incapacity or unwillingness, and I'm referring to the Prosecutor, for example. That said,
6 in a bid to assist the Chamber to arrive at its decision, the Chamber -- or, rather, the
7 Defence would like to put forward a certain number of elements relating to the capacity
8 and willingness of Côte d'Ivoire.

9 We will begin with its capacity. The Defence points out that for a State to be declared
10 unable, the threshold has been set very high. According to Article 17(3), and I quote:
11 "In order to determine inability in a particular case, the Court shall consider whether, due
12 to a total or substantial collapse or unavailability of its national judicial system, the State is
13 unable to obtain the accused or the necessary evidence and testimony, or otherwise
14 unable to carry out its proceedings."

15 We are very far from such a situation in Côte d'Ivoire. Côte d'Ivoire itself has frequently
16 proclaimed its own capacity to prosecute the individuals involved in the events that
17 followed the elections.

18 Secondly, as an illustration of the capacity of Côte d'Ivoire, the Defence would like to
19 point out the scope of the proceedings currently initiated in Côte d'Ivoire, even against the
20 highest-ranking personalities of the former regime.

21 For example, the Defence would like to point out that Simone Gbagbo and Charles Blé
22 Goudé, two of the alleged co-perpetrators of President Gbagbo in the DCC, are being
23 prosecuted in Côte d'Ivoire, and this is also the case with most of his former ministers and
24 high-ranking military officers. It is therefore not possible to state that Côte d'Ivoire is
25 unable to prosecute.

1 Regarding willingness, just as in the case of capacity, the Rome Statute defines in detail
2 the absence of willingness. This is to be understood as the fact of initiating prosecutions
3 with the purpose of absolving someone from his criminal responsibility or conducting
4 proceedings that are incompatible with the intention of prosecuting this person before a
5 jurisdiction.

6 This definition is consistent with the fight against impunity which underpins the Rome
7 Statute. In other words, the only relevant criterion is the criterion of sincerity on the part
8 of national authorities, so as to avoid staged trials where a person is benefiting from
9 political favours, and this would be compatible with the fight against impunity, and yet
10 nothing indicates that the national proceedings were initiated with this in mind.

11 On the contrary, the repeated statements on Ivorian -- of Ivorian authorities on the
12 supposed responsibility of President Gbagbo during the post-electoral events, as well as
13 the document that the Defence submitted to the Chamber, do not indicate that any
14 clemency will be extended to President Gbagbo or to the so-called pro-Gbagbo
15 individuals being prosecuted in Côte d'Ivoire today.

16 Quite logically, therefore, in light of the letter and the spirit of the Statute, Côte d'Ivoire
17 should be considered as not lacking willingness within the meaning of Article 17.

18 The Defence notes that the Trial Chamber in the Katanga case considered that there is
19 another form of a lack of willingness which is not explicitly stipulated in the Statute,
20 according to which if a State co-operates with the Court to ensure that someone is
21 prosecuted before the international jurisdiction, that State can be considered as not having
22 the willingness to prosecute within the meaning of Article 17.

23 The Defence is of the opinion that this test is not applicable to the present case, and there
24 are two main reasons for that.

25 In the Katanga case, the Chamber had to deal with total inaction on the part of the

1 national authorities with regard to the accused person, and that is clearly not the case in
2 the present case, as the Defence has already pointed out.

3 More specifically, and this is probably the most important point, the adoption of that
4 definition of a lack of willingness, which makes it possible for a State to do nothing, even
5 if it is able to do something by transferring someone to the ICC at its convenience, is
6 contrary to the primary obligation of the States to initiate proceedings. The Court cannot,
7 therefore, grant the States a waiver in relation to this responsibility.

8 In light of the foregoing, the Defence respectfully calls on the Pre-Trial Chamber to declare
9 this case inadmissible because it is, in fact, the subject of proceedings in Côte d'Ivoire, and
10 that country cannot be considered as unable or unwilling to prosecute.

11 I would like to conclude this part on admissibility by calling on the Chamber to exercise
12 caution. The history that this case will contribute to write is also the history of the
13 International Criminal Court. The decisions taken today might have consequences in or,
14 rather, on future cases. This is particularly the case when it comes to the relationship
15 between the Court and the States in which investigations are conducted.

16 If the Pre-Trial Chamber declared this case admissible, there will be a risk of sending a
17 message to the States that the Court may be used as a court of convenience, pliable to the
18 will of local political leaders, as is the case today in Côte d'Ivoire.

19 For example, the Pre-Trial Chamber cannot validate the gross manipulation when Côte
20 d'Ivoire has formally indicted President Gbagbo for economic crimes, with the obvious
21 aim of circumventing the principle of complementarity, whereas all the evidence that is
22 being unearthed today goes well beyond that scope.

23 More generally speaking, the Côte d'Ivoire, on several occasions, has shown that it
24 considers the Court as a court of convenience. This is how Alassane Ouattara spoke
25 about the ICC in April 2012, and I quote: "Maybe now we should speak about the others,

1 Simone Gbagbo and Blé Goudé. You know that arrest warrants have been issued against
2 them. The proceedings are ongoing. Maybe it will depend on them. Personally, I
3 prefer to have them tried here. Maybe they would like to go to The Hague, and if it is
4 their desire to go to The Hague, can I really stop them from doing that?"

5 This statement is reflected in the recent statements of the Côte d'Ivoire ambassador to the
6 UN, and I quote: "If the government thinks that we have the resources to try Madam
7 Gbagbo, then we will do so. Otherwise, we will refer her case to the ICC. It is possible
8 that Charles Blé Goudé can be transferred to the ICC. The government is examining the
9 matter and will take a decision in due course."

10 So, is that what the ICC is all about, a court that is waiting for a State to refer a case at its
11 convenience, a court that is waiting patiently for possible suspects to decide whether they
12 want to be prosecuted or not, a court which, in the final analysis, has no other interest
13 than to ensure that there is someone in the stand? The answer is, "No." No one in this
14 Court can subscribe to that idea, and yet that is the message that will be spread to
15 everyone if the present case is declared admissible.

16 Having completed my submissions on admissibility, I will now move on to four
17 preliminary issues: The first point concerns co-operation; the second point relates to the
18 document concerning the charges; the third point relates to the role of the legal
19 representative of victims in this case; and lastly point number 4 concerns the connection
20 between the present case and the ongoing cases in Côte d'Ivoire.

21 Regarding co-operation, as we indicated in the introduction international criminal
22 proceedings inevitably bring to light complex geopolitical dimensions that throw light on
23 the context of a case.

24 The present case is no different. It is characterised by the fact that it is particularly
25 complex because of the strong involvement of international protagonists, including the

1 UN and France. These two protagonists were present and mostly active throughout the
2 entire Ivorian crisis, well before the elections of 2010. ONUCI has been present in that
3 country ever since 2004, while the presence and involvement of France in Côte d'Ivoire
4 dates back to well before that.

5 In this light, they were the primary witnesses and particularly the primary protagonists in
6 the post-electoral crisis which constitutes the context of the present case.

7 The UN played several roles. It ensured the presence of observers, the deployment of
8 contingents for the maintenance of law and order, initiation of mediation efforts,
9 participation in peace negotiations, legitimisation of resort to force, participation in the
10 fighting, reconstruction of the country, reinforcement of the rule of law and the
11 verification of human rights abuses.

12 Regarding France, this country was the former colonial power and has been present
13 militarily, administratively, economically, financially and politically ever since
14 independence.

15 Under these circumstances, it is quite clear that both the UN and the French authorities
16 have information that would make it possible for the Court to determine the credibility of
17 the Prosecutor's allegations. More specifically, how can we imagine that both UN and
18 French authorities do not have crucial information relating to the RTI, the women's
19 demonstration, the Abobo market and the events of Yopougon?

20 As to the Ivorian authorities, it is quite logical to believe that they also have useful
21 information in their possession for example in relation to the movement of both
22 government and rebel forces and yet it is striking to realise that the Prosecutor does not
23 provide any information on this.

24 MR MACDONALD: (Interpretation) With your leave, your Honour, I am sorry to
25 interrupt my learned friend, but we were supposed to focus on admissibility and the

1 schedule of proceedings. I do not think it is necessary to make the opening speech here.

2 My learned friend will have the opportunity to do that tomorrow, but what are the
3 problems now?

4 If there are any motions, if there are any requests, they have to be made now, but the
5 Defence cannot make an opening statement even before the Prosecutor has had the
6 opportunity to make his. So we will have the opportunity to do that tomorrow and
7 discuss also the presentation of the Defence case.

8 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Yes, indeed.

9 You have to focus on issues of admissibility and the proper conduct of the proceedings.
10 We have only five minutes before the break. You can continue with procedural matters,
11 or we can break right now and resume at 4 p.m.?

12 MR ALTIT: (Interpretation) Thank you, Madam President.

13 These are crucial matters that relate to the procedure; the manner in which the
14 proceedings have been conducted. This is something that we absolutely need to raise
15 with the Chamber and that we have to discuss. It is absolutely not acceptable for the
16 Prosecutor to use such an excuse to interrupt my colleague from making his submission.
17 What had to be dealt with is being dealt with. We are dealing with procedural matters
18 and my colleague will arrive at a legal conclusion shortly, and I would like the Prosecutor
19 to be reminded to comply with the principle of courtesy, even if the factual elements are
20 not pleasant for him to hear.

21 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) You can continue
22 with matters relating to the proper conduct of the proceedings only and your contribution
23 now should be devoted to this type of issues.

24 You have four minutes - four minutes - after which I will interrupt you for the break.

25 MR JACOBS: (Interpretation) Thank you, your Honour. I do not think we need more

1 time than that.

2 We are really raising a procedural matter; a preliminary issue. In fact, all the requests
3 that the Defence have made to obtain from the three main protagonists, that is the UN,
4 France and Côte d'Ivoire, that is to obtain the necessary information, have been met by a
5 wall of silence, or with responses that are practically meaningless. This has an impact on
6 the proceedings and it is necessary to discuss them from the very outset of the
7 confirmation hearing, and this is all the more necessary because of the dearth of evidence
8 provided by the Prosecutor.

9 Consequently, it is necessary to postpone the confirmation hearing to a time when the
10 Chamber would have information that is indispensable for the ascertainment of the truth.
11 I've now concluded my submission on this first point. Maybe we should take the break
12 now?

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Yes, I believe so,
14 because you have only two minutes left and so we will break now and reconvene at 4 p.m.

15 THE COURT USHER: All rise.

16 (Recess taken at 3.26 p.m.)

17 (Upon resuming in open session at 4.01 p.m.)

18 THE COURT USHER: All rise.

19 Please be seated.

20 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Maître Altit, you
21 have a half-hour to proceed. I don't know whether you will speak, or Mr Jacobs will?

22 MR ALTIT: (Interpretation) Thank you, Madam President. Professor Jacobs will
23 continue our submissions.

24 MR JACOBS: (Interpretation) Thank you, your Honour.

25 I will now speak on the second preliminary remarks of the Defence regarding the

1 Document Containing the Charges. In the few minutes ahead, I will be raising some
2 points which should lead the Trial Chamber to dismiss in part or in its entirety the
3 Document Containing the Charges.

4 In the days ahead, Defence will have the opportunity to highlight the factual and legal
5 defects and inconsistencies within the DCC. These defences (sic) and inconsistencies are
6 not only prejudicial to Defence, which prepared its case on the basis of a flawed document,
7 but are also prejudicial to the credibility of the entire Court as an institution.

8 The Prosecution is supposed to have conducted an investigation in the Côte d'Ivoire,
9 particularly on President Gbagbo, with the vast resources available to the Prosecution, or
10 the OTP, and with the full co-operation of the Côte d'Ivoire over the last two years.

11 It is therefore unimaginable that the product of this investigation should be the DCC that
12 has been presented to this Chamber in the most important case of the young institution
13 which is the International Criminal Court.

14 In our preliminary remarks, we want to highlight two defects in the DCC which should
15 lead the Chamber at this stage of the proceeding to simply throw out the DCC in part or
16 in its entirety: First, lack of precision in the essential elements underpinning the charges
17 and, second, the absence of details regarding the mode of responsibility under 25(3)(d).

18 Let me first speak to the essential elements underpinning the charges. Charges are at the
19 very heart of any prosecution of an individual at the ICC, more specifically during the
20 confirmation hearings. In fact, it is on the basis of the facts that will be ultimately
21 confirmed and no longer subject to amendment that a trial is built.

22 It is therefore very important for the charges to be specific enough so that the accused
23 persons have the best possible conditions to prepare their case, both for the confirmation
24 hearing and for the trial that might subsequently open.

25 This requirement applies to the facts and the circumstances described in the DCC, beyond

1 which the Pre-Trial Chamber cannot reach particularly under Article 74(2) of the Statute.
2 This has been clarified by jurisprudence, and I'm referring here to the concept of facts and
3 circumstances described in the charges.
4 In fact, in a distinguished dissenting opinion in the Katanga case, Judge Van den
5 Wyngaert underscored the importance to distinguish between the material elements
6 underpinning the charges and subsidiary elements, and in her opinion she wondered why
7 the Prosecutor nor the Pre-Trial Chamber had not made that distinction in the preliminary
8 phase of the trial.
9 The onus quite logically and primarily is on the Prosecutor, who is the author in substance
10 of the DCC. He is the one, or it is the Prosecutor who submits the DCC. In the case at
11 hand, the Prosecutor has not made any effort to distinguish between the essential
12 elements underpinning the charges and subsidiary elements.
13 The Defence points out upfront that the word "charge" or "charges" does not figure in the
14 DCC, except in its title. This is not a good start which can enable the Defence to build its
15 case properly.
16 Furthermore, in the DCC the Prosecutor fails to put forth the elements in support of a
17 particular legal issue. The Prosecutor simply piles up a volume of events and alleged
18 attacks against civilian population, both in relation to demonstrating the context in which
19 crimes against humanity are alleged to have been committed and in relation to the mode
20 of responsibility for President Gbagbo.
21 The Prosecution fails to establish a specific link with the four elements that have been
22 identified and simply makes general remarks about the so-called criminal general policy
23 of President Gbagbo.
24 This leaves Defence with the unpleasant feeling that the Prosecution mixes up the
25 requirements for the existence of the crimes against humanity and requirements for

1 particular modes of responsibility and simply seeks ultimately to prosecute President
2 Gbagbo for all crimes committed in Côte d'Ivoire, rather than for specific facts.
3 In fact, in that context it is impossible for the Defence to distinguish within the DCC the
4 essential elements that relate to the criminal responsibility of President Gbagbo in the
5 DCC. For this reason, the Chamber should throw out the DCC in its entirety because it
6 fails to meet the requirements of specificity regarding the nature of these charges.
7 This lack of thoroughness on the part of the Prosecution is also reflected in their handling
8 of the second mode of liability; namely contribution under Article 25(3)(d).
9 Defence would like to recall that it was during a status conference held at the behest of
10 Defence that the Prosecution informed the Pre-Trial Chamber, almost in an off-handed
11 manner, an afterthought so to speak, that it intended to include a new mode of
12 responsibility, or of liability.
13 Had that status conference not taken place, one would wonder at what point the
14 Prosecution had intended to notify Defence of this very important thing? It is true that
15 this is an important and significant change, in spite of efforts to minimise it in the DCC.
16 The two modes of liability are fundamentally different, the one from the other. Indirect
17 co-perpetration does not require intention or criminal liability on the part of the
18 perpetrators, but on the other hand contribution under 25(3)(d) requires such an intention
19 for the group that is acting for a common purpose. Furthermore, the material elements
20 regarding these two modes of liability are not the same and the intention applies
21 differently as well.
22 This fundamental distinction was at the very heart of Judge Van den Wyngaert's
23 dissenting opinion in the Katanga case, when she faulted the majority for making it seem
24 as if the elements of contribution were part and parcel of elements for indirect
25 co-perpetration.

1 In that context, therefore, how can the Prosecution assert at paragraph 100 of the DCC that
2 it is relying on the same facts and circumstances mentioned above? The Prosecution
3 never identified a specific group, independently of President Gbagbo, which may have
4 had an intention to carry out a criminal undertaking within the competence of the Court.
5 Such a demonstration will require introduction of new facts and new circumstances, we
6 submit.

7 How can the Defence challenge the existence of a group of people acting for a common
8 purpose, when paragraph 106 of the DCC simply defines such a group as, quote,
9 "commanders and members of the pro-Gbagbo forces," without any further detail as to
10 their identity or to their supposed criminal intentions?

11 When one reads through these two unfortunate pages of the DCC, in which the
12 Prosecution outlines this mode of responsibility or liability, one is left with the feeling that
13 it only suffices to repeat what was mentioned in the 50 previous pages by taking
14 out -- and taking out President Gbagbo's name that this new mode of liability can take
15 hold. This does not work that way, as I have also -- I have already indicated, but even
16 there the Prosecutor does not do this properly.

17 Let me repeat that the Prosecution has defined the group as "commanders and members
18 of pro-Gbagbo forces, including President Gbagbo," so according to the Prosecution
19 President Gbagbo is included in the group of people acting for a common purpose. If
20 President Gbagbo were to be part of the group acting for a common purpose, what
21 distinction is there to be made then between that and co-perpetration? This is not
22 serious.

23 That confusion continues in the document when the Prosecution identifies the first
24 contribution to the commission of the crime as being the definition and
25 adopting -- adoption of the common plan. Once again, if he were part of the definition of

1 the plan, how is that different from co-perpetration? I will spare you the list of the
2 so-called contributions that were mentioned by the Prosecution in the DCC.
3 In any event, if President Gbagbo is -- actually did what he is being charged for, how is he
4 more of a contributor than a perpetrator? For these reasons, we call on the Chamber to
5 reject the part dealing with the liability under 25(3)(d) because of the total lack of details
6 as to the law and as to facts.
7 Defence also underscores that at the time of the date for the Confirmation of Charges,
8 Defence had requested time to prepare defence, its case, in relation to a new mode of
9 liability, but when we read the DCC, it would appear that it is the Prosecutor instead who
10 should have taken more time for that purpose.
11 Let me now turn, Madam President, your Honours, to the third preliminary remarks or
12 observations.
13 The Confirmation of Charges hearing is an important exercise, and we need to conduct
14 our proceedings in a proper manner. Defence would like to point out to the
15 preliminary -- to the Pre-Trial Chamber that the representatives of victims had an attitude,
16 both in terms of substance and in terms of manner of comment, throughout these
17 proceedings.
18 Now, talking about the manner of proceeding, the legal representatives of victims on
19 several occasions blamed the Defence for trying to increase or multiply the number of
20 procedural incidents, and even claimed that Defence was not exercising due diligence and
21 that it was overburdening the Chamber with a multiplicity of motions.
22 By the way, whenever Defence appealed against a decision, the legal representative of
23 victims felt that this was not justified and was simply a matter of delaying tactics. The
24 Defence is surprised at the manner in which the legal representatives seems to have
25 disdain for the Defence in these matters of proceedings. This does not make sense to us

1 because we are all part and parcel of the same trial, which is based on upholding and
2 respecting the rights of the Defence.

3 Curiously, one must note that the efforts by victims who legitimately seek to participate in
4 the proceedings have been compromised by their representative, who seems to have a
5 measure of despise against these proceedings. This lack of respect for the rights of the
6 Defence and the right to a fair trial by the Defence is reflected in the attitude of the
7 representative of victims.

8 How can we deny the Defence the right, the fundamental right, to appeal against any
9 decisions, a right which is recognised internationally by all jurisdictions? How can she
10 refer to issues relating to the jurisdiction of the Court as matters of procedure or a
11 procedural incident? You know very well that in the Tadic case the Appeals Chamber of
12 the ICTY dealt with this matter of criminal jurisdiction and competence. How then can
13 we deal with a situation where the trial of President Gbagbo is being referred to as a
14 procedural incident? This again is a breach of the fundamental rights of the Defence by
15 the legal representative of victims.

16 The attitude of the legal representative of victims is more scandalous to the extent that the
17 legal representative has increased a number of procedural issues and has even gone as far
18 as calling on the Chamber to deal with non-existent procedural issues and even gone as
19 far as seeking access to confidential documents of the Defence. This attitude by the legal
20 representative is a reflection of their desire to have the same rights as the parties in the
21 trial, and in this case they have been willing to refer to various case laws to support their
22 arguments.

23 Once more, the legal representative asked for access to confidential documents, but when
24 such request was turned down, the legal representative argued that CDH jurisprudence
25 allowed access for such representatives, whereas the CDH jurisdiction refers only to the

1 parties in the case.

2 What this leads us to is a situation where the legal representative of the victims seeks
3 ultimately to become a party to this trial, and this can be clearly seen in the various
4 arguments in support of their motions.

5 Defence would like to recall that victims are not parties to the proceedings, they are
6 simply participants, and in that regard their participation and contribution to the
7 proceedings must be strictly governed in order to preserve the proper conduct of
8 proceedings.

9 The responsibility for this guidance lies first and foremost with the Judges. In fact, the
10 Defence has raised these questions on a number of occasions in its response to legal
11 representative's motions, but the Pre-Trial Chamber did not remind the legal
12 representative of its legitimate but limited place in the proceedings.

13 Before moving on to the next preliminary remarks, the Defence would like to point out
14 that the Pre-Trial Chamber, in answer to a victim's request last evening, did not consult
15 the parties and therefore was in breach of the principle of adversarial hearings. On that
16 note, let me turn to my last preliminary remark, that is the connection between cases.

17 Clearly, from the case at hand, it emerges that for all, that is the Ivorian authorities and
18 the ICC, there is only one case, one case dealing with the alleged role of President Gbagbo
19 and his inner circle in the post-electoral violence. It is true, as I mentioned a while ago,
20 that all investigations, even at the national level, deal with President Gbagbo. The ICC
21 and its Prosecutor has dealt at length with the role of the alleged co-perpetrators of these
22 acts; namely, President Gbagbo, Simone Gbagbo and Blé Goudé. Therefore, there is no
23 reason why these cases should be split over several jurisdictions and over a number of
24 cases.

25 In these circumstances, therefore, the Defence prays the Chamber to establish a link

1 between these various prosecutions relating to the post-electoral violence and to draw the
2 necessary conclusions. These conclusions could be, one, in terms of complementarity,
3 the Court could hand over the matters to the Ivorian Courts. In that way, President
4 Gbagbo will be present at his trial in ongoing proceedings in which he is the main person
5 to be involved.

6 Secondly, it would also be logical for the Pre-Trial Chamber to suspend these proceedings
7 while waiting for further information from the Côte d'Ivoire on the involvement of the
8 former collaborators of President Gbagbo in the post-electoral events. Once again,
9 Simone Gbagbo and Charles Blé Goudé both have been -- are being prosecuted in Côte
10 d'Ivoire, and we believe that the -- it is important to note that President Gbagbo cannot be
11 tried without knowing what they have done in that context.

12 Let me conclude my preliminary remarks by saying briefly that the thrust of our remarks
13 has been, apart from the various issues raised by Defence and the presence of all those
14 who are involved in couching these legal proceedings and the historical outcome of these
15 proceedings that are being followed across the world.

16 The history of this trial is incomplete, as reflected in the incomplete DCC submitted by the
17 Prosecution, and so what happens in the end is that there is a search for an author, there is
18 a search for someone who should lead, and in these circumstances, as in the story by
19 Pirandello, what is likely to happen is that because of this diversity and these differences,
20 we might end up in a situation of confusion.

21 Contrary to the story of Pirandello, you, your Honours, Madam President, you have the
22 noble duty to conduct these proceedings and to bring together all these fragments
23 involving various personalities to a situation where these proceedings end without
24 culminating in a lie.

25 Thank you.

1 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I shall now hand
2 the floor to the Office of the Prosecution. You have half-an-hour to respond to the
3 Defence.

4 MS BENSOUDA: Madam President, senior trial lawyer, Eric MacDonald, will address
5 the Chamber.

6 MR MACDONALD: (Interpretation) Madam President, your Honours, first and
7 foremost I will cover the issue of admissibility and, secondly, I will move on to the first
8 point, that is notably the issue of co-operation.

9 The second point with regard to the Document Containing the Charges will be covered by
10 my colleague Reinhold Gallmetzer and the legal representatives of victims will then be
11 able to respond to the third point, and with regard to the last point I wonder whether in
12 fact the Prosecution does have anything to say in response. I would recall the
13 Chamber that Rule 122(3), and I'm interrupting my colleagues here, despite the fact that
14 these are viva voce exercise in presenting arguments, I do not think that the parties need
15 to remain seated and the Prosecution will intervene wherever they deem it appropriate, of
16 course mindful and respectful of the proceedings underway.

17 We would like to thank the Chamber for providing us with the opportunity of responding
18 to this application before 23 March, this last-minute application it should be said, despite
19 the fact that they were aware of the fact of the confirmation of the charges hearing was to
20 occur at this date, but four days beforehand the Defence filed its application in writing.

21 It would also be important for the Chamber to request of the Defence whether they have
22 any further evidence in addition to the additional 14 annexes upon which they are relying
23 in order to establish the common conduct and the -- between notably the crimes charged
24 before the ICC and before the Ivory Coast.

25 Now, within the context of this submission, I would like to say immediately that the

1 Prosecution will clearly show or demonstrate that the International Criminal Court has
2 jurisdiction in the matter and that this case is indeed purely and entirely admissible before
3 this Court.

4 The Defence is attempting to extend, or to extend the concept of behaviour or conduct,
5 and the Appeals Chamber of this very Court, what they call the substantially same
6 conduct test.

7 The Prosecution will show, in writing, that there is no doubt at all that this case is indeed
8 admissible; that Mr Gbagbo will not be rid of the charges levelled against him, and simply
9 for the very good reason that there is a no common measure between the conduct of the
10 charges levelled against him in Côte d'Ivoire and the charges, or crimes against humanity,
11 notably of murder of civilians, and Mr Gbagbo's conduct within the context of the rape of
12 women and civilians and his conduct with regard to the crimes against humanity of
13 persecution, persecution of part of the Ivorian population, and finally the charge or
14 charges or crimes of inhumane acts constituting a crime against humanity.

15 We shall show or demonstrate in writing, finally, that this application or submission filed
16 four days before the commencement of this hearing is in fact a smoke screen and
17 essentially it is probably destined to play to the public gallery.

18 Now, secondly, the issue of co-operation: Where are the submissions filed by the
19 Defence prior to this hearing requesting the assistance of this Chamber in the conduct of
20 its investigations out in the field? If the Defence finds it difficult to conduct said
21 investigations, well, where are those written submissions or filings?

22 The Chamber would not be in a position to delay proceedings today because, once again,
23 this is of course another technique on the part of the Defence, and we are mindful of this;
24 they are once again trying to stall proceedings.

25 Now, since the month of June, this Confirmation of Charges hearing has been planned,

1 and once again they have asked for it to be postponed. I would like -- I might sit down,
2 Maître Altit, if you would like to address the Trial Chamber.

3 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Yes, Maître Altit.

4 MR ALTIT: (Interpretation) Thank you, Madam President. Now, it would seem to
5 me that we should be responding or they should be responding to the salient points
6 broached just now. This is not time for gratuitous information or gratuitous comments.
7 I really do believe that there is a problem here. I think that the Prosecution will have the
8 time to expose his theory.

9 I would request that he not mislead the Trial Chamber. These were time-delaying
10 attempts. The experts sent by your Chamber recognised the reality of the situation.
11 There are certain things that can be accepted and others that can't.

12 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I'm sorry to
13 interrupt you. I would like to reassure you that you will have an imparted or allocated
14 time to speak and you will be able to respond to what the Prosecution has to say, and of
15 course you will have an equal amount of time to speak. You will have time to respond.

16 MR ALTIT: (Interpretation) I thank you.

17 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Please continue.

18 MR MACDONALD: (Interpretation) I thank you. The Prosecution submits that the
19 first point, notably the point with regard to co-operation, should be rejected or dismissed
20 because once again this is a tactic on the part of the Defence to delay proceedings.

21 The lack of action on the part of Defence over the last eight months, and its -- the fact that
22 it has not raised this matter with the Chamber prior to this shows that it is finding it
23 difficult to discover the 3,508 elements of evidence that the Prosecution has managed to
24 disclose to date.

25 Now, if there are any further elements that they required, first of all, they might have

1 informed the Prosecution of the fact and, secondly - which they did not - and, secondly,
2 they might have requested of the Registry for co-operation, and they were never notified
3 of the fact.

4 Now, to complain about this today, at the very last minute once again, is, and I shall
5 repeat myself, a tactic on the part of the Defence. In previous cases, the Prosecution took
6 part in hearings where the Defence found it difficult to obtain co-operation on the part of
7 certain national organisations or States, and maybe the Prosecution was in the position to
8 intercede with these organisations or States for them to co-operate with the
9 Defence because of course this is in the interest of justice. It is in the interest of justice for
10 the Defence, in some cases, when justified, to have access to certain documents.

11 I shall now -- I'd just like to revisit one issue.

12 The Prosecution contends that this issue of co-operation should also be dismissed in the
13 sense that it does not meet the criteria of 122(3) with regard to the proceedings or the
14 conduct of proceedings during this Confirmation of Charges hearing.

15 I believe that the most central point broached and of most interest to the Chamber, the
16 second point, is that of the Document Containing the Charges, and as previously
17 mentioned, my colleague Gallmetzer will now develop this, the response on the part of
18 the Prosecution to this point, and I thank you.

19 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Just before
20 allowing you to address the Court, it was not 23 March but 28 March was the date stated
21 by the Chamber for responses.

22 MR MACDONALD: (Interpretation) Yes, indeed, I had noted down the date and it
23 was a lapse on my part. I misspoke, it was indeed 28 March.

24 MR GALLMETZER: Good afternoon, your Honours. With your permission I would
25 like to address the arguments raised by the Defence in relation to the alleged defects of the

1 Document Containing the Charges. So before I go into detail, I remind our learned
2 colleagues from the Defence and I point out to the Chamber that this Pre-Trial
3 Chamber has issued a warrant of arrest against Mr Gbagbo on the basis of the series of
4 indirect co-perpetration under Article 25(3)(a), but it has expressly stated that the precise
5 mode of liability may have to be revisited in the context of the confirmation hearing.
6 So we have read it, we have thought carefully about it, and the result of our internal
7 thought process and deliberation is to present this Chamber with a different mode of
8 liability in addition to the one under Article 25(3)(a).

9 We have disclosed our Document Containing the Charges to the Defence pursuant
10 to -- the latest version that I'm relating to, pursuant to the order of the Chamber and
11 pursuant to Rule 121 of the regulations -- of the Rules of Procedure and Evidence that
12 provides that it has to be disclosed 30 days prior to the confirmation hearing.

13 Now, the fact that we had already disclosed other versions of that document earlier, and
14 that these versions were slightly different - not factually but in terms of legal
15 qualification - that does not cause any prejudice to the Defence. To the contrary, it
16 provides the Defence an advantage that they knew the Prosecution's case well in advance
17 to the 30 days, and the additional legal characterisation does not in fact constitute any
18 amendments or significant amendments to the facts and circumstances. As a matter of
19 fact, we rely on the same facts and on the same circumstances to support our other legal
20 characterisation under Article 25(3)(d).

21 The Defence in fact refers to new facts, but there are no new facts, it is the same facts.
22 Besides, even if there were new facts, as I said, the criteria is we have disclosed a
23 document 30 days in advance and that is the starting point from which our case needs to
24 be assessed.

25 Let me just go back one step. The Defence alleges a lack of specificity in the charges, and

1 it says the named charges is not mentioned in our document, apart from the title. That,
2 with all due respect to my learned colleague, is an inaccurate submission. It is, as you
3 can clearly see in the structure, the layout of our document, paragraphs 92 to 108 set out
4 the charges, and these are contained in sections H and I of the document, while the
5 remaining parts of the charging documents set out in minute detail the elements in the
6 Prosecution's case and explain how the Prosecution intends to establish each individual
7 elements of the crime and the elements of the mode of liability.

8 The Prosecution took this approach pursuant to the jurisprudence of this Chamber -- sorry,
9 of Pre-Trial Chamber I, that in its decision confirming the charges in the case against
10 Banda/Jerbo, and that is ICC-02/05-03/09-121, at paragraphs 36 to 38. This decision
11 explains exactly how the portion of the charges relates to other parts in the DCC, and
12 what the Chamber is requested to confirm is not the entire document, but only the
13 executive part in the charges themselves which in this case, as I said before, are laid out in
14 paragraphs 92 to 108.

15 Now, the remainder of the document has a specific purpose. That's why we're very
16 careful in explaining, as I said, in minute detail what the Prosecution's theory is, to
17 provide both to Defence advance notice of what our case is and to provide also clarity to
18 the Chamber of the details of our case.

19 In addition, we have provided the Defence and the Chamber with a list of evidence. In
20 this list of evidence, we have explained how each of the pieces of evidence that we intend
21 to use for the purposes of the Confirmation of Charges hearing relate to a specific fact that
22 we charge. This provides the Defence additional notice.

23 In addition, we have provided a courtesy copy of the footnoted version of the DCC, which
24 in a different format is meant to support the Defence in the reading of our case and to
25 provide them with notice of what the nature of our case is.

1 The jurisprudence of this Court has established that lists of evidence is an integral part of
2 how to read the case, and it is meant to assist the Defence in the understanding of the
3 Prosecution's case, and it is no different here. So we have provided all these details and
4 we are confident that it is very detailed and sufficient to provide adequate notice of which
5 the Defence obviously has a right, which we fully acknowledge.

6 Now, if I may go back to -- if I may go back to the facts and circumstances. The
7 Defence says that all of a sudden we come up with new facts and we do not explain how
8 our other legal characterisation of the facts and Article 25(3)(d) is made out by the facts
9 and circumstances and the evidence that we strive. This, again, with all due respect, is
10 not true. In section I of our Document Containing the Charges, and counts 5 to 8, we
11 specifically make cross -- may I continue with your permission? Thank you.

12 We specifically set out and make reference as to those facts that established individual
13 elements under Article 25(3)(d) and in the context of our presentation we will explain in
14 more detail how the charges under Article 25(3)(a) and 25(3)(d) they relate to each other,
15 we will make the argument that they are mostly included, and to the extent that they are
16 not, the facts and circumstances of the DCC are sufficient to make out the elements under
17 25(3)(d).

18 My learned colleague from the Defence has specifically mentioned that the Document
19 Containing the Charges does not indicate that the physical perpetrators are people who
20 espouse a common plan, or in this case who act on pursuant to a common purpose.

21 I would like to refer you to paragraph 39 of the Document Containing the Charges where
22 we say that although for the purpose of indirect co-perpetration it is not necessary in this
23 particular case not only Mr Gbagbo and members of his inner circle espoused a common
24 plan, but also other members of the pro-Gbagbo forces including the physical perpetrators
25 of the crime, and this is in paragraph 37, as I said, of the Document Containing the

1 Charges and the relevant evidence to support this can be found in footnotes 146 to 150 of
2 the footnoted version of the Document Containing the Charges.

3 We believe that this fully addresses the concern of the Chamber and therefore request the
4 Chamber to reject the motion of the Defence.

5 MR MACDONALD: (Interpretation) With your leave, Madam President, I would like
6 to quite simply add a few points of information; notably, in the decision on the issuance of
7 a warrant of arrest, I would refer the Chamber to paragraph 67 thereof -- 77 thereof, where
8 it is clearly mentioned that the mode of liability, as you will recall, will be revisited in the
9 light of the Confirmation of Charges hearing, and here we are. We are at the
10 Confirmation of Charges hearing.

11 So, the time-limits, according to the Statute and the Rules of Procedure, have also been
12 respected. The Prosecution would recall that the Defence not only has it in its possession
13 a Document Containing the Charges, but it has an annotated version thereof with citations
14 and references to each of the items of evidence.

15 So, in addition to the lists, the facts, they have additional information that goes beyond the
16 ordinary obligations upon the Prosecution, and this is to enable the Defence to prepare its
17 case.

18 So, the circumstances of the case provides a summary of the situation in the preceding
19 pages and paragraphs which enables the Chamber to study this and confirm the charges,
20 and it enables them, were the charges to be confirmed, to have this information at hand.

21 So, notification of additional mode of liability has been done with the distinct aim in mind
22 of avoiding us arriving at this trial stage with potential ambiguity in the air.

23 I'm being told to slow down, but I have come to the end of my presentation and I thank
24 you.

25 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) We have a few

1 minutes to spare, but I do believe that it would be better for us to take the break now and
2 hand the floor to you after the break; otherwise, you would have to break, interrupt your
3 presentation in five minutes.

4 MS MASSIDDA: (Interpretation) As you like, Madam President. I can start, I can
5 commence now, or I can wait for the break.

6 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I believe that we
7 should wait after the break and in such a manner you will not be interrupted.

8 THE COURT USHER: All rise.

9 (Recess taken at 4.53 p.m.)

10 (Upon resuming in open session at 5.29 p.m.)

11 THE COURT USHER: All rise.

12 Please be seated.

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) We are going to
14 continue with the next point on the agenda; that is response to the Defence observations
15 on admissibility and due process.

16 Ms Massidda, you have the floor.

17 MS MASSIDDA: (Interpretation) Thank you, your Honour.

18 I will begin with the admissibility of the case and subsequently deal with the procedural
19 issues raised by Mr Jacobs.

20 Madam President, your Honours, the victims take note of your decision to authorise them
21 to file documents on admissibility latest on 28 March 2013. This will make it possible for
22 us to also consult them on this very crucial issue. We will respond point by point to the
23 Defence on the issues raised and, since I am on my feet, I will make a few oral
24 observations.

25 The Defence request was notified on Friday, 15 February, at 5.30, that is one working day

1 before the commencement of the confirmation hearing. The Defence does not base its
2 application on any new element but on elements that were in its possession ever since the
3 beginning of the proceedings. They base their arguments for the admissibility challenge
4 on a document dated one-and-a-half years ago and which was in its possession for all that
5 time.

6 This document does not refer --

7 MR ALTIT: (Interpretation) Thank you, your Honour. I'm sorry for interrupting you,
8 but reference was made to a confidential document and we cannot overlook that.

9 MS MASSIDDA: (Interpretation) Your Honour, the document was mentioned by
10 Mr Jacobs and I am not revealing any confidential information in this document. I did
11 not mention any confidential information.

12 MR ALTIT: (Interpretation) The date and the authors were mentioned and I believe
13 Mr Jacobs refrained from giving any such information.

14 MS MASSIDDA: (Interpretation) Let me move on, your Honour. We are going to
15 deal with this in writing.

16 I would like to move on now to the merits of the Defence request. In its decision of
17 15 August 2012, the Pre-Trial Chamber established certain circumstances that are relevant
18 for considering admissibility. The Chamber already stated that Mr Gbagbo was arrested
19 on 11 April 2011 by Ivorian authorities, transferred to the north of the country from where
20 he was transferred to the Court on 29 November 2011 and indicted for economic crimes.
21 In light of the nature of the crimes charged against Mr Gbagbo which have no link to the
22 crimes relevant to the jurisdiction of the Court, the Chamber concluded that Article 55(1)
23 of the Rome Statute was not applicable in this particular case, but it seems to us, Madam
24 President, your Honours, that those conclusions of the Chamber are to be considered as
25 res judicata. As a result, the facts established by the Chamber concerning the nature of

1 the crimes charged against Mr Gbagbo in Côte d'Ivoire, as well as the link between those
2 crimes and those with which he is charged in this Court do not have, or rather does not
3 have to be debated again.

4 In fact, the Defence itself in paragraph 36 of its application concedes that Mr Gbagbo was
5 indicted on 18 April 2011 for economic crimes, specifically aggravated theft,
6 misappropriation of public funds, embezzlement, pillaging and crimes against the
7 national economy, and yet according to the settled law of the Court it is a sine qua non for
8 a case resulting from an investigation in a situation to be declared inadmissible such that
9 the national proceedings should involve not only the person but the conduct forming the
10 subject of the case brought before the Court.

11 The Appeals Chamber considered, and I quote, (Speaks English) "First alternative: The
12 question is not merely a question of investigation in the abstract, but is whether the same
13 case is being investigated by both the Court and the national jurisdiction."

14 (Interpretation) Moreover, it is up to the party making this allegation to provide
15 convincing evidence that an investigation or prosecution have been carried out or are
16 ongoing at the national level.

17 Madam President, your Honours, the Defence has alleged that Ivorian authorities carried
18 out investigations against Mr Gbagbo relating to crimes brought before the Court here,
19 but they do not provide any specific evidence to prove that the Ivorian authorities
20 effectively took concrete measures to investigate those crimes.

21 The Defence itself concedes that the crimes investigated by the Ivorian authorities in
22 relation to Mr Gbagbo are not the same but fall within the same context as the one raised
23 by the ICC, and that is paragraph 52 of the Defence application.

24 Insofar as the Defence puts forward the idea that the test of the same conduct should refer
25 to the general conduct linked to the context within which the crimes were perpetrated,

1 rather than the conduct linked to the direct commission of the crimes, we can only realise
2 that this interpretation does not have any basis and therefore cannot be accepted by the
3 Chamber.

4 The test of similar conduct has to be interpreted within its strictest meaning; that is it
5 should require that the identical incidents relating to the alleged conduct should be the
6 subject of investigations and prosecution at the national level and before the Court.

7 Given that the Defence does not provide any specific evidence to show that Côte d'Ivoire
8 carried out investigation and prosecution relating to the crimes charged before this Court,
9 it is the opinion of the victims that it is not even necessary to examine the points relating
10 to the capacity and willingness of the State under Article 17(1) of the Rome Statute.

11 Nevertheless, let me make a few points relating to the capacity of Côte d'Ivoire to carry
12 out public investigations. Based on available documents from the UN and NGOs, Côte
13 d'Ivoire is currently trying to strengthen its judicial system which was greatly damaged
14 because of structural problems and after the political crisis of 2010. In fact, it was only
15 last October that the Minister of Justice of Côte d'Ivoire announced the creation of a
16 specialised agency made up of prosecutors, investigating magistrates and police officers
17 to investigate the crimes committed during the post-electoral crisis.

18 Regarding what can be regarded as the weaknesses of the judicial system in its report
19 dated 21 December 2012 by the UN the Secretary-General states, and I quote, "The
20 strengthening of the judicial institutions remains a crucial task to fight against impunity
21 and ensure stability, security, compliance with human rights and respect for the law. I
22 welcome the determination of the government to reinforce the judicial structures and
23 penitentiary administration. However, I remain concerned by the continuing violations
24 of human rights, particularly the several cases of sexual violence against women and
25 children. I would like to appeal to the government to put an end to impunity by

1 urgently prosecuting perpetrators of serious violations of human rights irrespective of
2 their political affiliation in accordance with international instruments."

3 As a result, Madam President, your Honours, even if the Defence had demonstrated that
4 the Côte d'Ivoire authorities opened proceedings against Mr Gbagbo, and that is not the
5 case for the same crimes charged before the Court, the information available cannot
6 convince us that Mr Gbagbo can effectively be tried in Côte d'Ivoire. The victims are of
7 the opinion, Madam President, your Honours, that the Defence application should be
8 dismissed because of an obvious lack of basis.

9 And now, your Honours, I will comment on the issues raised in the second part of the
10 observations of the Defence. I'm wondering whether those issues are part of the
11 procedural matters to be dealt with under the proper conduct of the proceedings. In any
12 case, regarding the first two issues and also the last issue raised by the Defence, I will not
13 make any observations. I would subscribe to the submissions of the Prosecutor.

14 Incidentally, regarding the second issue raised by Mr Jacobs, I would like to point out that
15 this issue is premature and I will deal with that in my final observations.

16 Lastly, in respect of what the Defence refers to as the attitude of the representative of the
17 victims, I would like to point out that throughout the proceedings the Defence has the
18 opportunity to respond to submissions made by Common Legal Representative. For the
19 first time the legal representative was faced with proceedings that were almost completely
20 confidential because of the Defence requests. As a result, we are not able to fully
21 represent effectively the rights of the victims that we represent and I would like to recall
22 that the victims have a legitimate interest to participate effectively in the proceedings,
23 even if the Defence might not like this. The legal representative has the right, just like
24 any other counsel in this courtroom, to perform her professional obligations and the
25 Defence should not therefore describe the attitude of the legal representative as

1 scandalous, or unacceptable.

2 Thank you.

3 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.

4 I would like to ask Mr Altit whether he has any further observations to make? You have
5 ten minutes.

6 MR ALTIT: (Interpretation) Thank you, your Honour.

7 I will make some very brief remarks before handing over to Professor Jacobs to respond to
8 the observations on the DCC. Nevertheless, I would like to comment on the approach of
9 the Prosecutor, if I have fully understood what they have said.

10 The Defence should not raise any issues relating to jurisdiction, provisional release,
11 equality of arms and the fairness of the proceedings in general. On the other hand, they
12 feel that we should accept and even thank them for being overwhelmed with evidence
13 that is disclosed over 3,000 pages. We have budgetary resources for three individuals
14 and I will allow the Chamber to draw the consequences from this situation.

15 But the issue raised here is a serious issue and it relates to the rights of the Defence and
16 more specifically the fairness of the trial. The rights of the Defence and beyond that the
17 fairness of the trial is at the heart of every credible proceedings. We should not lose sight
18 of the fact that this is in the interest of justice, not in the interest of the Defence, so this is
19 not a strategy or a technique being used by the Defence to delay the proceedings, but
20 rather it is an essential right and these rights ensure that the proceedings are fair. These
21 include the rights of the Defence to raise those issues.

22 So where is the problem? The points have been raised and we are dealing here with
23 procedural matters and I will now hand over to Professor Jacobs to continue with our
24 submissions.

25 MR JACOBS: (Interpretation) Thank you, your Honour.

1 I would like to briefly respond to some of the issues raised concerning the DCC and
2 admissibility.

3 In respect of the DCC, my learned friend of the Office of the Prosecutor stated that in a
4 decision of 30 November 2011, more than one year ago, the Pre-Trial Chamber stated that
5 the mode of responsibility will be reviewed in due course with the parties and
6 participants. I do not see how this is a justification of what has happened in recent
7 months. Should the Defence have prepared itself in relation to all the modes of
8 responsibility while waiting for the Prosecution to decide?

9 The problem that arises here is that the Defence was notified once again during a status
10 conference requested by the Defence and this was done two months before the
11 commencement of the Confirmation of Charges hearing. Now, coming back specifically
12 to the two points, that is essential elements and mode of responsibility under 25(3)(d), the
13 Defence would like to thank the Prosecutor for giving us a complimentary copy of the
14 detailed document on the table of evidence. However, what is important is are all those
15 elements clearly indicated in the DCC?

16 I would like to point out that in the original of the DCC in French, the charges do not
17 appear after the title. The paragraph that appears mentions the word "accusations," so
18 the question is simple: Would it be possible after reading this document to identify the
19 essential elements and the subsidiary elements relating to the charges? And the answer
20 here is "No."

21 In fact, under 25(3)(d) and the mode of responsibility, I understand that the OTP cannot
22 explain the incoherencies and the defects of his document. For example, the definition of
23 a group covers one paragraph. A group acting with a common purpose is one of the
24 crucial elements of those charges and it is covered in one paragraph and as the Prosecutor
25 says we are referred to other documents. Once again reading a DCC should not give us

1 only a cursory idea of the charges.

2 Regarding the references, we are referred to the contextual elements of the crimes against
3 humanity. This proves once again that the Prosecutor is confusing between the
4 contextual elements of crimes against humanity and the mode of liability.

5 Another reference is made to the common plan under 5(3), but you have to show the
6 criminal intent of the group acting with a common purpose, and then there is reference
7 also to other members of the common plan. This is supposed to the group acting with a
8 common purpose. Are we to believe that that is the case or they are simply individuals
9 that contribute to the common purpose? So there is a lack of clarity regarding the mode
10 of responsibility under 25(3)(2).

11 Regarding admissibility, contrary to what the Prosecutor and the legal representative of
12 witnesses would have us believe, jurisprudence has never clearly specified the conduct.
13 It is not defined in the Statute. And in the Kenya case, the Judges mentioned that the
14 conduct should be substantially similar. So this is very clear.

15 The legal representative says that it should be the same crimes. In that case, the
16 Prosecutor who has chosen four incidents should now choose four other incidents to
17 support that claim of complementarity. This is not the legal characterisation of the facts.
18 If those four incidents had been characterised as genocide at the national level, rather than
19 crimes against humanity, does he mean that the Court should have taken over?

20 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I am sorry to
21 interrupt you, but you really need to conclude because the Bench has a few minutes,
22 needs a few minutes, to conclude before the Prosecutor takes over.

23 MR JACOBS: (Interpretation) Thank you. The legal representative of victims
24 mentioned the strict implementation -- or interpretation that has to be given to the
25 conduct in question. If this was the case there would be absurdity, because if today the

1 Prosecutor applied to the Pre-Trial Chamber to ask for leave to open a new investigation
2 in Côte d'Ivoire, based on the test of complementarity, if it is applied then that request will
3 not be granted because the highest ranking officials are being prosecuted today.

4 So we have a rather strange situation in which such an investigation would not be
5 allowed today, but a case derived from it is considered admissible.

6 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you. We
7 are going to suspend for a -- for some time and we will consult with the Judges regarding
8 the points that have been raised, after which we will give the floor to the Prosecutor.

9 (Pre-Trial Chamber confers)

10 THE COURT OFFICER: Your Honours, Madam President, just for the record of the case,
11 the hearing is still continuing and we are still in open session.

12 (Pre-Trial Chamber confers)

13 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.

14 Regarding the issues that have been raised, we have the following to say: Regarding
15 admissibility, the Chamber requested observations to be filed before 28 March 2013 and
16 thereafter we will reach our determination.

17 Regarding the four procedural matters that have been raised, co-operation to begin with,
18 the Chamber is of the opinion that the Confirmation of Charges hearing should not be
19 suspended because of the difficulties of the Defence. In its decision 325 of
20 14 December 2013, the Chamber already decided that the setting of the date for the
21 hearing could not depend on positive responses from requests for co-operation by the
22 Defence.

23 Regarding the DCC, in accordance with Rule 122(6) of the Rules of Procedure and
24 Evidence, the Chamber will settle this matter in the decision concerning the DCC.

25 Regarding the Common Legal Representative, the Chamber has duly noted the

1 observations of the Defence, but underscores the fact that the Defence did not file any
2 concrete motion on that matter.

3 As for the existing links or connection, it is the opinion of the Chamber that there is no
4 legal basis in the Statute or the Rules of Procedure that the hearing should go on taking
5 into consideration this issue of connection.

6 So to conclude, this confirmation hearing will continue and I will now give the floor to the
7 Office of the Prosecutor to make its presentation. You have 30 minutes.

8 MS BENSOUDA: (Interpretation) Thank you, Madam President.

9 Madam President, your Honours, the matter before you today concerns

10 Mr Laurent Gbagbo, a president who sacrificed the political electoral democratic
11 processes and preferred to resort to violence and crime in a bid to stay in power.

12 In December 2010 Côte d'Ivoire held peaceful elections and the Ivorian people had the
13 opportunity to come together and choose the person they wanted to lead their country,
14 but they were deprived of this possibility by, among others, Mr Gbagbo, who resorted to
15 violence against civilians in order to remain in power.

16 In only a few days, Côte d'Ivoire went from a country where ordinary law-abiding
17 citizens had massively turned out to elect their president to a theatre of extreme violence
18 which once again plunged this country into a state of chaos and divided its citizens.

19 In no time, hundreds of Ivorians morphed from voters to victims. The Republic of Côte
20 d'Ivoire then lapsed into five months of violence. I know that many Ivorians who were
21 hard hit by this tragedy are attentively following these proceedings. I would like
22 everyone to understand that in this case it is not a matter of determining who won or who
23 lost the election. It is not in any manner whatsoever a matter here of politics. We are
24 gathered here today because atrocious acts were committed on a large scale against the
25 Ivorian people after the elections.

1 We are here, Madam President, to send out a strong message to those who intend to
2 attempt to get to power, or to remain in power, by use of force and brutality, to tell them
3 that they shall henceforth be answerable for their actions.

4 (Speaks English) Madam President, with your leave, I will now continue in English.

5 Today my office is here to demonstrate that Mr Laurent Gbagbo bears the greatest
6 responsibility for some of the worst crimes committed in Côte d'Ivoire during the
7 post-election violence in 2010/2011. What should have been a moment of unity, the first
8 presidential elections in ten years in Côte d'Ivoire, descended into chaos and unspeakable
9 violence.

10 The Prosecution's evidence will show that Mr Gbagbo and members of his inner circle
11 adopted a policy and a common plan with the objective of maintaining Mr Gbagbo as
12 President of Côte d'Ivoire by any means, including by lethal force.

13 We will show that Mr Gbagbo and forces under his control are responsible for the deaths,
14 rapes, serious injuries to and arbitrary detention of countless law-abiding citizens,
15 civilians who were perceived to support Mr Ouattara.

16 For these brutal, revolting acts, the Prosecution charges Mr Gbagbo with crimes against
17 humanity and we will request the Chamber to commit Mr Gbagbo to trial for these crimes.

18 The first round of the presidential elections took place on 31 October 2010. The second
19 round was organised between 28 November and 1 December 2010.

20 On 2 December, the Chair of the Independent Electoral Commission announced the
21 provisional results declaring victory for Mr Ouattara. The next day the President of the
22 Constitutional Council overturned that decision and declared Mr Gbagbo the winner, and
23 the two candidates simultaneously declared themselves President of Côte d'Ivoire.

24 This results in the Republic of Côte d'Ivoire being engulfed in a violent post-election crisis,
25 until May of 2011, that shocked the world. This, Madam President, should have been a

1 historic moment, the first presidential elections in Côte d'Ivoire since 2000. Instead, in
2 the span of only three days, the country was transformed from an exercise in democracy
3 with more than 80 per cent of the registered voters casting their ballot, to a situation of
4 division and hatred during which hundreds of civilians became victims of mass violence.
5 Madam President, the Prosecution is here to give a voice to these victims, to all the victims
6 who suffered and those who continue to suffer. The International Criminal Court cannot
7 bring back the family members they have lost or make them even forget the pain that they
8 have suffered, and by charging Mr Gbagbo for the crimes committed, we aim at bringing
9 justice to these victims.

10 Madam President, your Honours, the Prosecution has selected four incidents that are
11 representative of the crimes committed by the pro-Gbagbo forces in a sustained series of
12 attacks put into motion by Mr Gbagbo during the post-election violence, and during the
13 next few days the Prosecution will summarise its core evidence regarding these four
14 incidents. It will show that Mr Gbagbo is responsible for the killings of at least 166
15 persons, the rapes of at least 34 women and girls, the infliction of serious bodily injury
16 and suffering on at least 94 persons, and for committing the crime of persecution against
17 at least 294 victims.

18 Let me emphasise again, Madam President, the charges that will be focused -- that will be
19 the focus of these proceedings relate only to the acts and individual criminal
20 responsibility of Mr Laurent Gbagbo. These charges, Madam President, are not brought
21 against the people of Côte d'Ivoire, nor against one or the other segment of its population.
22 These charges are not brought against any political, national, ethnic or religious groups
23 within this country. They are brought against an individual, who the Prosecution will
24 show committed crimes that victimised the entire population of Côte d'Ivoire.

25 This Court will guarantee fair proceedings and all of the rights of Mr Gbagbo under the

1 Rome Statute will be fully respected, and at the end of the confirmation hearing, it will be
2 for you, the Judges, for this Chamber alone, to decide whether to commit Mr Gbagbo to
3 trial.

4 Madam President, your Honours, with your leave now I will ask Mr Eric MacDonald to
5 summarise the charges and the foundation of the Prosecution's case against
6 Mr Laurent Gbagbo. I thank you, Madam President.

7 MR MACDONALD: (Interpretation) Madam President, your Honours, Mr Gbagbo was
8 the President of Côte d'Ivoire from October 2000 to December 2010. After having been in
9 power for ten years, he resolved to keeping it, regardless of the results of the 2010
10 elections, and he continued to insist that he would never hand over power.

11 Before the first round of elections, Mr Gbagbo and persons belonging to his inner circle
12 adopted a policy whereby they would remain in power by all possible means, particularly
13 by launching violent and deadly attacks against civilians who, according to them, were
14 supporters of the opponent, of their opponent or the opposition.

15 Mr Gbagbo in particular appointed persons loyal to him to key positions in government
16 and within the defence and armed forces and security forces of the Ivory Coast, as
17 well -- or the FDS. Thereby he was consolidating the power he had over them in order to
18 be able to use them, where necessary, in order to maintain himself at the Presidency.

19 He also re-enforced the FDS by systematically recruiting young militia and mercenaries
20 and placing them within the command chain in order to be able to control them.

21 Mr Gbagbo also personally made sure that forces loyal to him received proper training,
22 funding and weapons.

23 As stated earlier by Madam Prosecutor, after the second round of elections Mr Ouattara
24 and Mr Gbagbo both declared themselves Presidents of the Côte d'Ivoire. Immediately
25 thereafter, thousands of Mr Ouattara's supporters gathered to call for the resignation of

1 Mr Gbagbo. The international community, as an independent observer, recognised
2 Mr Ouattara as the president-elect and urged Mr Gbagbo to give up power.
3 Madam President, in spite of several repeated appeals to urge him to leave power,
4 Mr Gbagbo refused to leave power and continued to exercise his functions of President of
5 the Republic and commander-in-chief of the armed forces de facto. He mobilised the
6 forces under him and ordered them to implement the policy whereby he would remain in
7 power by force.
8 In concrete terms, he ordered that demonstrations be stopped and he deployed heavily
9 armed soldiers who used lethal force against unarmed demonstrators in the streets.
10 Throughout the period of the post-electoral violence, Mr Gbagbo co-ordinated the
11 implementation of this policy of this common plan. He frequently held meetings with
12 army commanders and his political allies. When informed of activities on the ground, he
13 endorsed the activities of his subordinates.
14 Mr Gbagbo was at the very centre of the decisions that led to the criminal activities of his
15 forces against civilians.
16 The pro-Gbagbo turned a blind eye to the crimes committed by forces loyal to him and
17 even denied on several occasions the existence of such crimes. No one was accountable.
18 In the meantime, Mr Ouattara and members of his government had settled at the Golf
19 Hotel in Cocody in Abidjan. Mr Gbagbo ordered his forces to put the hotel and its
20 occupants under siege, including Mr Ouattara and members of his government.
21 Throughout the post-electoral crisis, the army, the young militia and militia and
22 mercenaries maintained this state of siege and continued to launch violent attacks against
23 civilians suspected of supporting Mr Ouattara and also attacked the hotel using heavy
24 weaponry.
25 Madam President, your Honours, the evidence that the Prosecution will adduce will show

1 that from 28 November 2010, that is at the beginning of the second round of elections, the
2 presidential elections, to 8 May 2011, there was an implementation of the common plan
3 which culminated in systematic and widespread attacks by Mr Gbagbo's loyalist forces
4 against civilians and supporters of Mr Ouattara.

5 Repeated attacks by pro-Gbagbo forces were conducted following the same modus
6 operandi, namely excessive and brutal use of force against unarmed civilians, particularly
7 using heavy weaponry in densely populated areas and neighbourhoods, with a view to
8 dispersing supporters of Mr Ouattara or, further still, to terrorise the civilian population
9 who were suspected of supporting Mr Ouattara.

10 The pro-Gbagbo forces targeted residential neighbourhoods in Abidjan and several
11 communities in the west of Côte d'Ivoire which were considered to be Mr Ouattara's
12 bastions.

13 Furthermore, these forces also attacked some ethnic religious or national groups on the
14 assumption that their members were Mr Ouattara's supporters. Based on this theory of
15 group loyalty, the pro-Gbagbo forces proceeded to set up identity check-points and
16 roadblocks that were set up illicitly and even attacked persons whose names or physical
17 traits linked them to those groups. They further attacked various neighbourhoods and
18 institutions which were considered to be frequently visited by Mr Ouattara's supporters.

19 In the context of these attacks, and particularly in relation to the four events that have
20 been selected by the Prosecutor, which I will summarise, the pro-Gbagbo forces

21 committed the crimes for which Mr Gbagbo is charged in this case. 1. On

22 16 December 2010 in Abidjan, supporters of Mr Ouattara who were civilians marched
23 towards the radio broadcasting house, that is the RTI, in order to install the new general
24 manager of that institution. Pro-Gbagbo forces crushed that demonstration with
25 violence, whereas there had been no provocation in the days following, and up to 19

1 December 2010 the pro-Gbagbo forces launched violent attacks against civilians in various
2 neighbourhoods in Abidjan.

3 When this wave of attacks ended the pro-Gbagbo forces had killed at least 54 persons, had
4 wounded at least 50 and had raped at least 17 women and young girls and on each of
5 those occasions the victims were civilians.

6 The second event occurred on 3 March 2011. On 3 March 2011, more than 3,000 women
7 gathered for a peaceful march in Abobo, a densely populated neighbourhood of Abidjan,
8 with a view to calling for the resignation of Mr Gbagbo and to demonstrate against the
9 violation of human rights.

10 Pro-Gbagbo forces, as the Prosecution will show, opened fire without any warning on the
11 demonstrators, killing seven women and grievously wounding several others.

12 The third event occurred two weeks later on 17 March 2011. Pro-Gbagbo forces based at
13 the Commando Camp in Abobo shelled a densely populated civilian area where a local
14 market, a mosque and residential homes were located. During that single attack, more
15 than 25 civilians were killed and more than 40 were wounded following the shelling of the
16 market and the surrounding neighbourhoods.

17 Let me now turn to the fourth incident. Mr Gbagbo was arrested on 11 April 2011, and
18 that arrest, your Honour, does not indicate that the common plan had come to an end. In
19 fact, a few days before his arrest Mr Gbagbo, from his bunker, whereas his physical arrest
20 was only a matter of time as will be played out in the days ahead, called for the people to
21 chase down Mr Ouattara and his supporters whom he referred to as "terrorists." Even
22 when arrested, that would not put an end to the execution of the common plan.

23 On 12 April, young militia, young pro-Gbagbo militia and police officers and mercenaries
24 attacked several sectors of Yopougon and summarily executed or burnt alive more than 80
25 persons.

1 The perpetrators of these acts also raped some 17 women and in some cases killed their
2 husbands. Several victims were wounded during these attacks. All those victims were
3 natives of the north of Côte d'Ivoire, or hailed from neighbouring African countries.

4 Madam President, your Honours, consequently Mr Gbagbo is accused under Article
5 25(3)(a) of the Statute as indirect co-perpetrator of the following crimes against humanity,
6 or in the alternative under Article 25(3)(d), of contributing to the commission of these
7 crimes; namely, murder of at least 166 persons; rape of at least 34 women and young girls;
8 and serious physical and bodily injury and great suffering to at least 94 persons and in the
9 alternative attempted murder.

10 Furthermore, Mr Gbagbo is answerable for the crime against humanity of persecution for
11 political, national, ethnic and religious reasons in regard of at least 294 victims.

12 The figures put forth and the number of victims are only a very conservative estimate,
13 Madam President, your Honours.

14 These therefore essentially are the charges and the basis for the charges brought against
15 Mr Gbagbo.

16 In the days ahead, the Prosecution will provide evidence in support of its case by
17 identifying and referring to witness statements as well as excerpts indicating that these
18 crimes were indeed committed and that Mr Gbagbo is indeed criminally liable for them.

19 The Prosecution will rely on video excerpts and reports from the United Nations
20 organisation and from a number of NGOs. It will also rely on other documentary
21 evidence and computer-based information as well as information that was seized in the
22 presidential residence of Mr Gbagbo.

23 At the end of the confirmation hearings, the Prosecution will first pray the Chamber to
24 come to the conclusion that there is substantial and sufficient reason to believe that these
25 crimes were indeed committed. The Prosecution will also pray the Chamber to confirm

1 the liability of Mr Gbagbo and then also confirm that he should be criminally liable for
2 these crimes. Finally, the Prosecution will pray the Chamber to commit Mr Gbagbo to
3 trial that he may answer to those charges contained in the Document Containing the
4 Charges.

5 This will be the end of our preliminary or our opening session at these hearings within the
6 agreed time frames. Thank you for your kind attention.

7 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) I thank you and I
8 thank you for respecting the time frames. I want to thank all parties and participants in
9 that regard.

10 Before we adjourn, I would like to put a question to you and we hope that in the next
11 sessions you will be able to provide answers to those questions. A lot has been said
12 today about the mode of liability and we noticed that in one of -- in your conclusion as
13 well as in the Document Containing the Charges reference has been made to liability
14 under 25(3)(a) of the Statute, as well as another possible legal characterisation which
15 would be 25(3)(d) of the Statute.

16 Now, the Chamber would like you to clarify these assertions during your subsequent
17 presentations, or submissions. We would like to know from you whether you are asking
18 the Chamber to confirm the charges under those two modes of liability cumulatively, or in
19 the alternative, or would you rather have the Chamber analyse the facts under 25(3)(d) of
20 the Statute in the alternative; that is if and only if the Chamber comes to the conclusion
21 that the charges cannot be confirmed under 25(3)(a)?

22 Well, we don't ask for an answer to this question now, but we want to ask you to make
23 sure that you deal with this issue during your next submissions. Thank you.

24 MR MACDONALD: (Interpretation) I can provide a brief answer immediately. The
25 Prosecution will pray the Chamber to commit Mr Gbagbo to trial under the two modes of

1 liability and I think that when we come to the end of our submissions we will deal with
2 the specificities relating to these two modes of liability. So the specific answer is the two
3 modes of liability.

4 PRESIDING JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.

5 Thank you. We have now come to the end of today's hearing. I want to thank parties
6 and participants, the interpreters and the steno or court reporters. We resume tomorrow
7 at 14.30. The Court is adjourned.

8 THE COURT USHER: All rise.

9 (The hearing ends in open session at 6.28 p.m.)