

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-02/11  
Date: 3 October 2011

**PRE-TRIAL CHAMBER III**

**Before:** Judge Silvia Fernández de Gurmendi, Presiding Judge  
Judge Elizabeth Odio Benito  
Judge Adrian Fulford

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE**

**Public**

**Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an  
Investigation into the Situation in the Republic of Côte d'Ivoire**

Decision to be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo  
Ms Fatou Bensouda

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Detention Section**

**Victims and Witnesses Unit**

Ms Maria Luisa Martinod-Jacome

**Others**

**Victims Participation and Reparations  
Section**

Ms Fiona McKay

**Pre-Trial Chamber III** (the “Chamber”) of the International Criminal Court (the “Court”) issues the following Decision on the Prosecutor’s Request for authorisation of an investigation in Côte d’Ivoire pursuant to Article 15 of the Rome Statute (“Statute”).

## **I. PROCEDURAL HISTORY**

1. On 22 June 2011 the Presidency of the Court constituted Pre-Trial Chamber III and assigned the situation in the Republic of Côte d’Ivoire to the Chamber.<sup>1</sup>
2. On 23 June 2011, the Prosecutor filed his “Request for authorisation of an investigation pursuant to article 15” (“Request”) in which he requests authorisation from the Chamber to commence an investigation into the situation in the Republic of Côte d’Ivoire in relation to post-election violence in the period following 28 November 2010.<sup>2</sup>
3. The Prosecutor contends that the available information provides a reasonable basis to believe that crimes against humanity under Article 7 of the Statute and war crimes under Article 8 of the Statute were committed in the Republic of Côte d’Ivoire during the post-election violence following 28 November 2010.<sup>3</sup> It is submitted that the main objective of the proposed investigation is to identify those individuals who bear the greatest responsibility for ordering or facilitating these crimes.<sup>4</sup>
4. Pursuant to Regulation 49 of the Regulations of the Court (“Regulations”), the Prosecutor has provided information setting out (i) the references to the crimes that are believed to have been committed and a statement of the facts it is alleged provide

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<sup>1</sup> Decision Constituting Pre-Trial Chamber III and Re-assigning the Situation in the Republic of Côte d’Ivoire, 22 June 2011, ICC-02/11-2.

<sup>2</sup> Request for authorisation of an investigation pursuant to article 15, 23 June 2011, ICC-02/11-3, paragraphs 1 and 40.

<sup>3</sup> ICC-02/11-3, paragraph 72.

<sup>4</sup> ICC-02/11-3, paragraph 76.

a reasonable basis for believing that relevant crimes have been or are being committed, and (ii) a declaration explaining why the crimes that are listed fall within the jurisdiction of the Court.<sup>5</sup>

5. The Prosecutor has submitted a number of annexes which include reports from publicly-available sources (international organisations, non-governmental organisations and the media) as well as certain confidential information. The Prosecutor emphasises that the incidents currently relied on are not exhaustive, but instead they provide a sample that reflects the gravest crimes that occurred during the period of post-election violence.<sup>6</sup> Moreover, the Prosecutor observes that the legal characterisation of these incidents and any crimes that may be addressed at a later stage of the proceedings, if the request is granted, may deviate from the Request.<sup>7</sup>
6. The Prosecutor submits that due to the absence of national proceedings against those who bear the greatest responsibility for these crimes, and in the light of the suggested gravity of the acts committed, the cases that may potentially arise out of its investigation into the situation will be admissible. Furthermore, based on the available information, the Prosecutor submits that he has no reason to believe opening an investigation into the situation will not be in the interests of justice.<sup>8</sup>
7. In compliance with Rule 50 of the Rules of Procedure and Evidence (“Rules”), on 17 June 2011 the Prosecutor provided notice to the victims or their legal representatives of his intention to request authorisation from the Chamber to initiate an investigation in the Republic of Côte d’Ivoire, and he informed them that pursuant to Regulation 50(1) of the Regulations they had 30 days to make any representations to the Chamber.

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<sup>5</sup> ICC-02/11-3, paragraphs 61-173.

<sup>6</sup> ICC-02/11-3, paragraph 25.

<sup>7</sup> ICC-02/11-3, paragraph 25.

<sup>8</sup> ICC-02/11-3, paragraph 7.

8. On 6 July 2011, the Chamber issued an order to the Victims Participation and Reparations Section (“VPRS”) concerning the victims’ representations pursuant to Article 15(3) of the Statute, requesting (i) that all the victims’ representations received by the Court in relation to this Request were to be provided forthwith to the VPRS, and (ii) that the VPRS should provide a single, consolidated report on the collective and individual representations, to be submitted to the Chamber by 1 August 2011 with the original representations annexed thereto.<sup>9</sup> On 28 July 2011, the Chamber granted a request from the VPRS to extend the time limit to file the report to 29 August 2011.<sup>10</sup>
9. On 21 July 2011, the Prosecutor provided the Chamber with additional information on the (national) proceedings that had been conducted in Côte d’Ivoire and France regarding relevant crimes committed in the Republic of Côte d’Ivoire since 28 November 2010 and on the number of civilian deaths attributed to pro-Gbagbo forces.<sup>11</sup>

## **II. ACCEPTANCE OF JURISDICTION BY CÔTE D’IVOIRE**

10. On 18 April 2003, the Republic of Côte d’Ivoire, which is not a State party to the Statute, lodged a declaration under Article 12(3) of the Statute accepting the jurisdiction of the Court for crimes committed in its territory since the events of 19 September 2002 and, additionally, “for an unspecified period of time”

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<sup>9</sup> Order to Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, 6 July 2011, ICC-02/11-6, page 6.

<sup>10</sup> Decision on the VPRS request for an extension of time to report on victims’ representations pursuant to Regulation 35 of the Regulations of the Court, 28 July 2011, ICC-02/11-9, paragraph 6.

<sup>11</sup> Prosecution’s provision of additional information in relation to its request for authorisation of an investigation pursuant to Article 15, 21 July 2011 (notified on 22 July 2011), public redacted version filed on 16 August 2011, ICC-02/11-7-Conf-Exp.

(“Declaration”).<sup>12</sup> This Declaration was signed by Mamadou Bamba, Minister of Foreign Affairs of the Government of former President Laurent Gbagbo.

11. On 14 December 2010, the President, the Prosecutor and the Registrar of the Court received a letter from Alassane Ouattara, in his capacity as newly elected President of Côte d’Ivoire, confirming the continuing validity of the Declaration of 18 April 2003 and committing his country to full cooperation with the Court, without delay, in particular with respect to crimes and abuses committed since March 2004.<sup>13</sup>
12. In a subsequent letter addressed to the Prosecutor on 3 May 2011, President Ouattara referred to the serious crisis that had followed the presidential elections of 31 October 2010 and 28 November 2010 “during which it is unfortunately reasonable to believe that crimes falling under the jurisdiction of the International Criminal Court have

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<sup>12</sup> Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale : « Conformément à l’article 12 paragraphe 3 du statut de la Cour Pénale Internationale, le Gouvernement ivoirien reconnaît la compétence de la Cour aux fins d’identifier, de poursuivre, de juger les auteurs et complices des actes commis sur le territoire ivoirien depuis les événements du 19 septembre 2002. En conséquence, la Côte d’Ivoire s’engage à coopérer avec la Cour sans retard et sans exception conformément au chapitre IX du statut. Cette déclaration, faite pour une durée indéterminée, entrera en vigueur dès sa signature. Fait à Abidjan, le 18 Avr. 2003. Pour le Gouvernement de la République de Côte d’Ivoire Le Ministre d’Etat, Ministre des Affaires Etrangères, Bamba Mamadou » (Republic of Côte d’Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, 18 April 2003, <http://www.icc-cpi.int/NR/rdonlyres/7DA08D8E-FF5E-40C8-92D7-F058D5B032F3/279779/ICDE2.pdf>.)

<sup>13</sup> « Monsieur le Président, Le 18 Avril 2003, le Gouvernement de la République de Côte d’Ivoire reconnaissait solennellement, par son Ministre des Affaires Etrangères, la compétence de la Cour Pénale Internationale. Depuis le 02 décembre 2010, suite à l’élection présidentielle de sortie de crise qu’elle a organisée les 31 octobre et 28 novembre 2010, la Côte d’Ivoire a un nouveau Président de la République dont la victoire a été proclamée par la Commission Electorale Indépendante. Le Représentant spécial du Secrétaire Général de l’ONU a certifié les résultats de cette élection, conformément aux accords politiques de sortie de crise. L’ensemble de la Communauté internationale, notamment le Conseil de Sécurité de l’ONU, les Etats-Unis d’Amérique, la France, l’Union Africaine, la Communauté Economique des Etats d’Afrique de l’Ouest et l’Union Européenne, a reconnu les résultats de cette élection et m’a apporté son soutien. Aussi, en ma qualité de nouveau Président de la République de Côte d’Ivoire et conformément à l’article 12 paragraphe 3 du statut de Rome qui dispose que : *‘Si l’acceptation de la compétence de la Cour par un Etat qui n’est pas Partie au présent Statut est nécessaire aux fins du paragraphe 2, cet Etat peut, par déclaration déposée auprès du Greffier, consentir à ce que la Cour exerce sa compétence à l’égard du crime dont il s’agit. L’Etat ayant accepté la compétence de la Cour coopère avec celle-ci sans retard et sans exception conformément au chapitre IX* ‘, j’ai l’honneur de confirmer la déclaration du 18 avril 2003. A ce titre, j’engage mon pays, la Côte d’Ivoire, à coopérer pleinement et sans délai avec la Cour Pénale Internationale, notamment en ce qui concerne tous les crimes et exactions commis depuis mars 2004. Je vous prie de croire, **Monsieur le Président**, à l’expression de ma considération distinguée. **Alassane Ouattara** (Republic of Côte d’Ivoire, Letter confirming acceptance of jurisdiction of 14 December 2010, <http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>.)

been committed".<sup>14</sup> In light of the gravity of the crimes, he requested the assistance of the Court in order to ensure that the perpetrators would not go unpunished.<sup>15</sup>

13. By Article 12(3) of the Statute jurisdiction is accepted by a declaration lodged with the Registrar over "the crime in question" and by Rule 44(2) of the Rules, a declaration made under that Article implies acceptance of all crimes within the jurisdiction of the Court relevant to the situation. Therefore, the Registry has informed Côte d'Ivoire that the consequence of the Declaration under Article 12(3) of the Statute is that jurisdiction has been accepted as regards the crimes referred to in Article 5 of the Statute that are of relevance to the situation and that the provisions of Part 9 of the Statute and any Rules thereunder concerning States Parties apply.<sup>16</sup>

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<sup>14</sup> « Monsieur le Procureur, Le 18 avril, conformément à l'article 12 paragraphe 3 du Statut de Rome, le Gouvernement de la République de Côte d'Ivoire reconnaissant solennellement, par son Ministre des Affaires Etrangères, la compétence de la Cour pénale internationale aux fins d'identifier, de poursuivre, de juger les auteurs et complices des actes commis sur le territoire ivoirien depuis les événements du 19 septembre 2002. Cette déclaration fut faite pour une durée indéterminée. A l'issue de mon élection à la Présidence de la République de Côte d'Ivoire le 02 décembre 2010, l'une de mes premières décisions fut de confirmer, par lettre en date du 14 décembre 2010, l'acceptation par la Côte d'Ivoire de la compétence de la Cour pénale internationale. Pour les raisons que vous connaissez, le transfert de pouvoir à l'issue de l'élection présidentielle des 31 octobre et 28 novembre 2010 n'a pu s'opérer de la façon pacifique que j'appelais de mes vœux. Il s'en est suivi une période de grave crise au cours de laquelle il est malheureusement raisonnable de croire que des crimes relevant de la compétence de la Cour pénale internationale ont été commis. Ces crimes sont d'une telle gravité que j'en appelle à votre concours pour faire en sorte que les principaux auteurs ne restent pas impunis et ainsi contribuer à restaurer l'Etat de droit en Côte d'Ivoire. En ma qualité de Président de la République, je vais m'employer sans relâche à restaurer dans la plénitude de son indépendance et de ses prérogatives le système judiciaire ivoirien. Le Ministre de la Justice, Garde des Sceaux a déjà pris des mesures pour faire la lumière sur un certain nombre d'infractions commises au cours des derniers mois et des années précédentes. Je ne ménagerai par ailleurs aucun effort pour réconcilier les Ivoiriens entre eux et clore enfin une décennie de violences et de déchirures. Dans ce contexte, et après consultation avec le parquet général et les autorités judiciaires, il apparaît néanmoins que la justice ivoirienne n'est, à ce jour, pas la mieux placée pour connaître des crimes les plus graves commis au cours des derniers mois et toute tentative d'en traduire en justice les plus hauts responsables risquerait de se heurter à des difficultés de tous ordres. Par la présente, j'entends confirmer mon souhait que votre Bureau mène en Côte d'Ivoire des enquêtes indépendantes et impartiales sur les crimes les plus graves commis depuis le 28 novembre 2010 sur l'ensemble du territoire ivoirien, et fasse en sorte que les personnes portant la responsabilité pénale la plus lourde pour ces crimes soient identifiées, poursuivies et traduites devant la Cour pénale internationale. Je réitère l'engagement de mon pays à coopérer pleinement avec votre Bureau tout au long de ces enquêtes et poursuites, et confirme mon intention de faire en sorte que la Côte d'Ivoire devienne Etat Partie au Statut de Rome dans les meilleurs délais possibles. Je vous prie de croire, **Monsieur le Procureur**, en l'assurance de ma considération distinguée. Alassane Ouattara. Président de la République de Côte d'Ivoire (Letter confirming acceptance of jurisdiction of 3 May 2011, <http://www.icc-cpi.int/NR/rdonlyres/7DA08D8E-FF5E-40C8-92D7-F058D5B032F3/283315/LetterOuattaratoOTP030511.PDF>)

<sup>15</sup> *Ibid.*

<sup>16</sup> Registrar of the International Criminal Court, letter dated 31 October 2003.

14. The initial Declaration, which explicitly indicates its unspecified duration, was signed by the Minister of Foreign Affairs of the former President, Laurent Gbagbo, and he had the authority to sign a valid declaration on behalf of Côte d'Ivoire. The subsequent confirmation of the validity of this Declaration in the abovementioned letters of 14 December 2010 and 3 May 2011 demonstrates the intention of the newly-elected authorities to cooperate with the Court. Although these letters refer to crimes committed in 2004 and 2010, they do not seek to restrict or amend the scope of the 2003 Declaration but, instead, they specifically confirm the acceptance by the Republic of Côte d'Ivoire of the ICC's jurisdiction as regards crimes allegedly committed in the recent past.
15. The Chamber concludes that the Court has jurisdiction over crimes allegedly committed in Côte d'Ivoire since 19 September 2002, on the basis of the Declaration of acceptance of 18 April 2003 and the letters of December 2010 and May 2011. Indeed, since Côte d'Ivoire has confirmed its acceptance of jurisdiction in 2010 and 2011, the Chamber does not need to assess whether the Declaration made in 2003 could, on its own, cover crimes allegedly committed in 2010 or 2011. The relevant timeframe of the investigation, if authorised, will be determined by the Chamber on the basis of the Prosecutor's Request and the supporting materials, as well as the victims' representations under Article 15 of the Statute.

### **III. PROCEDURE UNDER ARTICLE 15 OF THE STATUTE**

16. Under Article 15(1) of the Statute, the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes that are within the jurisdiction of the Court. In accordance with Article 15(3) of the Statute, if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he shall submit a request



for authorisation for an investigation, together with any supporting material that has been collected.

17. Rule 48 of the Rules provides that in determining whether there is a reasonable basis to proceed with an investigation under Article 15(3) of the Statute, the Prosecutor shall consider the factors set out in Article 53 (1)(a) to (c) of the Statute. This provision provides that the Prosecutor, in deciding whether to initiate an investigation, shall consider whether (a) the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under Article 17 of the Statute; and (c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
18. In accordance with Article 15(4) of the Statute, if the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that “the case” appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of the case.<sup>17</sup> Pre-Trial Chamber II has indicated that “the case” in Article 15(4) of the Statute should be understood to relate to potential cases within the situation under consideration.<sup>18</sup> The “supporting material” consists of all of the information in the annexes presented by the Prosecutor as part of his Request, including materials from governmental sources, international organisations, non-governmental organisations and the media.<sup>19</sup> As set out in Article

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<sup>17</sup> Article 15(4) of the Statute.

<sup>18</sup> Pre-Trial Chamber II, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 (notified on 1 April 2010), ICC-01/09-19-Corr, paragraph 64.

<sup>19</sup> ICC-02/11-3 and attached confidential annexes 1A, 1B, 1C, 1G and 2, and public Annexes 1D, 1E, 1F, 3, 4, and 5.

15(3) of the Statute, victims' representations also form part of the "available information" the Chamber is to consider when making its decision under Article 15(4) of the Statute.

#### **IV. VICTIMS' REPRESENTATIONS**

19. Pursuant to instructions by the Chamber,<sup>20</sup> on 28 August 2011 the Registry filed a consolidated report on the victims' representations, along with 1089 annexes containing representations relating to the situation in the Côte d'Ivoire.<sup>21</sup> The original Registry filing suggests that 679 of the representations meet the requirements of Rule 85 of the Rules,<sup>22</sup> including 655 individual representations and 24 collective representations (comprising 141 documents),<sup>23</sup> which are referred to in greater detail below. An Addendum to the Report on Victims' Representations was filed on 12 September 2011, containing an updated version of Annex B to the Report, which includes three additional individual representations which had been previously listed in Annex C, and one re-categorised collective representation.<sup>24</sup> Although few of the victims express a view in their representations as to whether an investigation should be authorised by the Chamber, or on the scope of the proposed investigation, some indicated their general desire for justice to be done, requesting that any perpetrators are punished and they seek reparations for the harm they have suffered as a result of the alleged crimes. The Registry suggests in its report that an inference can be drawn from the sheer number of communications received by the Court from the victims that they support the involvement of the Court in Côte d'Ivoire.<sup>25</sup>

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<sup>20</sup> ICC-02/11-6, 6 July 2011.

<sup>21</sup> Report on Victims' Representations, 29 August 2011 (notified on 30 August 2011), public redacted version filed 29 August 2011 (notified on 30 August 2011), ICC-02/11-11-Conf with 1089 confidential *ex parte* annexes.

<sup>22</sup> ICC-02/11-11-Red, paragraph 4.

<sup>23</sup> ICC-02/11-11-Red, paragraph 9.

<sup>24</sup> Addendum to the Report on Victims' Representations, 9 September 2011, ICC-02/11-13-Conf-Exp. (notified on 12 September 2011), public redacted version filed on 9 September 2011 (notified on 12 September 2011), ICC-02/11-13-Red.

<sup>25</sup> ICC-02/11-11-Red, paragraphs 66-67.

20. The Chamber also notes that many of the victims did not provide sufficient information to enable the Chamber to determine whether the contextual or other elements of the underlying acts relating to the crimes have been fulfilled. For example, many victims state that they were beaten or subjected to other physical abuse without providing particulars of the nature or the extent of their mistreatment. In the event, there is a degree of ambiguity as to whether or not the events may constitute torture or cruel and inhuman treatment. However, in light of the low evidential threshold established by Article 15 of the Statute, the Chamber has considered the victims' submissions in a non-restrictive manner. The Chamber emphasises that this broad approach, adopted at this early stage of the proceedings with respect to information provided by the victims, is without prejudice to any later consideration of the facts, when a stricter threshold will be applied.

## V. JURISDICTION

21. In accordance with Rule 48 of the Rules, the Chamber will examine whether there is "a reasonable basis to proceed" taking into account the factors set out in Article 53 (1)(a) to (c) of the Statute, on the basis of the Prosecutor's Request and the supporting material contained in the annexes to the Request, as well as the representations made by the victims. In so doing, it will bear in mind that the underlying purpose of the procedure in Article 15(4) of the Statute is to prevent unwarranted, frivolous or politically motivated investigations.<sup>26</sup>

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<sup>26</sup> ICC-01/09-19-Corr, paragraph 32; see also M. Bergsmo and J. Pejić, "Article 15", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, 2<sup>nd</sup> ed. (Munich etc.: C.H.Beck etc., 2008), page 591, which reads: "[...] the Chamber's application of the "reasonable basis" standard should primarily be steered by the underlying purpose of paragraph 4, that of providing a judicial filter which will protect the Court from the damaging effects of frivolous or politically motivated charges." Also on page 589 it reads: "Paragraph 3 [of Article 15], just as paragraph 4, aims in part at protecting the Court from frivolous or politically motivated charges."

22. The Chamber will first examine whether i) there is a reasonable basis to believe that the alleged crimes committed in Côte d'Ivoire fall within one or more categories of crimes referred to in Article 5 of the Statute (jurisdiction *ratione materiae*); ii) they fulfil the temporal requirements specified under Article 11 of the Statute (jurisdiction *ratione temporis*); and iii) they fulfil the alternative jurisdictional parameters provided for in Article 12, paragraph 2, of the Statute (jurisdiction *ratione loci* or *ratione personae*).

#### A. THE REASONABLE BASIS THRESHOLD

23. Pursuant to Article 53(1)(a) of the Statute the Chamber must examine whether “the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed”.
24. This test of “reasonable basis to believe” is the lowest evidential standard provided by the Statute. Thus, the information available to the Prosecutor is not expected to be “comprehensive” or “conclusive”, which contrasts with the position once the evidence has been gathered during the investigation.<sup>27</sup> In evaluating the information provided by the Prosecutor and the victims, the Chamber must be satisfied that a sensible or reasonable justification exists for the belief that a crime falling within the jurisdiction of the Court “has been or is being committed”.<sup>28</sup>
25. It follows that any finding in this Decision is without prejudice to any later submission to, or finding by, the Chamber in the context of a different stage of the proceedings in the situation of Côte d'Ivoire, in accordance with the evidential standard applicable at that stage of the proceedings.

<sup>27</sup> ICC-01/09-19-Corr, paragraph 27.

<sup>28</sup> ICC-01/09-19-Corr, paragraph 35.

**B. JURISDICTION RATIONAE MATERIAE**

**1. Crimes against Humanity**

26. The Prosecutor submits that there is a reasonable basis to believe that pro-Gbagbo forces committed crimes against humanity during the post-election violence in the period following 28 November 2010.<sup>29</sup> However, the Prosecutor further submits that the information currently available does not indicate that there is a reasonable basis to believe that crimes against humanity were also committed by pro-Ouattara forces and if an investigation is authorised, he intends to investigate whether crimes against humanity were committed by pro-Ouattara supporters pursuant to a State or “organisational” policy.<sup>30</sup>
27. Under Article 7(1) of the Statute, a crime against humanity involves any of the specified acts that are listed (“underlying acts”) when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (“contextual elements”).
28. The contextual elements of crimes against humanity derive from a combination of the “chapeau” of Article 7(1) of the Statute and the definition of “attack” provided by Article 7(2) of the Statute. Article 7(2) of the Statute indicates that an “attack directed against any civilian population” is a course of conduct involving the multiple commission of the acts referred to in paragraph 1 against a civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack.

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<sup>29</sup> ICC-02/11-3, paragraphs 73-74.

<sup>30</sup> ICC-02/11-3, paragraph 75.

29. Accordingly, crimes against humanity involve the following contextual elements: (i) an attack directed against any civilian population; (ii) a State or organisational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus exists between the individual act and the attack; and (v) knowledge of the attack. The Chamber concludes that the requirement of knowledge cannot be adequately addressed at this stage, given the individual perpetrators will only be definitively identified if the investigation is authorised.<sup>31</sup>
30. The Chamber will analyse, both with regard to contextual elements and underlying acts, first the acts allegedly committed by pro-Gbagbo forces and next the acts allegedly committed by pro-Ouattara forces.

### **Acts allegedly committed by Pro-Gbagbo forces**

#### *a. Contextual elements of crimes against humanity*

##### i. An attack directed against a civilian population

31. An attack is not restricted to a “military attack”.<sup>32</sup> Instead, the term refers to “a campaign or operation carried out against the civilian population”. Further, as provided by Article 7(2)(a) of the Statute, it consists of a course of conduct involving the multiple commission of the acts referred to in Article 7(1) of the Statute.<sup>33</sup>
32. Pursuant to Article 7(1) of the Statute the attack must be “directed against any civilian population”. The potential civilian victims of a crime under Article 7 of the Statute can be of any nationality or ethnicity, or they may possess other distinguishing

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<sup>31</sup> For this reason, the mental element will not be addressed for any of the contextual elements and underlying crimes analysed herein.

<sup>32</sup> Elements of Crimes, Introduction to Article 7 of the Statute, paragraph 3.

<sup>33</sup> Pre-Trial Chamber II, Case of the Prosecutor v. Jean-Pierre Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, paragraph 75.

features.<sup>34</sup> It is for the Prosecutor to demonstrate, to the relevant standard of proof, that the attack was directed against the civilian population as a whole and not merely against randomly selected individuals.<sup>35</sup>

33. The Chamber does not need to be satisfied that the entire civilian population of the area in question was targeted.<sup>36</sup> However, the civilian population must have been the primary object of the attack and not just incidental victims.<sup>37</sup> The term “civilian population” refers to those who are civilians, as opposed to members of armed forces and other legitimate combatants.<sup>38</sup>

#### *Submissions of the Prosecutor*

34. The Prosecutor alleges that “pro-Gbagbo forces committed widespread and systematic attacks against civilians associated with [Alassane Ouattara] in pursuance of a policy of the State of Côte d’Ivoire under the leadership of former President Gbagbo to launch violent attacks against political opponents or persons perceived to

<sup>34</sup> ICC-01/05-01/08-424, paragraph 76. Pre-Trial Chamber II, referred in this paragraph to Pre-Trial Chamber I, Case of the Prosecutor v. Katanga and Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04-01/07-717, paragraph 399.

<sup>35</sup> ICC-01/05-01/08-424, paragraph 77. Pre-Trial Chamber II referred to ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, paragraph 627; ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, paragraph 90.

<sup>36</sup> ICC-01/05-01/08-424, paragraph 77. Pre-Trial Chamber II referred to ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001, paragraph 80; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, paragraph 330; ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, paragraph 90.

<sup>37</sup> ICC-01/05-01/08-424, paragraphs 76-77. Pre-Trial Chamber II referred to ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, paragraphs 91-92; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement 31 July 2003, paragraph 624; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, paragraph 33.

<sup>38</sup> ICC-01/05-01/08-424, paragraph 78. Pre-Trial Chamber II referred to ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paragraph 425; Article 3 Common to the 1949 Geneva Conventions; Article 4 of the Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, United Nations Treaty Series, volume 75, p. 135; Articles 43 and 50 of Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, United Nations Treaty Series, volume 1125, p. 3.

support the political opponents in order to retain power by all means".<sup>39</sup> It is alleged that a number of attacks took place in Abidjan and in western Côte d'Ivoire.<sup>40</sup>

35. The Prosecutor submits that the attacks by pro-Gbagbo forces targeted civilians, often on the basis of ethnic, religious, national or suspected political affiliations.<sup>41</sup> The Prosecutor further submits that West-African immigrants or Ivorians of West-African descent were particularly selected by the pro-Gbagbo forces during the post-election violence.<sup>42</sup>

*Materials presented by the Prosecutor*

36. The supporting material suggests that crimes were committed by a diverse group of defence and security forces and militias that remained loyal to President Gbagbo after the election results were announced in November 2010.<sup>43</sup>
37. In particular, the material presented by the Prosecutor shows that attacks were carried out between 2 December 2010 and May 2011 by forces loyal to Laurent Gbagbo. These forces consisted of the defence and security forces, that are said to have included the *Forces Armées Nationales de Côte d'Ivoire* ("FANCI");<sup>44</sup> the *Forces de défense et de sécurité* ("FDS", Defence and Security Forces),<sup>45</sup> military, gendarmes and various police forces; the *Centre de commandement des opérations de sécurité* ("CECOS", Centre for the Command of Security Operations), which is responsible to the Minister of Defence; the *Brigade anti-émeute* police force ("BAE"); and the *Compagnies*

<sup>39</sup> ICC-02/11-3, paragraph 74.

<sup>40</sup> ICC-02/11-3, paragraphs 82, 85, 88.

<sup>41</sup> ICC-02/11-3, paragraphs 83, 84, 85, 86.

<sup>42</sup> ICC-02/11-3, paragraph 87.

<sup>43</sup> Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 224.

<sup>44</sup> UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, page 172.

<sup>45</sup> UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, pages 171-172.



*républicaines de sécurité* police force (“CRS”).<sup>46</sup> In addition, pro-Gbagbo militias included youth groups such as the “*Jeunes Patriotes*” (“Young Patriots”) and the *Congrès panafricain des Jeunes et des Patriotes* (“COJEP”), led by Charles Blé Goudé, and the *Fédération Estudiantine et Scolaire de Côte d’Ivoire* (“FESCI”).<sup>47</sup> It is said that the militia groups were recruited, trained, and armed by Côte d’Ivoire governmental forces, who gave them their instructions.<sup>48</sup> In addition, the supporting documentation indicates that pro-Gbagbo forces hired and deployed an estimated 4,500 mercenaries who were armed with weapons from FDS stocks (and, in some cases, were given uniforms).<sup>49</sup>

38. The supporting material indicates that following the announcement on 2 December 2010 of the provisional results of the run-off election, the FDS (which remained loyal to Mr Gbagbo) along with other militias associated with the political party *La Majorité Présidentielle* (“LMP”) carried out attacks on civilians living in neighbourhoods considered to be supportive of Mr Ouattara.<sup>50</sup>
39. The supporting material suggests that during February and March 2011, pro-Gbagbo forces including CECOS, the Republican Guard, CRS and the Young Patriots carried

<sup>46</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 224.

<sup>47</sup> UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l’homme et du droit international humanitaire commises à l’Ouest de la Côte d’Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, page 141; “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 224-225 and UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 52 ; European Union, Council Decisions 2010/656/CFSP, Renewing the restrictive measures against Côte d’Ivoire, 29 October 2010, ICC-02/11-3-Anx3, page 213.

<sup>48</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, pages 57 – 58.

<sup>49</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 19.

<sup>50</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, pages 17-20; FIDH, Côte d’Ivoire: It is Urgent to Prevent the Escalation to Civil War, March 2011, ICC-02/11-3-Anx4, pages 298-300; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 223-225 and 234-243 .

out attacks on civilians in Abidjan who were perceived to be Ouattara supporters (in some cases the attackers singled out Muslim civilians or West-African immigrants).<sup>51</sup>

40. It further indicates that an attack was also carried out by pro-Gbagbo forces on West-African immigrants in several towns in western Côte d'Ivoire, including Bedi-Gouzan.<sup>52</sup> The victims were reportedly targeted on the basis of their ethnicity.<sup>53</sup>

*Conclusions of the Chamber*

41. The available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that in the aftermath of the presidential elections in Côte d'Ivoire an attack was committed by pro-Gbagbo loyalists against the civilian population in Abidjan and in the west of the country, from 28 November 2011 onwards. It indicates that pro-Gbagbo forces targeted civilians who they perceived supported Mr Ouattara, and the attack was often directed against specific ethnic or religious communities.

ii. State or organisational policy

42. Pursuant to Article 7(2)(a) of the Statute, the attack against the civilian population must be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack". Under the Elements of Crimes, the "policy to commit such an attack" means that the State or organisation actively promotes or encourages the attack against a civilian population. This policy needs to have been implemented by either State or organisational action, although it may, in exceptional circumstances, be implemented by a deliberate failure to take action, when this is consciously aimed at

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<sup>51</sup> Human Rights Watch, Côte d'Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, pages 156-159.

<sup>52</sup> Human Rights Watch, Côte d'Ivoire: West African Immigrants Massacred, 31 March 2011, ICC-02/11-3-Anx4, pages 163-165.

<sup>53</sup> Human Rights Watch, Côte d'Ivoire: West African Immigrants Massacred, 31 March 2011, ICC-02/11-3-Anx4, pages 163-165.

encouraging such attack. The Elements of Crimes further clarify that the existence of such a policy cannot be inferred solely from the absence of governmental or organisational action.<sup>54</sup>

43. The Statute does not provide definitions for the terms “policy” or “State or organisational”. However, the Pre-Trial Chambers have established criteria as regards the “policy” requirement. The following elements have been identified by the Pre-Trial Chambers: a) it must be thoroughly organised and follow a regular pattern; b) it must be conducted in furtherance of a common policy involving public or private resources; c) it can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population; and d) it need not be explicitly defined or formalised (indeed, an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy this particular criterion).<sup>55</sup>
44. The Chamber considers that these criteria are applicable to the present case, pursuant to Article 21(2) of the Statute.<sup>56</sup>

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<sup>54</sup> Elements of the Crimes, Article 7, Introduction.

<sup>55</sup> ICC-01/09-19-Corr, paragraphs 84-86. In its decision Pre-Trial Chamber II referred to the following decisions: ICC-01/04-01/07-717, paragraph 396; and ICC-01/05-01/08-424, paragraph 81.

<sup>56</sup> ICC-01/09-19-Corr, paragraphs 86, 87. Pre-Trial Chamber II took into consideration early jurisprudence of the ad hoc tribunals which was later abandoned: ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997, paragraph 653; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paragraph 580; ICTR, *Prosecutor v. Rutaganda*, Judgement, 6 December 1999, paragraph 69; ICTR, *Prosecutor v. Musema*, Judgement, 27 January 2000, paragraph 204; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Judgement, 21 May 1999, paragraphs 123-125, 581. Pre-Trial Chamber II specified that this requirement was abandoned by the Kunarac Appeal Judgement, which held that neither the attack nor the acts of the accused need to be supported by any form of “policy” or “plan”: ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, paragraph 98. Pre-Trial Chamber II stated that the conclusion was then endorsed *inter alia* in ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, paragraph 36, ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgement, 31 March 2003, paragraph 234, ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, paragraph 329; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, paragraph 204.

45. With regard to the definition of the terms “State or organisational”, the Chamber agrees with the criteria established by Pre-Trial Chamber II. While the term “State” is self-explanatory, for a “State policy” to commit an attack, the policy does not necessarily need to have been conceived “at the highest level of the State machinery”. Hence, a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy.<sup>57</sup>
46. With regard to the term “organisational”, the Chamber agrees with the approach of Pre-Trial Chamber II in the sense that the determination of whether a group qualifies as an “organisation” under the Statute must be made on a case-by-case basis. Pre-Trial Chamber II has identified a number of factors that could, *inter alia*, be taken into account and which may assist this Chamber in its determination in the present case, namely: a) whether the group is under a responsible command, or has an established hierarchy; b) whether the group possesses the means to carry out a widespread or systematic attack against a civilian population; c) whether the group exercises control over part of the territory of the State; d) whether the group directed its criminal activities against the civilian population as a primary purpose; e) whether the group articulates, explicitly or otherwise, an intention to attack a civilian population; and f) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.<sup>58</sup>

#### *Submissions of the Prosecutor*

47. The Prosecutor submits that the attacks on the civilian population in Côte d’Ivoire were committed pursuant to the policy of the state of Côte d’Ivoire under the leadership of former President Gbagbo in order to target his political opponents and

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<sup>57</sup> ICC-01/09-19-Corr, paragraph 89. Pre-Trial Chamber II referred to ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, paragraph 205.

<sup>58</sup> ICC-01/09-19-Corr, paragraphs 90-93.

their supporters.<sup>59</sup> It is alleged that President Gbagbo and his allies stigmatised Alassane Ouattara as the “candidate of the foreigners” and used the media, including the State-sponsored radio-television (“RTI”), to engage in a campaign of incitement to hatred and violence against those who were perceived to be their political opponents or belonged to foreign groups, and to galvanise the troops of the Republican Guard and the FDS to defend Côte d’Ivoire against them.<sup>60</sup> The Prosecutor submits that the available evidence demonstrates a State policy of violence as shown by the recruitment, financing and training of various militia forces and mercenaries.<sup>61</sup>

*Materials presented by the Prosecutor*

48. The supporting material indicates there was a media campaign by President Gbagbo against Alassane Ouattara and his supporters that involved use of RTI and other media outlets to incite the population to acts of violence against West-African nationals and peacekeepers.<sup>62</sup> One of the first attacks allegedly occurred on 16 December 2010, and the violence continued for months.<sup>63</sup> A Human Rights Watch report from March 2011 states that “targeted killings, enforced disappearances, politically motivated rapes and persecution of West-African nationals over a three-

<sup>59</sup> ICC-02/11-3, paragraph 96.

<sup>60</sup> ICC-02/11-3, paragraphs 97-99, 101 and 103.

<sup>61</sup> ICC-02/11-3, paragraphs 104-107.

<sup>62</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 57; Képaar, Abidjan-Dakar: La presse pro-Gbagbo accuse “Ouattara candidat de l’étranger”, ICC-02/11-3-Anx5, page 124; Human Rights Watch, My Heart Is Cut”, Sexual Violence by Rebels and Pro-Government Forces in Côte d’Ivoire, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 71; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 221-222; UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 22; FIDH, Côte d’Ivoire: It is Urgent to Prevent the Escalation to Civil War, March 2011, ICC-02/11-3-Anx4, page 22; UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, pages 56-57; Human Rights Watch, Côte d’Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, page 155.

<sup>63</sup> One early attack occurred on 16 December 2010, when several women arrested during that day’s demonstration were reportedly arrested and later gang-raped twice while in detention by a group of three men wearing masks. Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 238.

month period demonstrate a policy of systematic violence by security forces under the control of Gbagbo and militias long loyal to him".<sup>64</sup>

49. The supporting documentation further shows that Charles Blé Goudé publicly called on the Young Patriots to defend the country against foreigners and foreign peacekeepers, and that a number of attacks were committed following this speech.<sup>65</sup>
50. The supporting material also indicates that pro-Gbagbo government forces hired around 4,500 mercenaries, including large numbers of Liberian nationals, and armed them with weapons, and in some cases uniforms, from FDS supplies.<sup>66</sup> In addition, the available information suggests state involvement in the recruitment of young people throughout Côte d'Ivoire for military training in Abidjan and in the west of the country.<sup>67</sup> Recruitment was apparently carried out, *inter alia*, on the basis of a "circulaire" signed by Laurent Gbagbo seeking the recruitment of young people in order to increase the strength of LMP loyalists in Abidjan.<sup>68</sup> According to a report by the United Nations High Commissioner for Refugees ("UNHCR"), sophisticated arms and machetes were reportedly distributed illegally to these recruits, and reports

<sup>64</sup> Human Rights Watch, Côte d'Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, page 155.

<sup>65</sup> Human Rights Watch, Côte d'Ivoire: Pro-Gbagbo Forces Abducting Opponents, 23 December 2010, ICC-02/11-3-Anx4, page 143; UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 19; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 240; ONUCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, 10 May 2011, ICC-02/11-3-Anx3, page 138.

<sup>66</sup> Human Rights Watch, Côte d'Ivoire: Pro-Gbagbo Forces Abducting Opponents, 23 December 2010, ICC-02/11-3-Anx4, page 143; UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, pages 57-58; and UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 19; ONUCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, 10 May 2011, ICC-02/11-3-Anx3, page 140.

<sup>67</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 57; ONUCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, 10 May 2011, ICC-02/11-3-Anx3, page 138.

<sup>68</sup> ONUCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, 10 May 2011; ICC-02/11-3-Anx3, page 138.

revealed the existence of arm caches in Abidjan and in the interior of the country.<sup>69</sup> The United Nations Operation in Côte d'Ivoire ("UNOCI") has suggested that the militias were financed by the government of Laurent Gbagbo.<sup>70</sup>

### *Conclusions of the Chamber*

51. The supporting material indicates that despite the contested results of the elections, Mr Gbagbo remained in control of large parts of the State apparatus. On the basis of the available information, the Chamber agrees with the Prosecutor that there is a reasonable basis to believe that the attack by pro-Gbagbo forces during the post-electoral violence that began on 28 November 2010 was committed pursuant to a state policy.

#### iii. Widespread or systematic nature of the attack

52. An act under Article 7(1) of the Statute constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against a civilian population.

53. The term "widespread" encompasses "the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims".<sup>71</sup> This element refers both to the large-scale nature of the attack and the number of victims.<sup>72</sup> The assessment is not

<sup>69</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 58.

<sup>70</sup> ONUCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, 10 May 2011; ICC-02/11-3-Anx3, page 138.

<sup>71</sup> ICC-01/09-19-Corr, paragraph 95. Pre-Trial Chamber II referred to ICC-01/05-01/08-424, paragraph 83; ICC-01/04-01/07-717, paragraph 395. It also cited ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paragraph 580; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Appeal Judgement, 27 January 2000, paragraph 204.

<sup>72</sup> ICC-01/09-19-Corr, paragraph 95. Pre-Trial Chamber II referred to ICC-01/05-01/08-424, paragraph 83; Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-01-Corr, paragraph 62. It also cited ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paragraph 94; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, paragraph 101; ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal

exclusively quantitative or geographical, but must be carried out on the basis of the individual facts. Accordingly, a widespread attack may be the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude”.<sup>73</sup>

54. The term “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence”.<sup>74</sup> An attack’s systematic nature can “often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis”.<sup>75</sup>

#### *Submissions of the Prosecutor*

55. The Prosecutor submits there is a reasonable basis to believe that attacks directed against the civilian population in Côte d’Ivoire by pro-Gbagbo forces were both widespread and systematic.<sup>76</sup> The Prosecutor further submits that the available information provides *prima facie* indications that the State apparatus, including the security forces, were colluding with militia groups (in particular the Young Patriots and Liberian mercenaries) in order to attack civilians.<sup>77</sup> According to the Prosecutor, this violence included three main elements: i) raids were allegedly carried out by pro-

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Judgement, 12 June 2002, paragraph 94; R. Dixon, C. K. Hall, “Article 7, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, 2<sup>nd</sup> ed. (Munich etc.: C.H.Beck etc., 2008), page 178.

<sup>73</sup> ICC-01/09-19-Corr, paragraph 95. Pre-Trial Chamber II referred to ICC-01/05-01/08-424, paragraph 83. It also cited, ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, paragraph 545; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, paragraph 206; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paragraph 94; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, paragraph 101; R. Dixon, C. K. Hall, “Article 7, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, 2<sup>nd</sup> ed. (Munich etc.: C. H. Beck etc., 2008), page 178.

<sup>74</sup> ICC-01/09-19-Corr, paragraph 96. Pre-Trial Chamber referred to ICC-01/04-01/07-717, paragraph 394; ICC-02/05-01/07-1-Corr, paragraph 62. See also ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgement, 7 May 1997, paragraph 648; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paragraph 94; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, paragraph 101.

<sup>75</sup> ICC-01/09-19-Corr, paragraph 96, Pre-Trial Chamber II referred to ICC-01/04-01/07-717, paragraph 397. It also cited ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paragraph 94; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, paragraph 545.

<sup>76</sup> ICC-02/11-3, paragraph 109.

<sup>77</sup> ICC-02/11-3, paragraph 110.



Gbagbo security forces and unofficial militias against the headquarters of the opposition in Abidjan and in the neighbourhoods that were perceived as allied with Alassane Ouattara; ii) excessive force was used in heavily populated areas in order to disperse protesters; and iii) military roadblocks and checkpoints were set up by pro-Gbagbo militia members and security forces at which killings occurred.<sup>78</sup>

56. The Prosecutor further submits that the alleged acts of violence were on a large scale, during which a considerable number of civilians throughout the territory of Côte d'Ivoire were targeted.<sup>79</sup> These extensive violations are said to have resulted in the displacement of around one million people.<sup>80</sup>

*Materials presented by the Prosecutor*

57. With regard to the first element set out above, the material presented by the Prosecutor indicates that security forces loyal to Laurent Gbagbo attacked activists associated with the pro-Ouattara *Rassemblement des Houphouëtistes pour la démocratie et la Paix* ("RHDP") and carried out raids against the headquarters of Mr Ouattara's political party, the *Rassemblement des Républicains* ("RDR").<sup>81</sup> Attacks were also carried out by pro-Gbagbo security forces against neighbourhoods perceived as allied with Alassane Ouattara.<sup>82</sup> It is reported that between December 2010 and January 2011, a number of assaults by pro-Gbagbo security forces resulted in the deaths and the disappearance of scores of residents of Abidjan.<sup>83</sup>

<sup>78</sup> ICC-02/11-3, paragraph 111.

<sup>79</sup> ICC-02/11-3, paragraphs 112-114.

<sup>80</sup> ICC-02/11-3, paragraph 113.

<sup>81</sup> Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, ICC-02/11-3-Anx4, pages 214 and 234; Human Rights Watch, Côte d'Ivoire: Violence Campaign by Security Forces, Militias, 26 January 2011, ICC-02/11-3-Anx4, pages 145-149.

<sup>82</sup> Human Rights Watch, Côte d'Ivoire: Violence Campaign by Security Forces, Militias, 26 January 2011, ICC-02/11-3-Anx4, pages 145-149; Amnesty International, "They looked at his identity card and shot him dead" Six months of post electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 223-225 and 234-235.

<sup>83</sup> Human Rights Watch, Côte d'Ivoire: Violence Campaign by Security Forces, Militias, 26 January 2011, ICC-02/11-3-Anx4, pages 145-149.

58. As to the second element, the supporting information contains reports documenting the use of excessive force by pro-Gbagbo forces to disperse protesters, resulting in deaths in Abidjan on 16 December 2010, 18 and 19 January 2011, 19 February 2011, and throughout March 2011.<sup>84</sup> Similar attacks are reported to have occurred elsewhere in the country on 20 January 2011.<sup>85</sup>
59. Finally, for the third element the available information supports the Prosecutor's allegation that killings occurred in December 2010 and February 2011 at a number of pro-Gbagbo roadblocks and military checkpoints.<sup>86</sup>
60. The supporting material also indicates the existence of several mass graves in Abidjan, and there is documentation relating to widespread arbitrary arrests, "disappearances" and incidents of rape.<sup>87</sup>

#### *Victims' Representations*

61. The Chamber has received representations from victims describing the widespread and systematic nature of crimes that are said to have been carried out by pro-Gbagbo forces from 28 November 2010 onwards. Victims have identified as pro-Gbagbo forces, *inter alia*, the FDS, the CRS, and the FESCI.<sup>88</sup> Victims refer to attacks against civilians in Abidjan that were carried out by Pro-Gbagbo forces after 28 November

<sup>84</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, pages 18-20; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 234-235; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, pages 197 – 198.

<sup>85</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, pages 18-19.

<sup>86</sup> Human Rights Watch, Côte d'Ivoire: Violence Campaign by Security Forces, Militias, 26 January 2011, ICC-02/11-3-Anx4, pages 146-147; Amnesty International, "They looked at his identity card and shot him dead" Six months of post electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 240-243.

<sup>87</sup> Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 235, 238-239; Report of the High Commission for Human Rights on the situation of human rights in Cote d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 55.

<sup>88</sup> ICC-02/11-11, paragraph 47.

2010.<sup>89</sup> Other victims submit that pro-Gbagbo forces attacked civilians between December 2010 and February 2011, either for participating in peaceful demonstrations in support of Mr. Ouattara or simply for being perceived by pro-Gbagbo forces as his supporters because of their ethnic origin.<sup>90</sup> Victims refer to attacks allegedly carried out by pro-Gbagbo forces against civilians that were understood as sympathising with the RHDP.<sup>91</sup> One of the collective representations includes information on attacks by pro-Gbagbo forces against civilians who were of northern or foreign origin.<sup>92</sup> One representation also refers to attacks purportedly carried out systematically by pro-Gbagbo forces by targeting RHDP militants, as well as neighbourhoods and civilians considered to be supportive of Mr. Ouattara.<sup>93</sup> Two representations deal with widespread crimes allegedly committed by Pro-Gbagbo forces after 28 November 2010, particularly against militants from the RHDP and the members of certain ethnic groups (Dioulas) and Muslims.<sup>94</sup>

### *Conclusions of the Chamber*

62. The Chamber considers that the available information sufficiently substantiates the Prosecutor's submission that there is a reasonable basis to believe that the attack carried out by pro-Gbagbo forces against the civilian population in Côte d'Ivoire was widespread and systematic, as demonstrated, *inter alia*, by the extended time period in which crimes were carried out (from 28 November 2010 to May 2011), the geographic range of the alleged crimes (many of the neighbourhoods of Abidjan and the west of Côte d'Ivoire), and the high number of reported victims.

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<sup>89</sup> ICC-02/11-11-Conf-Exp-Anx138-142; Anxs156-178.

<sup>90</sup> ICC-02/11-11-Conf-Exp-Anx185-222.

<sup>91</sup> ICC-02/11-11-Conf-Exp-Anx256, 262.

<sup>92</sup> ICC-02/11-11-Conf-Exp-Anx274.

<sup>93</sup> ICC-02/11-11-Conf-Exp-Anx130.

<sup>94</sup> ICC-02/11-11-Conf-Exp-Anx264, 265.

***b. Underlying acts constituting crimes against humanity***

***i. Murder***

63. In order to establish that the crime of murder has been committed, the Chamber must be satisfied that a “perpetrator killed one or more persons”.<sup>95</sup>

*Submissions of the Prosecutor*

64. The Prosecutor alleges that during the post-election period, including particularly between 28 November 2010 and 6 May 2011, the publicly-available reports indicate that between 700 and 1048 civilians were killed by pro-Gbagbo forces.<sup>96</sup>

*Materials presented by the Prosecutor*

65. The supporting material indicates that forces loyal to Mr Gbagbo resorted to excessive force by using live ammunition and heavy weaponry to disperse protesters, killing scores of people.<sup>97</sup> Forces loyal to Mr Gbagbo are said to have killed at least 50 individuals in March 2011 alone by firing mortar rounds into neighbourhoods known to be pro-Ouattara strongholds.<sup>98</sup> A number of individuals who were perceived to be supporters of Mr. Ouattara, along with some West-African immigrants, were allegedly killed at roadblocks set up by pro-Gbagbo militias and the police.<sup>99</sup> Pro-Gbagbo militias, aided by mercenaries, reportedly killed at least 37 West-African

<sup>95</sup> Elements of Crimes, Article 7(1)(a).

<sup>96</sup> ICC-02/11-3, paragraph 119. See also Prosecution’s provision of additional information in relation to its request for authorisation of an investigation pursuant to Article 15, 21 July 2011 (notified on 22 July 2011), ICC-02/11-7-Conf-Exp, public redacted version filed 16 August 2011, ICC-02/11-7-Red, paragraphs 20 – 21.

<sup>97</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, pages 17-19.

<sup>98</sup> Human Rights Watch, Côte d’Ivoire: West African Immigrants Massacred, 31 March 2011, ICC-02/11-3-Anx4, page 163.

<sup>99</sup> Human Rights Watch, Côte d’Ivoire: West African Immigrants Massacred, 31 March 2011, ICC-02/11-3-Anx4, page 163, 165-166; Human Rights Watch, Côte d’Ivoire: Violence Campaign by Security Forces, Militias, 26 January 2011, ICC-02/11-3-Anx4, pages 146-147; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 240-243.

immigrants in a village near the border with Liberia on 22 March 2011.<sup>100</sup> The available material shows that UNOCI received information about mass graves across Abidjan, and it verified the existence of at least ten graves containing the bodies of 68 people allegedly killed by pro-Gbagbo militias on 12 April 2011, the day following Laurent Gbagbo's arrest.<sup>101</sup>

### *Victims' Representations*

66. The Chamber has received representations from victims concerning murders allegedly committed by pro-Gbagbo forces from 28 November 2010 onwards. Victims referred to acts of murder allegedly committed by pro-Gbagbo forces in Abidjan between December 2010 and March 2011.<sup>102</sup> The victims included RHDP militants and members of the Dioula ethnic group and the Muslim community.<sup>103</sup> One collective representation provides details of various murders allegedly carried out in the west of the country; in this instance, the victims were individuals who were believed to be foreigners or who originally came from the north of Côte d'Ivoire.<sup>104</sup>

### *Conclusions of the Chamber*

67. The Chamber concludes that the available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that murders were committed by pro-Gbagbo forces from 28 November 2010 onwards.

<sup>100</sup> Human Rights Watch, Côte d'Ivoire: West African Immigrants Massacred, 31 March 2011, ICC-02/11-3-Anx4, page 163.

<sup>101</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 21; Report of the High Commission for Human Rights on the situation of human rights in Cote d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 55; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, pages 198-199.

<sup>102</sup> ICC-02/11-11-Conf-Exp- Anx138, 139, 160, 161, 163, 164, 166, 169, 178 186, 192, 193, 196, 197, 198, 201, 202, 204, 205, 206, 213, 214, 215, 216, 217, 221, 222, 256 and 262.

<sup>103</sup> ICC-02/11-11-Conf-Exp-Anx264, 265.

<sup>104</sup> ICC-02/11-11-Conf-Exp-Anx274.

ii. Rape

68. In order to establish that the crime of rape has been committed, the Chamber must be satisfied that a “perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body” and that the “invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”. The Chamber accepts that the concept of “invasion” is intended to be neutral as regards gender.<sup>105</sup>

*Submissions of the Prosecutor*

69. The Prosecutor submits that during the period of post-election violence, pro-Gbagbo forces were responsible for acts of rape against individuals who were active and public members of Alassane Ouattara’s political party or who, on account of their ethnicity, were considered to be pro-Ouattara (e.g. those who spoke Dioula or Mossi, or who came from Mali).<sup>106</sup>

*Materials presented by the Prosecutor*

70. The supporting material submitted by the Prosecutor includes reports by Human Rights Watch and Amnesty International documenting the rape of a number of women in Abidjan by individuals identified as being pro-Gbagbo. The available information suggests that women were gang raped by members of the pro-Gbagbo security forces in Abobo following the 16 December 2010 march by RHDP

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<sup>105</sup> Elements of Crimes, Article 7(1)(g)-1.

<sup>106</sup> ICC-02/11-3, paragraphs 131 – 133.

supporters. In several cases rape victims were apparently told to report their "problem" to Mr. Ouattara.<sup>107</sup> UNOCI recorded at least 47 cases of rape in the west of Côte d'Ivoire, perpetrated by the FDS, militia groups, mercenaries and civilians. For example in Duékoué on 4 January 2011, 19 women were reportedly gang raped by armed militiamen.<sup>108</sup>

### *Victims' Representations*

71. The Chamber has received representations from victims concerning rapes allegedly committed by pro-Gbagbo forces, from 28 November 2010 onwards. Several representations refer to rapes allegedly committed by pro-Gbagbo forces in Abidjan in December 2010 and March 2011.<sup>109</sup>

### *Conclusions of the Chamber*

72. The Chamber concludes that the available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that acts of rape were committed by pro-Gbagbo forces during the period of post-election violence from 28 November 2010 onwards.

#### iii. Imprisonment or other severe deprivation of physical liberty

73. To establish imprisonment or other severe deprivation of physical liberty, the Chamber must be satisfied that a "perpetrator imprisoned one or more persons or

<sup>107</sup> Human Rights Watch, Côte d'Ivoire: Violence Campaign by Security Forces, Militias, 26 January 2011, ICC-02/11-3-Anx4, page 149. Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 238, 243.

<sup>108</sup> ONUCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, 10 May 2011, ICC-02/11-3-Anx3, page 156. UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 22.

See also UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 56.

<sup>109</sup> ICC-02/11-11-Conf-Exp-Anx1, 125, 141, 142, 156, 270 and 272.

otherwise severely deprived one or more persons of physical liberty.”<sup>110</sup> The Chamber further notes that it is necessary that “[the] gravity of the conduct was such that it was in violation of fundamental rules of international law”.<sup>111</sup>

*Submissions of the Prosecutor*

74. It is submitted that supporters of Alassane Ouattara were subjected to arbitrary arrest and detention by the FDS and the security forces loyal to Mr Gbagbo, beginning about 28 November 2010 and continuing throughout December 2010 and January 2011.<sup>112</sup>

*Materials presented by the Prosecutor*

75. The material provided by the Prosecutor indicates that between 15 and 22 December 2010, 471 civilians were reportedly arbitrarily arrested and detained in various detention centres, including the *Préfecture de police*, where police officers allegedly made the release of those arrested dependent on the payment of sums of money as large as 150,000 FCFA (approximately 300 USD).<sup>113</sup> These arbitrary arrests and the subsequent period of detention appear to have taken place in the context of the violent repression of an attempted public demonstration by RHDP supporters on 16 December 2010.<sup>114</sup> Sixty-three people were reportedly arrested in a raid conducted on 4 January 2011 by members of the FDS on the PDCI headquarters in Cocody, Abidjan. On 28 January 2011 two journalists claim to have been arrested and tortured in Abidjan by security forces loyal to Laurent Gbagbo.<sup>115</sup> In addition, the UNHCR

<sup>110</sup> Elements of Crimes, Article 7(1)(e).

<sup>111</sup> Elements of Crimes, Article 7(1)(e).

<sup>112</sup> ICC-02/11-3, paragraphs 122-124.

<sup>113</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 51.

<sup>114</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, pages 51-52.

<sup>115</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 52; Amnesty International, “They looked at his identity card



reports that Liberian mercenaries were used to identify certain individuals in order to arrest, abduct or assassinate them.<sup>116</sup>

### *Conclusions of the Chamber*

76. The Chamber concludes that the available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that individuals were subjected to arbitrary arrest and detention by pro-Gbagbo forces during the period of post-election violence, beginning on 28 November 2010.

#### iv. Enforced disappearance

77. For the crime of enforced disappearance the perpetrator must have arrested, detained or abducted one or more individuals or refused to acknowledge their arrest, detention or abduction, or to give information on the fate or whereabouts of the relevant individuals. Therefore, the arrest, detention or abduction must have been followed or accompanied by a refusal to acknowledge that the individual has been deprived of his or her freedom or to give information on the fate or whereabouts of those concerned.<sup>117</sup> Moreover, the arrest, detention or abduction must have been carried out by, or with the authorisation, support or acquiescence of, a State or a political organisation.<sup>118</sup>

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and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 239.

<sup>116</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, pages 57-58.

<sup>117</sup> Elements of Crimes, Article 7(1)(i).

<sup>118</sup> Elements of Crimes, Article 7(1)(i).

*Submissions of the Prosecutor*

78. The Prosecutor refers to reports indicating that between December 2010 and February 2011 supporters of Alassane Ouattara were abducted and taken to unknown locations.<sup>119</sup>

*Materials presented by the Prosecutor*

79. According to a UNOCI report, 72 individuals had been abducted as of 27 January 2011.<sup>120</sup> A Human Rights Watch report refers to a statement by UNHCR in which it is set out that as of 10 February 2011 almost 100 people had “disappeared” during the post-election violence.<sup>121</sup> Other material demonstrates that on 4 January 2011 18 Malian nationals working as baggage handlers in Abidjan were allegedly abducted and taken to an unknown destination by a group of armed civilians.<sup>122</sup>

80. Several instances of enforced disappearance are said to have occurred in the aftermath of the pro-Ouattara demonstration on 16 December 2010.<sup>123</sup> The available information attributes the disappearance of seven men associated with Alassane Ouattara’s political party to members of CECOS, the elite gendarme and police unit, as well as to pro-Gbagbo militia forces.<sup>124</sup>

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<sup>119</sup> ICC-02/11-3, paragraph 128.

<sup>120</sup> ONUCI, Retranscription du pont de presse hebdomadaire de l’UNOCI, 27 January 2011, ICC-02/11-3-Anx3, pages 75-76.

<sup>121</sup> Human Rights Watch, President Zuma Should Be on the Side of Justice in Ivory Coast, 22 February 2011, ICC-02/11-3-Anx4, page 152.

<sup>122</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 58.

<sup>123</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 235.

<sup>124</sup> Human Rights Watch, Côte d’Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, page 158.

*Victims' representations*

81. The Chamber has received representations from victims concerning instances of enforced disappearance allegedly committed by pro-Gbagbo forces from 28 November 2010 onwards. Two representations refer to an enforced disappearance that took place in which an individual was allegedly taken away by pro-Gbagbo forces.<sup>125</sup> Other representations refer to the enforced disappearance by pro-Gbagbo forces of several individuals in March and April 2011.<sup>126</sup>

*Conclusions of the Chamber*

82. The Chamber concludes that the available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that pro-Gbagbo forces committed the crime of enforced disappearance during the period of post-election violence from 28 November 2010 onwards.

v. Other underlying acts not presented by the Prosecutor

83. The crime against humanity of torture, as set out in Article 7(1)(f) of the Statute, requires that the perpetrator inflicted severe physical or mental pain or suffering upon one or more individuals who are under the custody or control of the perpetrator, and it is necessary that the pain or suffering did not arise only from, and was not inherent to, lawful sanctions.<sup>127</sup> The crime against humanity of other inhumane acts under Article 7(1)(k) of the Statute requires that the "perpetrator inflicted great suffering or serious injury to body or to mental or physical health by

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<sup>125</sup> ICC-02/11-11-Conf-Exp-Anx258, 261.

<sup>126</sup> ICC-02/11-11-Conf-Exp-Anx140 and 178.

<sup>127</sup> Elements of Crimes, Article 7(1)(f).

way of an inhumane act” similar in character to those listed in Article 7(1) of the Statute.<sup>128</sup>

*Materials presented by the Prosecutor*

84. The supporting material indicates that acts of torture and other inhumane acts were committed by pro-Gbagbo forces in the context of widespread and systematic attacks against the civilian population.
85. The information provided by the Prosecutor shows that there were reportedly 90 cases of torture or abusive treatment between 15 December and 21 December 2010.<sup>129</sup> It also documents daily attacks by pro-Gbagbo security forces and armed militias, who allegedly beat foreign residents with bricks, clubs and sticks.<sup>130</sup> The material also documents a number of other incidents of torture during February and March 2011.<sup>131</sup> The majority of these attacks purportedly took place in the Yopougon, Port Bouët and Cocody neighbourhoods of Abidjan where there were a considerable number of pro-Gbagbo militias.<sup>132</sup>

*Conclusions of the Chamber*

86. In light of the material submitted by the Prosecutor, the Chamber is satisfied that there is a reasonable basis to believe that torture and other inhumane acts were committed by pro-Gbagbo forces during the period of post-election violence from 28 November 2010 onwards.

<sup>128</sup> Elements of Crimes, Article 7(1)(k).

<sup>129</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 51.

<sup>130</sup> Human Rights Watch, Côte d’Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, pages 154-155. Human Rights Watch, Côte d’Ivoire: Violence Campaign by Security Forces, Militias, 26 January 2011, ICC-02/11-3-Anx4, pages 146-147.

<sup>131</sup> UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, pages 154-156.

<sup>132</sup> Human Rights Watch, Côte d’Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, page 156.

c. Nexus between individual acts and the attacks

*Submissions of the Prosecutor*

87. The Prosecutor submits that a nexus between the individual criminal acts and the attack can be inferred from i) the geographic and temporal overlap of the attack and the crimes; ii) the fact that the attackers were the perpetrators of the crimes; iii) the accounts that have been provided of the raids on the pro-Ouattara neighbourhoods and Mr. Ouattara's political headquarters; (iv) the use of excessive force against protestors and the deployment of heavy artillery in densely populated areas; and (v) the prolonged nature of the attacks, which it is said shows "a pattern of conduct largely attributable to the official apparatus of the State, including FDS, CECOS and Republic Guards, combined with unofficial forces such as Young Patriots and Liberian militia".<sup>133</sup>

*Materials presented by the Prosecutor*

88. The material submitted by the Prosecutor indicates that a nexus exists between the individual criminal acts and the attacks in Abidjan and in the west of Côte d'Ivoire during the period of post-election violence following 28 November 2010, as the information before the Chamber suggests that many of the crimes committed during this time were not isolated acts, but instead formed part of an attack within the meaning of Article 7(2) of the Statute.<sup>134</sup>

<sup>133</sup> ICC-02/11-3, paragraphs 115 – 116.

<sup>134</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 21; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, pages 51-58; Human Rights Watch, Côte d'Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, pages 154-162; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 219-221; 223-245.

*Conclusions of the Chamber*

89. In determining whether an act falling within the scope of Article 7(1) of the Statute forms part of an attack, the Chamber must consider the nature, aims and consequences of the act.<sup>135</sup> Isolated acts that clearly differ in their nature, aims and consequences from other acts that occur during an attack, fall outside the scope of Article 7(1) of the Statute.<sup>136</sup>
90. The information available to the Chamber indicates that there is a reasonable basis to believe that at least some of the underlying acts committed by pro-Gbagbo forces during the period of post-electoral violence in Côte d'Ivoire (from 28 November 2010 to May 2011) were not isolated acts, but formed part of an attack, thus constituting crimes against humanity.
91. In light of the above considerations, the Chamber is satisfied that there is a reasonable basis to believe that crimes against humanity were committed by forces loyal to Laurent Gbagbo in Côte d'Ivoire since 28 November 2010.

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<sup>135</sup> ICC-01/09-19-Corr, paragraph 98. Pre-Trial Chamber II in its decision ICC-01/05-01/08-424, at paragraph 86 stated: "In determining whether an act forms part of a widespread attack, the Chamber considers the characteristics, the aims, the nature or consequences of the act." See also ICTR, Prosecutor v. Kalelijeli, Case No. ICTR-98-44A-T, Judgement, 1 December 2003, paragraph 866. "An act may form part of the widespread or systematic attack without necessarily sharing all the same features, such as the time and place of commission of the other acts constituting the attack. In determining whether an act forms part of a widespread or systematic attack, the Chamber will consider its characteristics, aims, nature, and consequence." See also Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement, 15 May 2003, paragraph 326. "A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds. Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack."

<sup>136</sup> ICC-01/09-19-Corr, paragraph 98.

## Acts allegedly committed by Pro-Ouattara forces

### *a. Contextual elements of crimes against humanity*

#### Relevant individuals and groups

92. According to the available information, the Ouattara forces included the *Forces Nouvelles*, although on 17 March 2011 President Ouattara reportedly signed a decree unifying the FDS, the *Forces Nouvelles* and the FANCI into the *Forces républicaines de Côte d'Ivoire* ("FRCI").<sup>137</sup> The pro-Ouattara forces are also said to have included tribal groups (in particular the "Dozos") and foreign mercenaries, as well as policemen and gendarmes who had defected from the official state apparatus controlled by Laurent Gbagbo, and neighbourhood-based defence forces.<sup>138</sup>

#### i. An attack directed against a civilian population

#### *Submissions of the Prosecutor*

93. It is submitted that the information currently available to the Prosecutor does not establish that there is a reasonable basis to believe that crimes against humanity were committed by pro-Ouattara forces.<sup>139</sup> The Prosecutor submits that if an investigation is authorised, "the Prosecutor intends to investigate" whether pro-Ouattara forces may have committed crimes against humanity.<sup>140</sup> However, it is of note that the

<sup>137</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 20; ONUCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, 10 May 2011, ICC-02/11-3-Anx3, page 134.

<sup>138</sup> UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, page 173-175; UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, pages 140-141; Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, page 167; Human Rights Watch, 2 April 2011, Côte d'Ivoire: Ouattara Should Act to Control Troops, ICC-02/11-3-Anx4, page 177.

<sup>139</sup> ICC-02/11-3, paragraph 75.

<sup>140</sup> ICC-02/11-3, paragraph 75.

Prosecutor indicates that at least one FRCI attack, on the “Carrefour” neighbourhood of Duékoué, was reportedly perpetrated in a systematic manner (see below).<sup>141</sup>

*Materials presented by the Prosecutor*

94. The supporting material submitted by the Prosecutor indicates that by the end of January 2011, supporters of Alassane Ouattara had commenced reprisal attacks, and that by February 2011 they had become organised, and had been reinforced by individuals from the *Force Nouvelles* and by FDS defectors.<sup>142</sup> On 23 March 2011 the *Forces Nouvelles* reportedly launched a military operation.<sup>143</sup> The information provided by the Prosecutor indicates that FRCI forces summarily executed and raped those who were perceived to be supporters of Laurent Gbagbo in Abidjan<sup>144</sup> and in the western towns of Toulepleu, Doké, Bloléquin, Duékoué and Guiglo.<sup>145</sup> Reports show that on 29 March 2011 pro-Ouattara forces allegedly killed many hundreds of civilians in the Carrefour neighbourhood of Duékoué, and that individuals of Guéré ethnicity were particularly targeted.<sup>146</sup>

*Conclusions of the Chamber*

95. The available information demonstrates that there is a reasonable basis to believe that in the aftermath of the presidential elections in Côte d’Ivoire, pro-Ouattara forces carried out attacks against the civilian population, particularly in the west of the

<sup>141</sup> ICC-02/11-3, paragraphs 152, 153.

<sup>142</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 19.

<sup>143</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d’Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 20.

<sup>144</sup> Human Rights Watch, Côte d’Ivoire: Gbagbo Forces Tortured Killed in Abidjan, 2 June 2011, ICC-02/11-3-Anx4, pages 179 – 190.

<sup>145</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 167-176; ONUCI, Rapport sur les violations des droits de l’homme et du droit international humanitaire commises à l’Ouest de la Côte d’Ivoire, 10 May 2011 ICC-02/11-3-Anx3, page 146; ICC-02/11-11-Conf-Exp-Anx3, 5, 22, 39, 51, 54, 64, 78 – 85, 87, 89 – 93, 95 – 96, 98, 100 – 101, 103 – 104, 106 – 107, 601, 602, 603, 604, 605, 606, 608, 617, 618, 619, 620, 625, 648, 649, 668, 669, 670, 671, 673, 685.

<sup>146</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 168 and 172-173.



country in March 2011. The material indicates that pro-Ouattara forces targeted civilians who were perceived to support Laurent Gbagbo, and that the attacks were directed against specific ethnic communities.

ii. State or organisational policy

*Materials presented by the Prosecutor*

96. Reports concerning the identity of the forces that carried out the killings in Duékoué indicate that the “Dozos” as well as the FRCI were responsible for the crimes.<sup>147</sup> According to a report by Amnesty International over 100 witnesses have indicated “the systematic and targeted nature of the killings committed by uniformed FRCI soldiers and *Dozos*” against the Gueré community.<sup>148</sup> A Human Rights Watch report also suggests that after Republican Forces took control of Duékoué on 29 March 2011, hundreds of Gueré residents were killed in Carrefour by soldiers from *Forces Nouvelles* and by *Dozo* militia members.<sup>149</sup> Several witnesses describe the summary executions of civilians who had not managed to flee before the arrival of the FRCI.<sup>150</sup> Pro-Ouattara forces are said to have dragged men out of their homes and executed them in the street.<sup>151</sup> Some attackers reportedly threatened “to kill the Gueré until the last one because of their support for Gbagbo.”<sup>152</sup>

97. A report by Amnesty International indicates that within three days of the commencement of the FRCI offensive in the west, the FRCI had taken control of

<sup>147</sup> ONUCI, Rapport sur les violations des droits de l’homme et du droit international humanitaire commises à l’Ouest de la Côte d’Ivoire, 10 May 2011, ICC-02/11-3-Anx3, pages 146 – 147.

<sup>148</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 254-257.

<sup>149</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 172-173.

<sup>150</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, page 168.

<sup>151</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 168-169.

<sup>152</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, page 168.

“almost the entire part of the country” previously held by Laurent Gbagbo.<sup>153</sup> Human Rights Watch indicated that the crimes in Duékoué involved FRCI under the overall command of Ouattara’s Prime Minister, Guillaume Soro.”<sup>154</sup>

### *Conclusions of the Chamber*

98. According to the available information, FRCI forces appeared to act under an overall command and in coordination with the militia groups, and they possessed the means to carry out a widespread or systematic attack against the civilian population.
99. The Chamber notes that there is disagreement within the jurisprudence of the Court on the criteria required for a group to constitute an organisation for purposes of Article 7 of the Statute.<sup>155</sup> In the present case, the FRCI fulfils the criteria for an organised armed group as a party to a non-international armed conflict,<sup>156</sup> and so inevitably it qualifies as an organisation within the context of Article 7 of the Statute. Therefore, it is unnecessary to consider this issue further.
100. The information provided to the Chamber also tends to show that the pro-Ouattara forces acted pursuant to a policy when committing the attack in the west of Côte d’Ivoire, as demonstrated by the regular pattern of the crimes in which particular ethnic groups were targeted (*e.g.* the Gueré). As will be discussed in detail in the section below, the supporting material indicates that the attacks in Duékoué and neighbouring villages were carried out in a systematic manner. The attackers went from village to village and systematically raped and killed the Gueré inhabitants.

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<sup>153</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 250.

<sup>154</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, page 167; UN Human Rights Council, Rapport de la Commission d’enquête internationale indépendante sur la Côte d’Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, page 173.

<sup>155</sup> ICC-01/09-19-Corr, Dissenting opinion of Judge Hans-Peter Kaul, paragraphs 44-66.

<sup>156</sup> See paragraph 126.

The Chamber finds that the systematic manner in which these attacks were carried out strongly suggests the existence of an organisational policy.

101. On the basis of the information submitted to the Chamber, the Chamber finds that there is a reasonable basis to believe that crimes committed by pro-Ouattara forces in the west of Côte d'Ivoire after the FRCI took control of the area were carried out pursuant to an organisational policy.

iii. Widespread or systematic nature of the attack

*Submissions of the Prosecutor*

102. The Prosecutor indicates that at least one FRCI attack, on the "Carrefour" neighbourhood of Duékoué, was reportedly perpetrated in a systematic manner.<sup>157</sup>

*Materials presented by the Prosecutor*

103. The available information indicates that members of the FRCI and the Dozos carried out a systematic sweep of the Carrefour neighbourhood in Duékoué, killing many individuals who appeared to be in hiding or who were attempting to flee.<sup>158</sup> The supporting information also suggests that the attack against Duékoué and other western villages occurred over a one month period.<sup>159</sup> An Amnesty International report describes the attacks on the Gueré compounds as "systematic raids".<sup>160</sup> It is further stated that "all the churches in the *Quartier Carrefour* were vandalised, looted, and burned down".<sup>161</sup> Human Rights Watch further suggests that "the Republican

<sup>157</sup> ICC-02/11-3, paragraphs 152 and 153.

<sup>158</sup> ONUCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, 10 May 2011, ICC-02/11-3-Anx3, pages 146 – 147.

<sup>159</sup> Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, page 168.

<sup>160</sup> Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 254.

<sup>161</sup> Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 254.

Forces systematically targeted alleged Pro-Gbagbo civilians”, predominantly those from the Gueré population, and they went from house to house in villages, looting and burning homes and killing all those who had not managed to flee.<sup>162</sup>

### *Victims' Representations*

104. The Chamber has received representations from victims suggesting that crimes carried out by FRCI forces against perceived Gbagbo supporters in Côte d'Ivoire in 2011 were carried out in a widespread and systematic manner. One suggests that in March 2011, the troops of Ouattara, having chased out the pro-Gbagbo forces, took control of the west and particularly the department of Duékoué (with aerial support from the ONUCI and the Licorne Forces). It is alleged that pro-Ouattara forces pillaged and burned the villages of Cué, Hiébly and Diéhiba, liquidating the civilian population in each of these localities.<sup>163</sup> Another representation suggests that in March 2011 the pro-Ouattara forces took control of the town of Toulepleu and massacred civilians and burned the villages.<sup>164</sup> Two collective representations refer to attacks allegedly carried out by the FRCI in other localities in the west of Côte d'Ivoire between April and May 2011.<sup>165</sup>

### *Conclusions of the Chamber*

105. On the basis of the available information, the Chamber concludes that there is a reasonable basis to believe that the crimes carried out in Duékoué and other towns in the west of Côte d'Ivoire in March 2011, which took place over a period of days and in a number of different villages, were carried out in a widespread and systematic manner. Some of the events described in the supporting material and in the victims'

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<sup>162</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 254 – 256.

<sup>163</sup> ICC-02/11-11-Conf-Exp-Anx15.

<sup>164</sup> ICC-02/11-11-Conf-Exp-Anx54.

<sup>165</sup> ICC-02/11-11-Conf-Exp-Anx179, 180.

representations in this context also occurred in other parts of the country, over a wider time period. As a result, depending on the outcome of the investigation, crimes in other parts of the country (potentially reflecting a broader timeframe) could form part of this attack against the civilian population.

***b. Underlying acts constituting crimes against humanity***

***i. Murder***

*Materials presented by the Prosecutor*

106. The supporting material presented by the Prosecutor indicates that in March 2011 pro-Ouattara forces, including the FRCI and several pro-Ouattara militias, attacked and killed numerous civilians in dozens of villages and towns in and around Toulepleu, Bloléquin, Guiglo and Duékoué in the west of Côte d'Ivoire.<sup>166</sup> The information refers in particular to an attack that allegedly took place on 29 and 30 March 2011, in which pro-Ouattara forces purportedly killed hundreds of civilians in the "Carrefour" neighbourhood of Duékoué.<sup>167</sup>

*Victims' Representations*

107. The Chamber has received representations from victims concerning murders allegedly committed by pro-Ouattara forces in the west of Côte d'Ivoire and

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<sup>166</sup> Human Rights Watch, Côte d'Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, pages 155, 159-161; Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 167-173; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 253-262.

<sup>167</sup> Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 167-173; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 253-262; Opération des Nations Unies en Côte d'Ivoire, Division des Droits de L'Homme, Rapport Sur Le Violations de L'Homme et du droit International Humanitaire Commises à L'Ouest de la Côte d'Ivoire, May 2011, ICC-02/11-3-Anx3, pages 146 – 147.

elsewhere, from December 2010-May 2011. There is reference to an attack by pro-Ouattara forces on the community of Duékoué on 29 and 30 March 2011, which resulted in hundreds of civilian deaths.<sup>168</sup> Other representations suggest that civilians were killed by FRCI forces in Yopougon in April and May 2011.<sup>169</sup> Several representations refer to murders allegedly committed during an attack between March and April 2011 by pro-Ouattara forces.<sup>170</sup> Similarly, members of the *Front populaire ivoirien* (“FPI”)<sup>171</sup> were allegedly murdered by the FRCI between April and May 2011.<sup>172</sup> Two representations also refer to alleged murders committed during an attack by the FRCI in May 2011.<sup>173</sup>

### *Conclusions of the Chamber*

108. On the basis of the available information, it appears that there is a reasonable basis to believe that murders were committed by the FRCI and other pro-Ouattara forces, particularly in the west of Côte d’Ivoire since 28 November 2010.

#### ii. Rape

### *Materials presented by the Prosecutor*

109. The supporting material indicates that the Republican forces committed many acts of rape during their attack on the villages in the west of Côte d’Ivoire in March 2011.<sup>174</sup> Human Rights Watch reports that “[i]n the vast majority of documented cases

<sup>168</sup> ICC-02/11-11-Conf-Exp-Anx3, 22, 51, 78-85, 89-93, 95, 96, 98, 100, 103, 104, 106, 107.

<sup>169</sup> ICC-02/11-11-Conf-Exp-Anx118, 119.

<sup>170</sup> ICC-02/11-11-Conf-Exp-Anx601, 602, 604, 606, 608, 617, 633, 648, 649, 661, 669, 671 and 673, 668, 669.

<sup>171</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 212.

<sup>172</sup> ICC-02/11-11-Conf-Exp-Anx312, 332, 380, 381.

<sup>173</sup> ICC-02/11-11-Conf-Exp-Anx480 and 481.

<sup>174</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 171-172; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 262-263.

fighters held women captive in houses for one or several days, gang raping them repeatedly before moving to the next town or village.”<sup>175</sup>

#### *Victims' Representations*

110. The Chamber has received representations from victims concerning offences of rape allegedly committed by pro-Ouattara forces during the period of post-election violence. One victim was allegedly raped by pro-Ouattara forces in Yopougon.<sup>176</sup> Another victim reports rapes that allegedly occurred in Abidjan.<sup>177</sup>

#### *Conclusions of the Chamber*

111. On the basis of the information presented by the Prosecutor, it appears that there is a reasonable basis to believe that offences of rape were committed by the FRCI and other pro-Ouattara forces, particularly in the west of Côte d'Ivoire in March 2011.

#### iii. Imprisonment or other severe deprivation of physical liberty

#### *Materials presented by the Prosecutor*

112. It appears from the available information that during the course of the pro-Ouattara offensive in the west of Côte d'Ivoire in March 2011, FRCI soldiers held both men and women captive who had been unable to flee, and thereafter they raped many of the captives.<sup>178</sup>

<sup>175</sup> Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 171-172.

<sup>176</sup> ICC-02/11-11-Conf-Exp-Anx21.

<sup>177</sup> ICC-02/11-11-Conf-Exp-Anx498.

<sup>178</sup> Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 171-172; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 263.

*Victims' Representations*

113. The Chamber has received representations from various victims concerning instances of imprisonment during the period of post-election violence, beginning in 2010. Several individual representations allege that pro-Ouattara forces kidnapped and illegally detained various individuals because of their affiliation with Mr. Gbagbo's political party.<sup>179</sup> Two other victims claim that the FRCI allegedly detained civilians in Abidjan because of their affiliation with Mr. Gbagbo's political party.<sup>180</sup> One victim claims that a man was detained and beaten by pro-Ouattara forces in Abidjan.<sup>181</sup> Two further representations refer to several men who were allegedly detained by pro-Ouattara forces in May 2011.<sup>182</sup> Several victims refer to their alleged capture and detention by pro-Ouattara forces.<sup>183</sup> Two representations refer to the alleged detention and forced imprisonment of several individuals in Abidjan by pro-Ouattara forces.<sup>184</sup>

*Conclusions of the Chamber*

114. On the basis of the information presented by the Prosecutor, it appears that there is a reasonable basis to believe that the FRCI and other pro-Ouattara forces committed the crime of imprisonment and that they otherwise severely deprived various civilians of their liberty, particularly in the west of Côte d'Ivoire in March 2011.

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<sup>179</sup> ICC-02/11-11-Conf-Exp-Anx280, 283, 284, 286 and 366.

<sup>180</sup> ICC-02/11-11-Conf-Exp-Anx386, 389.

<sup>181</sup> ICC-02/11-11-Conf-Exp-Anx574

<sup>182</sup> ICC-02/11-11-Conf-Exp-Anx577 and 581.

<sup>183</sup> ICC-02/11-11-Conf-Exp-Anx598 and 599.

<sup>184</sup> ICC-02/11-11-Conf-Exp-Anx610, 668, 669 and 670



c. Nexus between individual acts and the attack

*Materials presented by the Prosecutor*

115. The material submitted by the Prosecutor indicates that a nexus exists between the individual criminal acts and the attack in the west of Côte d'Ivoire during the period of post-election violence following 28 November 2010. The information before the Chamber suggests that many of the crimes committed during this time were not isolated acts, but instead formed part of an attack within the meaning of Article 7(2) of the Statute.<sup>185</sup>

*Conclusions of the Chamber*

116. In light of the above, the Chamber is satisfied that there is a reasonable basis to believe that a nexus exists between the individual criminal acts and the attack in the west of Côte d'Ivoire beginning on 28 November 2011. Therefore, there is a reasonable basis to believe that crimes against humanity were committed by forces loyal to Alassane Ouattara, particularly in the west of Côte d'Ivoire in March 2011. Some of the events described in the supporting material and in the victims' representations in this context also occurred in other parts of the country, over a wider time period. As a result, depending on the outcome of the investigation, crimes in other parts of the country (potentially reflecting a broader timeframe) could form part of this attack against the civilian population.

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<sup>185</sup> Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 167-174; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 253-263.

## 2. War crimes

117. The Prosecutor submits that war crimes were committed by pro-Gbagbo and pro-Ouattara forces in the Republic of Côte d'Ivoire in the context of an armed conflict not of an international character between 25 February 2011 and 6 May 2011.<sup>186</sup>

118. Specifically, the Prosecutor submits that there is a reasonable basis to believe that the war crimes murder (Article 8(2)(c)(i) of the Statute) and attacking civilians (Article 8(2)(e)(i) of the Statute) were committed. In addition, the Prosecutor submits that pro-Gbagbo forces were responsible for the war crimes of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission (Article 8(2)(e)(iii) of the Statute) and pro-Ouattara forces committed the war crime of rape (Article 8(2)(e)(vi) of the Statute).<sup>187</sup>

### *a. Contextual Element: Existence of an armed conflict not of an international character.*

119. A non-international armed conflict is defined as “the outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature and which takes place within the confines of a State territory”.<sup>188</sup> The hostilities may occur (i) between governmental authorities and organised dissident armed groups or (ii) between the latter groups.<sup>189</sup> The Chamber agrees with the approach of Pre-Trial Chambers I and II when they decided that “organised armed groups” are groups

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<sup>186</sup> ICC-02/11-3, paragraph 134.

<sup>187</sup> ICC-02/11-3, paragraph 134.

<sup>188</sup> ICC-01/05-01/08-424, paragraph 231.

<sup>189</sup> ICC-01/05-01/08-424, paragraphs 229-231.

with a sufficient degree of organisation to enable them to plan and carry out military operations for a prolonged period of time.<sup>190</sup>

120. As regards the “protracted” nature of the conflict,<sup>191</sup> Pre-Trial Chamber II has concluded as follows:

The Chamber is also mindful that the wording of article 8(2)(f) of the Statute differs from that of article 8(2) (d) of the Statute, which requires the existence of a “protracted armed conflict” and thus may be seen to require a higher or additional threshold to be met - a necessity which is not set out in article 8(2)(d) of the Statute. The argument can be raised as to whether this requirement may nevertheless be applied also in the context of article 8(2)(d) of the Statute. However, irrespective of such a possible interpretative approach, the Chamber does not deem it necessary to address this argument, as the period in question covers approximately five months and is therefore to be regarded as “protracted” in any event.<sup>192</sup>

121. The Chamber agrees with the suggestion of Pre-Trial Chamber II that the duration of any relevant confrontation is to be considered when assessing whether there was a protracted armed conflict.

#### *Prosecutor’s submissions*

122. The Prosecutor submits that an armed conflict not of an international character took place between pro-Gbagbo and pro-Ouattara forces on the territory of the Côte d’Ivoire between 25 February 2011 and 6 May 2011.<sup>193</sup> It is said that an armed conflict existed during the relevant period of time based on “the composition and structure of the opposing forces, the prolonged nature and overall intensity of the fighting, especially in Abidjan, Toulepleu, Duékoué and Bloléquin, the fact that heavy military arms were used, as well as the fact that both pro-Gbagbo and pro-Ouattara forces at times controlled parts of the territory of Côte d’Ivoire”.<sup>194</sup> The Prosecutor also relies

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<sup>190</sup> Pre-Trial Chamber I, Decision on the Confirmation of Charges, Prosecutor v. Thomas Lubanga Dyilo, 29 January 2007, ICC-01/04-01/06-803-tEN, paragraphs 232-234. See also ICC-01/05-01/08-424, paragraphs 233-234, adding that organised armed groups must be under responsible command.

<sup>191</sup> Article 8(2)(f) of the Statute.

<sup>192</sup> ICC-01/05-01/08-424, paragraph 235.

<sup>193</sup> ICC-02/11-3, paragraph 134.

<sup>194</sup> ICC-02/11-3, paragraph 144.

on statements made by the International Committee of the Red Cross and the UN Security Council in which they referred to the existence of an armed conflict in Côte d'Ivoire.<sup>195</sup>

*Materials presented by the Prosecutor*

123. On the supporting material presented by the Prosecutor, it appears that between 25 February 2011 and 6 May 2011 pro-Gbagbo forces comprised the military, defence and security forces of the state in Côte d'Ivoire.<sup>196</sup> Furthermore, the pro-Gbagbo youth groups (including the *Jeunes Patriotes* and the FESCI)<sup>197</sup> and foreign mercenaries were trained and supplied with weapons by the FDS.<sup>198</sup> The FDS was under the command of Mr. Gbagbo until 17 March 2011, when the FRCI was created, as rehearsed in greater detail below. However, the "elite units" of the FDS allegedly remained loyal to Mr. Gbagbo.<sup>199</sup>
124. It is suggested in the available information that between 25 February 2011 and 6 May 2011 the pro-Ouattara forces consisted of the *Forces Nouvelles*, which were renamed the FRCI on 9 March 2011 and unified with the FDS on 17 March 2011 by a presidential decree signed by Alassane Ouattara.<sup>200</sup> These forces also included tribal groups and Liberian mercenaries.<sup>201</sup> Human Rights Watch indicated that crimes were

<sup>195</sup> ICC-02/11-3, paragraph 145.

<sup>196</sup> UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, pages 171 and 172.

<sup>197</sup> UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, page 141; UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, pages 173-174.

<sup>198</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 19.

<sup>199</sup> UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, page 171.

<sup>200</sup> UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, page 20.

<sup>201</sup> UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, pages 174-175; UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, pages 140 – 141; Amnesty International, "They looked at his

committed by “Republican Forces under the overall command of Ouattara’s Prime Minister, Guillaume Soro”.<sup>202</sup>

125. The material provided to the Chamber indicates that by 25 February 2011 the post-election crisis in Côte d’Ivoire had escalated into a protracted armed conflict throughout the entire country, between pro-Ouattara and pro-Gbagbo forces. News reports relied on by the Prosecutor indicate that battles took place during the last week of February and throughout the month of March 2011, with Mr. Ouattara’s forces eventually seizing control of much of the country and Mr Gbagbo’s forces holding Abidjan. The fighting intensified when the FRCI reached Abidjan on 31 March 2011.<sup>203</sup> On 11 April 2011, Mr Gbagbo was arrested at his residence by pro-Ouattara forces, after helicopter attacks that were led by UNOCI and the French Force Licorne.<sup>204</sup> Following Mr Gbagbo’s arrest, the fighting continued until the FRCI took control of the Yopougon neighbourhood of Abidjan on 5 May 2011.<sup>205</sup>

#### *Victims’ representations*

126. The Chamber has received representations from victims concerning the existence of an armed conflict in Côte d’Ivoire. Three collective representations refer to fighting in

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identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 218.

<sup>202</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, page 167; UN Human Rights Council, Rapport de la Commission d’enquête internationale indépendante sur la Côte d’Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, page 173.

<sup>203</sup> BBC News, Ivory Coast: Battle for Abidjan Intensifies, ICC-02/11-3-Anx5, pages 21-23; Jeune Afrique, Crise Ivoirienne: embuscade à Abobo, plus d’une dizaine de morts, ICC-02/11-3-Anx5, page 46; Jeune Afrique, Côte d’Ivoire: les secrets d’un offensif éclair, ICC-02/11-3-Anx5, pages 61-64.

<sup>204</sup> ICC-02/11-3, paragraphs 141-146; UN Human Rights Council, Rapport de la Commission d’enquête internationale indépendante sur la Côte d’Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, pages 176-180; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 210-287; Le Figaro, Paris confirme l’arrestation de Gbagbo par des pro-Ouattara à Abidjan, 11 April 2011, ICC-02/11-3-Anx5, page 189.

<sup>205</sup> RFI, Côte d’Ivoire: Yopougon est désormais sous le contrôle des FRCI, 5 May 2011, ICC-02/11-3-Anx5, pages 72-73.

May 2011 between Pro-Gbagbo and Pro-Ouattara forces, in Irobo and Grand-Lahou.<sup>206</sup>

*Conclusions of the Chamber*

127. In light of the above, the Chamber is satisfied that there is a reasonable basis to believe that an armed conflict not of an international character existed in Côte d'Ivoire from 25 February 2011 until 6 May 2011. On the basis of the available information, the Chamber finds that the FRCI forces were a sufficiently organised armed group with the ability to plan and carry out military operations for a prolonged period of time. Furthermore, taking into account the fact that the clashes between pro-Gbagbo governmental forces and the pro-Ouattara forces occurred over a period of at least two and a half months, the Chamber concludes that the armed conflict was protracted. Finally, the Chamber takes note that if the investigation is authorised the Prosecutor intends to assess, among other things, whether the alleged support of UNOCI and French Licorne troops to pro-Ouattara forces in order to arrest Mr. Gbagbo renders part of the conflict international.<sup>207</sup>

***b. Underlying acts***

128. The Chamber will first analyse the acts allegedly committed by pro-Gbagbo forces and then turn to the acts allegedly committed by pro-Ouattara forces.

**Acts allegedly committed by Pro-Gbagbo forces**

**i. Murder and intentionally directing attacks against the civilian population**

129. The war crime of murder, as set out in Article 8(2)(c)(i) of the Statute requires that the perpetrator killed one or more individuals and that the person or persons killed were

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<sup>206</sup> ICC-02/11-11-Conf-Exp-Anx253, 254, 255.

<sup>207</sup> ICC-02/11-3, paragraph 146.

either *hors de combat*, or civilians, medical personnel or religious personnel taking no active part in the hostilities.<sup>208</sup>

130. The war crime of intentionally directing attacks against the civilian population, as set out in Article 8(2)(e)(i) of the Statute, requires that the perpetrator directed an attack and that the object of the attack was the civilian population or individual civilians who were not taking part directly in the hostilities.<sup>209</sup>

*Submissions of the Prosecutor*

131. The Prosecutor submits that between 25 February 2011 and 6 May 2011, pro-Gbagbo forces committed the war crimes of murder, pursuant to Article 8(2)(c)(i) of the Statute, and attacking civilians, pursuant to Article 8(2)(e)(i) of the Statute. According to the Prosecutor, the majority of the murders and the attacks against civilians occurred when pro-Ouattara forces launched military operations in order to wrest control of the south of the country from pro-Gbagbo forces.<sup>210</sup>

*Materials presented by the Prosecutor*

132. The available information reveals that at the end of March 2011, pro-Gbagbo forces allegedly carried out three major attacks against the civilian population: on 22 March in Bedi-Gouzan in the west of Côte d'Ivoire, when at least 37 West-African migrants were killed;<sup>211</sup> in Bloléquin on 25 March, when the attackers reportedly systematically killed over 100 people who had taken refuge in government buildings;<sup>212</sup> and on 28 March in Duékoué, when Liberian mercenaries and militias loyal to Laurent Gbagbo

<sup>208</sup> Elements of Crimes, Article 8(2)(c)(i)-1.

<sup>209</sup> Elements of Crimes, Article 8(2)(e)(i).

<sup>210</sup> ICC-02/11-3, paragraphs 147 and 150.

<sup>211</sup> ICC-02/11-3, paragraph 151; Human Rights Watch, Côte d'Ivoire: West African Immigrants Massacred, 31 March 2011, ICC-02/11-3-Anx4, pages 163-164; Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 173-175.

<sup>212</sup> Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, page 174.

are said to have killed several people for being Ouattara supporters.<sup>213</sup> After the final FRCI offensive in Yopougon, withdrawing pro-Gbagbo militia and Liberian mercenaries reportedly killed at least 120 civilians who were returning to Liberia.<sup>214</sup>

*Victims' representations*

133. The Chamber has received representations from victims concerning murders allegedly committed by pro-Gbagbo forces between 25 February 2011 and 6 May 2011. Various victims claim that people were executed in Abidjan by pro-Gbagbo forces in April 2011, because of their ethnic origin or perceived political affiliation (it is noted that they asked the victims to show their identity cards).<sup>215</sup> Three collective representations refer to murders allegedly committed by pro-Gbagbo forces in May 2011 in the west of the country.<sup>216</sup>

*Conclusions of the Chamber*

134. The Chamber concludes that the available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that between 25 February 2011 and 6 May 2011 pro-Gbagbo forces were responsible for murders and intentionally directing attacks against the civilian population.

ii. Attacks intentionally directed against personnel or objects involved in a humanitarian or peacekeeping mission

135. Article 8(2)(e)(iii) of the Statute refers to the war crime of intentionally directing attacks against personnel, installations, material, units or vehicles involved in a

<sup>213</sup> Amnesty International, "They Looked at his Identity Card and Shot him Dead", Six Months of Post-Electoral Violence in Côte d'Ivoire, May 2011, ICC-02/11-3-Anx4, pages 250-251.

<sup>214</sup> Xinhua, Over 100 people killed in southwest Côte d'Ivoire, 10 May 2011, ICC-02/11-3-Anx5, page 165; La dépêche/AFP, Côte d'Ivoire: 120 civils tués par les miliciens et mercenaires pro-Gbagbo, 5 May 2011, ICC-02/11-3-Anx5, page 167; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, pages 200-201.

<sup>215</sup> ICC-02/11-11-Conf-Exp-Anx223, 224, 227, 228, 229, 230, 231, 232, 235, 236, 237, 238, 240, 241, 258 and 259.

<sup>216</sup> ICC-02/11-11-Conf-Exp-Anx253, 254, 255.



humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, if they were entitled to the protection afforded to civilians or civilian objects under the international law of armed conflict.

136. This war crime requires i) that the perpetrator directed an attack; ii) the object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; and iii) the personnel, installations, material, units or vehicles were entitled to the protection afforded to civilians or civilian objects under the international law of armed conflict.<sup>217</sup>

*Submissions of the Prosecutor*

137. The Prosecutor submits that between 27 February 2011 and 2 April 2011, “pro-Gbagbo forces, including the Young Patriots as well as unidentified elements” committed twelve attacks on UNOCI personnel, equipment and installations that were entitled to protection under the international law of armed conflict.<sup>218</sup> The Prosecutor submits that although only nine out of these twelve incidents can be directly linked to pro-Gbagbo forces, it can be inferred that these forces were behind all twelve incidents.<sup>219</sup>

*Materials presented by the Prosecutor*

138. The supporting material demonstrates that between 27 February 2011 and 2 April 2011, twelve attacks against UN staff occurred in, *inter alia*, Abidjan, Daloa,

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<sup>217</sup> Elements of Crimes, Art. 8(2)(e)(iii).

<sup>218</sup> ICC-02/11-3, paragraphs 159 and 160.

<sup>219</sup> ICC-02/11-3, paragraph 161.

Yamoussoukro, and Guiglo.<sup>220</sup> UN and other reports indicate that the pro-Gbagbo camp directly incited its forces to use violence against peacekeepers.<sup>221</sup>

### *Conclusions of the Chamber*

139. The Chamber concludes that the available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that between 27 February 2011 and 2 April 2011, pro-Gbagbo forces intentionally directed attacks against UNOCI personnel, equipment, and installations that were entitled to protection.

#### iii. Intentionally directing attacks against protected objects

140. Article 8(2)(e)(iv) of the Statute encompasses the crime of intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives. This war crime requires that the perpetrator directed an attack and that the object of the attack was one or more of the buildings set out above.<sup>222</sup>

### *Submissions of the Prosecutor*

<sup>220</sup> UN Security Council Report, ICC-02/11-3-Anx3, pages 4-6; UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, pages 23-24; UN High Commission for Refugees, Briefing Notes, ICC-02/11-3-Anx3, page 43; United Nations, Press Release UNOCI-998, 3 April 2011, ICC-02/11-3-Anx3, page 120; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, pages 202-203; BBC News, Ivory Coast: UN experts attacked in Yamoussoukro, ICC-02/11-3-Anx5, page 30-31; Reliefweb, Côte d'Ivoire: UN peacekeepers wounded in an ambush north of Abidjan, ICC-02/11-3-Anx5, page 101; UN News Centre, Côte d'Ivoire: Four UN soldiers wounded in another assault by Gbagbo's forces, ICC-02/11-3-Anx5, page 103.

<sup>221</sup> ICC-02/11-3, paragraph 161; UN Security Council, Twenty-seventh progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire, 30 March 2011, S/2011/211, ICC-02/11-3-Anx3, pages 23-24; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 222; Human Rights Watch, Côte d'Ivoire: Pro-Gbagbo Forces Abducting Opponents, 23 December 2010, ICC-02/11-3-Anx4, page 143.

<sup>222</sup> Elements of Crimes, Article 8(2)(e)(iv).

141. The Prosecutor submits that between February 2011 and May 2011 pro-Gbagbo forces carried out a number of attacks on buildings dedicated to religion.<sup>223</sup>

*Materials presented by the Prosecutor*

142. The information provided demonstrates that between 25 February 2011 and 6 May 2011, attacks were directed against religious places, namely mosques and other Muslim buildings (e.g. the Boribana mosque in Attécoubé) as well as against Catholic and Baptist churches and buildings (e.g. the Jesuit Institute of Technology in Angré, Abidjan and the Baptist Church in Yopougon, Abidjan). These attacks resulted in the destruction of property belonging to religious groups and also in the death of some religious leaders (e.g. the Imam of Williamsville in Abidjan).<sup>224</sup>

*Conclusions of the Chamber*

143. The Chamber concludes that the available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that between 25 February 2011 and 6 May 2011, pro-Gbagbo forces intentionally directed attacks against buildings dedicated to religion.

<sup>223</sup> ICC-02/11-3, paragraphs 162 – 164.

<sup>224</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, pages 55-56; UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, pages 150-151 and 154-155; UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, page 183; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, page 202; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 237-238; Le Nouvel Observateur, "On vous tuera tous, jusqu'au dernier", ICC-02/11-3-Anx5, pages 33-36.

iv. Other underlying acts not presented by the Prosecutor

144. The definition of rape under Article 8(2)(e)(vi) of the Statute is identical to the definition of rape in Article 7(1)(g) of the Statute set out above.<sup>225</sup>
145. The war crime of sexual violence as provided for in Article 8(2)(e)(vi) of the Statute requires that the perpetrator “committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature” and that such “conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions”. The same elements of consent as regards rape, described above, apply when acts of sexual violence constitute a war crime.<sup>226</sup>

*Materials presented by the Prosecutor*

146. The available information indicates that pro-Gbagbo groups were responsible for widespread acts of rape, along with other forms of sexual violence, in Côte d’Ivoire in the context of the post-electoral political and military conflict.<sup>227</sup> The information refers to the rape of individuals who were considered supporters of Alassane Ouattara by pro-Gbagbo forces.<sup>228</sup> There are reports that women who were detained

<sup>225</sup> Elements of Crimes, Article 8(2)(e)(vi)-1.

<sup>226</sup> Elements of Crimes, Article 8(2)(e)(vi)-6.

<sup>227</sup> UN Security Council Report, ICC-02/11-3-Anx3, p. 22; Human Rights Watch, My Heart Is Cut", Sexual Violence by Rebels and Pro-Government Forces in Côte d’Ivoire, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 10; UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, pages 200-203; UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 56.

<sup>228</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 167-168; Human Rights Watch, Côte d’Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, pages 157-158.

by pro-Gbagbo forces were raped while in detention,<sup>229</sup> and other reports refer to men who were the victims of sexual violence.<sup>230</sup>

#### *Victims' representations*

147. The Chamber has received representations from victims concerning rape and sexual violence allegedly committed by pro-Gbagbo forces between 25 February 2011 and 6 May 2011. Two individual victims refer to acts of rape and sexual violence allegedly committed by pro-Gbagbo forces in Abidjan.<sup>231</sup>

#### *Conclusions of the Chamber*

148. In light of the information provided, the Chamber concludes that there is a reasonable basis to believe that acts constituting rape and sexual violence were committed by pro-Gbagbo forces during the period from 25 February 2011 to 6 May 2011.

#### c. Nexus between the individual acts and the armed conflict

149. In order to establish the nexus between the individual act and the armed conflict, the Chamber must be satisfied that the acts took place in the context of, and were associated with, an armed conflict not of an international character. However, neither the Statute nor the Elements of Crimes otherwise define the relationship between the individual act and the armed conflict.<sup>232</sup>

150. The Chamber agrees with Pre-Trial Chamber I, when it concluded (following the jurisprudence of the *ad hoc* tribunals) that the crimes must be closely related to the

<sup>229</sup> Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 238.

<sup>230</sup> UN Human Rights Council, Report of the High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, 15 February 2011, ICC-02/11-3-Anx3, page 56.

<sup>231</sup> ICC-02/11-11-Conf-Exp-Anx248, 249.

<sup>232</sup> Elements of Crimes, article 8.

hostilities, meaning that the armed conflict must play a substantial role in the perpetrator's decision and his ability to commit the crime, and the manner in which it was committed.<sup>233</sup>

*Submissions of the Prosecutor*

151. The Prosecutor submits that the majority of the murders and the attacks against civilians occurred in the context of fighting between pro-Gbagbo and pro-Ouattara forces, particularly when the pro-Ouattara forces launched military operations to gain control of the South of the country, and that accordingly a link can be established between the alleged war crimes and the hostilities.<sup>234</sup>

*Materials presented by the Prosecutor*

152. The supporting material shows that acts of murder, rape, sexual violence and attacks against civilians, UN objects and personnel and other protected objects that were allegedly committed by pro-Gbagbo forces in the territory of Côte d'Ivoire were linked with the armed conflict between pro-Ouattara and pro-Gbagbo forces. This can be inferred from the information provided, namely that the perpetrators were members of pro-Gbagbo forces and that the underlying acts were committed in the course of hostilities. Further, the majority of the victims of the crimes described above appear to have been associated with the pro-Ouattara forces.<sup>235</sup>

*Conclusions of the Chamber*

153. In light of the information provided, the Chamber concludes that there is a reasonable basis to believe that the crimes allegedly committed by pro-Gbagbo forces

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<sup>233</sup> ICC-01/04-01/07-717, paragraphs 378-383.

<sup>234</sup> ICC-02/11-3, paragraphs 171 - 173.

<sup>235</sup> UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, pages 160-163; UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, pages 176-179.

were closely related to the existence of an armed conflict between the pro-Gbagbo and the pro-Ouattara forces in the territory of Côte d'Ivoire.

### **Acts allegedly committed by Pro-Ouattara forces**

#### **i. Murder and intentionally directing attacks against the civilian population**

##### *Submissions of the Prosecutor*

154. The Prosecutor submits that between 25 February 2011 and 6 May 2011, pro-Ouattara forces committed the war crime of murder pursuant to Article 8(2)(c)(i) of the Statute and attacking civilians pursuant to Article 8(2)(e)(i) of the Statute. According to the Prosecutor, the majority of the murders and attacks against civilians occurred when pro-Ouattara forces launched military operations to take control of the south of the country from pro-Gbagbo forces.<sup>236</sup>

##### *Materials presented by the Prosecutor*

155. The supporting material presented by the Prosecutor indicates that during their offensive, pro-Ouattara forces (including the FRCI and several pro-Ouattara militias) attacked and killed numerous civilians in dozens of villages and towns in and around Toulepleu, Bloléquin, Guiglo, Duékoué, Doké, Diboké Dahoua, Delobly, Bahé Bé, Pinhou, Guéibli, Guinglo-Zia, Diéhiba and Diahoun, as well as the Abobo and Anyama districts in Abidjan.<sup>237</sup> On 29 and 30 March 2011, pro-Ouattara forces allegedly killed hundreds of civilians in the "Carrefour" neighbourhood of

<sup>236</sup> ICC-02/11-3, paragraphs 148 and 150.

<sup>237</sup> Human Rights Watch, Côte d'Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, pages 155, 159-161; Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 167-173; Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 253-262.

Duékoué.<sup>238</sup> The supporting material further suggests that the attack against the “Carrefour” quarter of Duékoué was intended as a collective punishment against the Gueré population.<sup>239</sup> The material presented by the Prosecutor indicates that pro-Ouattara forces killed at least 95 unarmed civilians in Abidjan during April and May 2011, in what – as it is reported – was a collective punishment of ethnic groups associated with Laurent Gbagbo’s militias.<sup>240</sup> It has additionally been suggested that individuals were killed after being found with weapons at *Forces Nouvelles* checkpoints in Abobo.<sup>241</sup>

### *Victims’ Representations*

156. The Chamber has received representations from victims concerning murders allegedly committed by pro-Ouattara forces between 25 February 2011 and 6 May 2011. Various individual victim representations also refer to murders allegedly committed by pro-Ouattara forces in Abidjan and several other areas in March and April 2011.<sup>242</sup>

### *Conclusions of the Chamber*

157. The Chamber concludes that the available information substantiates the Prosecutor’s submission that there is a reasonable basis to believe that between 25 February 2011 and 6 May 2011, pro-Ouattara forces were responsible for the murder of, and intentionally directing attacks against, civilians.

<sup>238</sup> Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 167-173; Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 253-262.

<sup>239</sup> ICC-02/11-3, paragraph 155; Human Rights Watch, Côte d’Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 167-173; “Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 253-262.

<sup>240</sup> Human Rights Watch, Côte d’Ivoire: Gbagbo Forces Tortured, Killed in Abidjan, 2 June 2011, ICC-02/11-3-Anx4, pages 179 – 185.

<sup>241</sup> ICC-02/11-3, paragraph 152; Human Rights Watch, Côte d’Ivoire: Crimes Against Humanity by Gbagbo Forces, 15 March 2011, ICC-02/11-3-Anx4, pages 160 - 161.

<sup>242</sup> ICC-02/11-11-Conf-Exp-Anx332, 385, 422, 479, 480, 482, 487.



## ii. Rape

### *Submissions of the Prosecutor*

158. The Prosecutor alleges that in March 2011, during their military offensive in the west of Côte d'Ivoire, the FRCI raped at least 23 people, all of Gueré ethnicity.<sup>243</sup> The Prosecutor submits that pro-Ouattara forces detained dozens of women for a day or longer and repeatedly raped them.<sup>244</sup>

### *Materials presented by the Prosecutor*

159. The supporting material indicates that pro-Ouattara forces allegedly committed acts of rape on 8 March 2011 in Basobli;<sup>245</sup> on 20 March 2011 in Bloléquin;<sup>246</sup> on 14 March 2011 in Doké;<sup>247</sup> on 29 and 31 March 2011 in Duékoué;<sup>248</sup> on 13 April 2011 in Deahouepieu;<sup>249</sup> and on 3 May in Yopougon in Abidjan.<sup>250</sup>

### *Victims' Representations*

160. The Chamber has received representations from victims concerning acts of rape allegedly committed by pro-Ouattara forces between 25 February 2011 and 6 May 2011.<sup>251</sup>

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<sup>243</sup> ICC-02/11-3, paragraph 166.

<sup>244</sup> ICC-02/11-3, paragraph 166.

Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, pages 171-172.

<sup>246</sup> Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011, ICC-02/11-3-Anx4, page 172

<sup>247</sup> UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, page 157.

<sup>248</sup> Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 263.

<sup>249</sup> UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, page 157.

<sup>250</sup> UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire, A/HRC/17/49, 14 June 2011, ICC-02/11-3-Anx3, page 201.

<sup>251</sup> ICC-02/11-11-Conf-Exp-Anx486 and 670..

*Conclusions of the Chamber*

161. The Chamber concludes that the available information substantiates the Prosecutor's submission that there is a reasonable basis to believe that in the period between 25 February 2011 and 6 May 2011, pro-Ouattara forces committed crimes of rape in the west of Côte d'Ivoire and in Abidjan.

iii. Other underlying acts not presented by the Prosecutor (pillage)

162. The war crime of pillage under Article 8(2)(e)(v) of the Statute requires that the perpetrator appropriated certain property without the consent of the owner, with the intent to deprive him or her of the property and to appropriate it for private or personal use.<sup>252</sup>

*Materials presented by the Prosecutor*

163. The materials presented by the Prosecutor indicate that FRCI troops and other armed elements pillaged houses in Duékoué and other towns in the west during their military offensive in March and April 2011.<sup>253</sup>

*Victims' Representations*

164. The Chamber has received multiple representations from victims concerning pillage allegedly carried out by pro-Ouattara forces between 25 February 2011 and 6 May 2011. Numerous victims have referred to acts of pillage committed in various areas of Abidjan (particularly Yopougon) between March and May 2011.<sup>254</sup> Many other

<sup>252</sup> Elements of Crimes, Article 8(2)(e)(v).

<sup>253</sup> Human Rights Watch, Côte d'Ivoire: Ouattara Forces Kill, Rape Civilians During Offensive, 9 April 2011. ICC-02/11-3-Anx4, pages 168-170.

<sup>254</sup> ICC-02/11-11-Conf-Exp-Anx2, 29, 123, 124, 331, 333, 366, 367, 372, 373, 374, 375, 376, 377, 386, 387, 390, 392, 393, 394, 397, 407, 412, 444, 499, 504, 559, 571, 584, 585, 586, 587, 600, 601, 602, 603, 604, 605, 607, 608, 609 611, 612, 614, 615, 616, 647, 648, 649 651, 652, 671, 673, 682, 683, and 684.

representations allege that pro-Ouattara forces committed acts of pillage in a number of other locations between March and May 2011.<sup>255</sup>

*Conclusions of the Chamber*

165. The Chamber concludes that on the available information that there is a reasonable basis to believe that in the period between 25 February 2011 and 6 May 2011 pro-Ouattara forces committed crimes of pillage, particularly in the west of Côte d'Ivoire and in areas in and around Abidjan.

iv. Other underlying acts not presented by the Prosecutor (cruel treatment and torture)

*Materials presented by the Prosecutor*

166. The war crime of cruel treatment, as contained in Article 8(2)(c)(i), requires that the perpetrator inflicted severe physical or mental pain or suffering upon a protected person, including civilians and those *hors de combat*. In addition to this element, the war crime of torture requires that the perpetrator acted as he did for such purposes as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on any discrimination of any kind.<sup>256</sup>

167. The supporting material provided by the Prosecutor indicates that between 25 February and 6 May 2011, the FRCI treated young men inhumanely for no apparent reason other than their age or ethnic group, "particularly the Gueré, Bété, Goro and Attié, all strongly linked to former President Gbagbo - or the neighbourhood they

<sup>255</sup> ICC-02/11-11-Anx10, 27, 287, 288, 289, 290, 291, 294, 295, 297, 298, 305, 306, 307, 317, 320, 321, 337, 338, 351, 352, 356, 358, 360, 362, 363, 364, 368, 369, 370, 379, 420, 441, 483, 484, 486, 490, 491, 492, 498, 507, 570, 578, 579, 598, 599, 631, 636 and 639.

<sup>256</sup> Elements of Crimes, Article 8(2)(c)(i)-3 and 8(2)(c)(i)-4.

were from”.<sup>257</sup> According to a Human Rights Watch report, victims of the Republican Forces described “being struck repeatedly with guns, belts, rope and fists to extract information on where weapons were hidden or to punish them for alleged participation in the Young Patriots, a pro-Gbagbo militia group”.<sup>258</sup> Torture is said to have included “forcibly removing teeth from one victim and placing a burning knife on another victim, then cutting him.”<sup>259</sup> The information provided also shows that supporters of Laurent Gbagbo were hit with sticks and rifle butts “by FRCI soldiers in the yard of the presidential residence after their surrender”.<sup>260</sup> People close to Laurent Gbagbo were also allegedly severely beaten at the Golf Hotel in Abidjan after their surrender.<sup>261</sup>

#### *Victims’ Representations*

168. The Chamber has received representations from victims concerning acts of cruel treatment and torture allegedly committed by pro-Ouattara forces from 25 February 2011 to 6 May 2011. A further victim claims to have endured physical abuse and beatings, allegedly at the hands of the FRCI in Abidjan.<sup>262</sup> Several other individuals also refer to physical abuse allegedly perpetrated by the FRCI in Abidjan.<sup>263</sup> Two victims claim to have been subjected to physical abuse when the FRCI attacked their area.<sup>264</sup> One individual claims that the FRCI subjected him or her to physical abuse in

<sup>257</sup> Human Rights Watch, Côte d’Ivoire: Gbagbo Forces Tortured Killed in Abidjan, 2 June 2011, ICC-02/11-3-Anx4, pages 180, 189.

<sup>258</sup> Human Rights Watch, Côte d’Ivoire: Gbagbo Forces Tortured Killed in Abidjan, 2 June 2011, ICC-02/11-3-Anx4, page 180.

<sup>259</sup> Human Rights Watch, Côte d’Ivoire: Gbagbo Forces Tortured Killed in Abidjan, 2 June 2011, ICC-02/11-3-Anx4, p. 180.

<sup>260</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, pages 245- 246.

<sup>261</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 246.

<sup>262</sup> ICC-02/11-11-Conf-Exp-Anx 367.

<sup>263</sup> ICC-02/11-11-Conf-Exp-Anx390, 392, 393, 394, 398, 399, 402.

<sup>264</sup> ICC-02/11-11-Conf-Exp-Anx305, 306.

in April 2011.<sup>265</sup> Several individuals refer to physical abuse by the FRCI when they attacked a village in April 2011.<sup>266</sup>

*Conclusions of the Chamber*

169. On the basis of the information presented by the Prosecutor, the Chamber finds that there is a reasonable basis to believe that acts of torture and cruel treatment were carried out by the FRCI and other pro-Ouattara forces between 25 February and 6 May 2011.

d. Nexus between the individual acts and the armed conflict

*Submissions of the Prosecutor*

170. The Prosecutor submits that the majority of the murders, attacks against civilians, and acts of rape occurred when pro-Ouattara forces launched military operations to gain control over the south of the country from pro-Gbagbo forces<sup>267</sup> and that accordingly a link can be established between the alleged war crimes and the armed hostilities.<sup>268</sup>

*Materials presented by the Prosecutor*

171. The supporting material shows that murders, attacks against civilians, and acts of rape, pillage, cruel treatment and torture allegedly committed by pro-Ouattara forces in the territory of Côte d'Ivoire were linked with the armed conflict between pro-Ouattara and pro-Gbagbo forces. This can be inferred from the information received, namely that the perpetrators were members of pro-Ouattara forces and that the underlying acts were committed in the course of hostilities. Further, the majority of

<sup>265</sup> ICC-02/11-11-Conf-Exp-Anx378.

<sup>266</sup> ICC-02/11-11-Conf-Exp-Anx320, 324, 326, 327, 353, 354, 360, 362, 363, 364, 368, 369.

<sup>267</sup> ICC-02/11-3, paragraphs 171 - 173.

<sup>268</sup> ICC-02/11-3, paragraphs 171 - 173.

the victims of the crimes described above appear to have been associated with the pro-Gbagbo forces.<sup>269</sup>

### *Conclusions of the Chamber*

172. In light of the information provided, the Chamber concludes that there is a reasonable basis to believe that the crimes committed by pro-Ouattara forces were closely related to the existence of an armed conflict between the pro-Gbagbo and pro-Ouattara forces in the territory of Côte d'Ivoire.

### **C. JURISDICTION RATIONE TEMPORIS**

173. In accordance with the Declaration lodged under Article 12(3) of the Statute in 2003, the Court has jurisdiction over crimes committed in Côte d'Ivoire since 19 September 2002.

174. The Prosecutor indicates that the situation of Côte d'Ivoire has been under preliminary examination by his Office since the receipt of the Declaration on 1 October 2003.<sup>270</sup> However, the Prosecutor proposes investigating crimes committed after 28 November 2010 (as opposed to crimes that may have been committed throughout the entire period of the ICC's jurisdiction) because it is submitted: (i) the violence during this later period reached unprecedented levels and (ii) there is a wealth of information available to establish that the reasonable basis threshold is satisfied with respect to the alleged crimes committed during this period.<sup>271</sup>

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<sup>269</sup> UN Human Rights Division, UNOCI, Rapport sur les violations des droits de l'homme et du droit international humanitaire commises à l'Ouest de la Côte d'Ivoire, UNOCI/HRD/2011/02, May 2011, ICC-02/11-3-Anx3, pages 151 and 160-163; UN Human Rights Council, Rapport de la Commission d'enquête internationale indépendante sur la Côte d'Ivoire, A/HRC/17/48, 8 June 2011, ICC-02/11-3-Anx3, pages 171-180 and 184.

<sup>270</sup> ICC-02/11-3, paragraph 15.

<sup>271</sup> ICC-02/11-3, paragraph 44.

175. Accordingly, the Prosecutor has requested that the Chamber authorises an investigation into the situation in the Republic of Côte d'Ivoire in relation to the period following 28 November 2010.<sup>272</sup> However, the Prosecutor also suggests that once the Chamber has reviewed the supporting material, it may conclude that the temporal scope of the investigation should be broadened to encompass events that occurred between 19 September 2002 and the date of the filing of the Request, i.e. 23 June 2011.<sup>273</sup>

176. In light of the matters set out above, the Chamber needs to decide on the period of time to be covered by the investigation, namely, first, whether to authorise an investigation into crimes that may be committed after the date of the filing (*viz.* 23 June 2011), and, second, whether to authorise an investigation into crimes committed before 28 November 2010.

### **1. End date of the investigation authorisation**

177. In its decision authorising the investigation into the situation in Kenya, Pre-Trial Chamber II decided that it would be erroneous to widen the time limit of the investigation to include events following the date of the Prosecutor's Request.<sup>274</sup> Pre-Trial Chamber II interpreted the reference in Article 53(1)(a) of the Statute to "a crime [which] has been or is being committed" as encompassing only those crimes committed prior to the date the Prosecutor filed his request.<sup>275</sup>

178. In this connection, the decision of Pre-Trial Chamber I on the arrest warrant issued for Callixte Mbarushimana for crimes allegedly committed in the North and South

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<sup>272</sup> ICC-02/11-3, paragraph 181.

<sup>273</sup> ICC-02/11-3, paragraph 42.

<sup>274</sup> ICC-01/09-19-Corr, paragraph 206.

<sup>275</sup> ICC-01/09-19-Corr, paragraph 206.

Kivu Provinces of the Democratic Republic of Congo (“DRC”) is of relevance.<sup>276</sup> Pre-Trial Chamber I indicated that in order for the case “not to exceed the parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor’s Request must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court” through the original referral in 2004. It was only within the context of this “original” situation that subsequent prosecutions could be initiated. The Chamber explicitly set out that a single situation “can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, insofar as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral”.<sup>277</sup> The Chamber concluded that it was satisfied on a *prima facie* basis that the crimes allegedly committed in the Kivus were sufficiently linked to (“falls within the context of”) the situation of crisis referred to the Court.<sup>278</sup>

179. Bearing in mind the volatile environment in Côte d’Ivoire, the Chamber finds it necessary to ensure that any grant of authorisation covers investigations into “continuing crimes” – those whose commission extends past the date of the application. Thus, crimes that may be committed after the date of the Prosecutor’s application will be covered by any authorisation, insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011. They must, at least in a broad sense, involve the same actors and have been committed within the context of either the same attacks (crimes against humanity) or the same conflict (war crimes). Therefore if the authorisation is granted, it will

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<sup>276</sup> Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1, paragraph 5. This decision, original classified Under Seal was reclassified as public on 11 October 2011 pursuant to decision ICC-01/04-01/10-7. Jurisdiction in the case against Callixte Mbarushimana is based on the referral to the Prosecutor of the situation in the Democratic Republic of Congo by the DRC President in accordance with articles 13(a) and 14 of the Statute on 3 March 2004. ICC-01/04-98-Anxl.

<sup>277</sup> ICC-01/04-01/10-1, paragraph 6.

<sup>278</sup> ICC-01/04-01/10-1, paragraphs 6 and 7.



include the investigation of any ongoing and continuing crimes that may be committed after the 23 June 2011 as part of the ongoing situation.<sup>279</sup>

## 2. The starting date of the authorisation

180. The Chamber considers that a similar analysis should apply to any crimes that may have been committed before the commencement date requested by the Prosecutor for the authorisation, provided they are part of the same situation.

181. The materials available to the Chamber include, in summary form, details of the history concerning the political and military crisis in Côte d'Ivoire since the coup attempt of 2002, which resulted in the *de facto* partition of the country into a northern zone controlled by the armed opposition (the *Forces Nouvelles*) and a southern zone controlled by President Gbagbo.<sup>280</sup> Human Rights Watch indicates that efforts to resolve the conflict between the government of President Gbagbo and the rebels ended in a series of broken peace agreements,<sup>281</sup> over 11,000 foreign peacekeeping troops on the ground and the imposition of a UN arms embargo.<sup>282</sup> Although the peace agreements and peacekeepers brought about a cessation of active hostilities, they did not bring peace or unity to the country. The end result was a stalemate, a

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<sup>279</sup> There is support in the jurisprudence of the International Criminal Tribunal for Rwanda for the exercise of jurisdiction over ongoing crimes, as long as these acts are sufficiently linked to crimes that took place during the period over which the ICTR has temporal jurisdiction. See Prosecutor v Nsengiyumva, Case No. ICTR-96-12-I, Decision on the Defence Motions Objecting to the Jurisdiction of Trial Chamber on the Amended Indictment, 13 April 2000, paragraphs 27-28. See also Carsten Stahn, Mohamed M. El Zeidy, Héctor Olásolo, The International Criminal Court's Ad Hoc Jurisdiction Revisited, 99 Am J Int'l Law 421, pages 430-431 (discussing ICTR and human rights jurisprudence on continuing crimes and suggesting that the ICC could rely on events that commenced prior to the date set in an Article 12(3) declaration provided that those acts were of a continuing nature).

<sup>280</sup> Amnesty International, "They looked at his identity card and shot him dead" Six months of post-electoral violence in Côte d'Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 217; Human Rights Watch, My Heart Is Cut", Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 24; FIDH, Côte d'Ivoire: It is Urgent to Prevent the Escalation to Civil War, March 2011, ICC-02/11-3-Anx4, page 297; International Crisis Group, Côte d'Ivoire: le pire est peut-être à venir, March 2005, ICC-02/11-3-Anx4, page 319.

<sup>281</sup> Such as Linas-Marcoussis of January 2003, Accra III of July 2004, the Pretoria Agreement of April 2005 and the Ouagadougou Agreement of March 2007).

<sup>282</sup> Human Rights Watch, My Heart is Cut: Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire, August 2007, ICC-02/11-3-Anx4, page 24.

situation of “no peace, no war”<sup>283</sup> or “intermittent civil war”.<sup>284</sup> The long-awaited presidential election took place on 31 October 2010 and 28 November 2010, having been postponed six times since 2005. However, far from solving the political crisis, the elections plunged “the country into even deeper turmoil with severe consequences for the overall human rights situation”.<sup>285</sup> While the context of violence reached a critical point in late 2010, it appears that this was a continuation of the ongoing political crisis and the culmination of a long power struggle in Côte d’Ivoire.<sup>286</sup>

182. The information contained in the supporting material submitted by the Prosecutor and some of the victims’ representations provide indications of very serious human rights violations and abuses that have been committed since the September 2002 coup attempt that could amount to crimes within the jurisdiction of the Court.<sup>287</sup> According to this information, the political and military crisis that followed was devastating from the point of view of human rights and was “punctuated by atrocities attributable to both sides, including extrajudicial killings, massacres, enforced disappearances, and numerous incidents of torture”.<sup>288</sup> Human Rights Watch Report set out that rebel forces reportedly carried out widespread abuses against civilians in some areas under their control, which included “extrajudicial executions, massacres, torture, cannibalism, mutilation, the recruitment and use of child soldiers and sexual

<sup>283</sup> Human Rights Watch, *My Heart is Cut: Sexual Violence by Rebels and Pro-Government Forces in Côte d’Ivoire*, August 2007, ICC-02/11-3-Anx4, page 24.

<sup>284</sup> International Crisis Group, *Côte d’Ivoire: le pire est peut-être à venir*, March 2005, ICC-02/11-3-Anx4, page 315.

<sup>285</sup> FIDH, *Côte d’Ivoire: It is Urgent to Prevent the Escalation to Civil War*, March 2011, ICC-02/11-3-Anx4, page 297; UN Human Rights Council, *Report of the High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire*, 15 February 2011, ICC-02/11-3-Anx3, page 46.

<sup>286</sup> Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 221.

<sup>287</sup> See for instance, *Opération des Nations Unies en Côte d’Ivoire, Division des Droits de L’Homme, Rapport Sur Le Violations de L’Homme et du droit International Humanitaire Commises à L’Ouest de la Côte d’Ivoire*, May 2011, ICC-02/11-3-Anx3, page 132. Amnesty International, “They looked at his identity card and shot him dead” Six months of post-electoral violence in Côte d’Ivoire, May 2011, AFR 31/002/2011, ICC-02/11-3-Anx4, page 273.

<sup>288</sup> Human Rights Watch, *My Heart Is Cut*, *Sexual Violence by Rebels and Pro-Government Forces in Côte d’Ivoire*, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 26.

violence including rape, gang rape, egregious sexual assault, forced incest and sexual slavery".<sup>289</sup> Government forces and government-recruited mercenaries are said to have "frequently executed, detained, and attacked perceived supporters of the rebel forces based on ethnic, national, religious and political affiliation".<sup>290</sup> Human Rights Watch further reports that "civilian militias tolerated or encouraged by state security forces engaged in widespread targeting of the immigrant community".<sup>291</sup> It appears that the most egregious acts of sexual violence were committed during the period of active hostilities from September 2002 to mid 2003.<sup>292</sup> According to the UNOCI the massacres at Diapahi, Guitrozon and Petit Duékoué in 2005 are illustrative of the deterioration of inter-community relations.<sup>293</sup> According to the same report, impunity for serious human rights violations was the norm. In addition to a general lack of willingness to investigate and prosecute, the crisis in Côte d'Ivoire has had dramatic consequences for the judicial system in the country as a whole, in particular in the west.<sup>294</sup>

183. In his Request, the Prosecutor suggests that "[u]pon review of the supporting material, the Chamber may conclude that Côte d'Ivoire repeatedly experienced violence prior to the 2010 elections and therefore broaden the temporal scope of the investigations to events that occurred between 19 September 2002 [...] and 23 June 2011".<sup>295</sup> The Chamber has received submissions from victims concerning crimes

<sup>289</sup> Human Rights Watch, *My Heart Is Cut*, Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 26.

<sup>290</sup> Human Rights Watch, *My Heart Is Cut*, Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 26.

<sup>291</sup> Human Rights Watch, *My Heart Is Cut*, Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 26.

<sup>292</sup> Human Rights Watch, *My Heart Is Cut*, Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire, Volume 19, No. 11(A), August 2007, ICC-02/11-3-Anx4, page 31.

<sup>293</sup> See for instance, *Opération des Nations Unies en Côte d'Ivoire, Division des Droits de L'Homme, Rapport Sur Le Violations de L'Homme et du droit International Humanitaire Commises à L'Ouest de la Côte d'Ivoire*, May 2011, ICC-02/11-3-Anx3, page 132.

<sup>294</sup> *Opération des Nations Unies en Côte d'Ivoire, Division des Droits de L'Homme, Rapport Sur Le Violations de L'Homme et du droit International Humanitaire Commises à L'Ouest de la Côte d'Ivoire*, May 2011, ICC-02/11-3-Anx3, page 133.

<sup>295</sup> ICC-02/11-3, paragraph 42.

allegedly committed during the crisis in Côte d'Ivoire in the latter part of 2002 and in 2003.<sup>296</sup> However, the Prosecutor's Request does not refer to specific incidents that may have occurred prior to 28 November 2010, and the vast majority of the supporting materials provided by the Prosecutor focus on the most recent post-electoral crisis.<sup>297</sup>

184. In the absence of sufficient information on specific events, the Chamber is however unable to determine whether the reasonable basis threshold has been met with regard to any specific crimes. Indeed, the Chamber is of the view that with regard to this part of his request, the Prosecutor has not provided sufficient supporting material in relation to the contextual elements and underlying acts of the crimes within the jurisdiction of the Court allegedly committed during that period of time.

185. Sufficient information on specific crimes committed between 2002 and 2010 is an essential prerequisite for the Chamber to be able to assess whether there is a reasonable basis to proceed. In accordance with Rule 50(4) of the Rules, the Prosecutor is to revert to the Chamber with any additional information that is available to him on potentially relevant crimes committed between 2002 and 2010.

#### *D. JURISDICTION RATIONE LOCI / JURISDICTION RATIONE PERSONAE*

186. In order for a crime to fall within the jurisdiction of the Court for the purpose of Article 53(1)(a) of the Statute, it must also meet at least one of the conditions that are set out in the alternative in Article 12 of the Statute.

187. The crime must occur in the territory of either a State Party to the Statute or a State that has lodged a declaration by virtue of Article 12(3) of the Statute, or a national of

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<sup>296</sup> ICC-02/11-11-Conf-Exp-Anx 12, 21, 54, 55, 315, 339-350, 379, 513-544, 546, 548, 549-554, 572.

<sup>297</sup> ICC-02/11-3, paragraphs 39 and 41 and supporting materials.

the relevant State must have committed the offence. In this regard, the Prosecutor submits that the crimes at issue in the Request were committed in the territory of Côte d'Ivoire.<sup>298</sup>

188. On the basis of the available information, the Chamber concludes that the alleged crimes occurred in the territory of the Republic of Côte d'Ivoire, and thus the Court has jurisdiction *ratione loci* under Article 12(2)(a) of the Statute. Since the requirement of jurisdiction *ratione loci* is fulfilled, the Chamber does not need to examine jurisdiction *ratione personae* under Article 12(2)(b) of the Statute.

## VI. ADMISSIBILITY

189. Pursuant to Article 17 of the Statute, the Chamber must examine, on the basis of the available information, whether the "case" is admissible.

190. Although Article 53(1)(b) of the Statute refers to the admissibility of a "case" under Article 17 of the Statute, the Chamber considers that at this early stage of the proceedings, given there is no case with identified suspects, a determination as regards admissibility involves consideration of one or more potential cases within the broader context of the "situation". The Chamber must conduct an initial admissibility examination in order to determine whether there is a "reasonable basis to proceed" with an investigation pursuant to Articles 15 and 53(1)(b) of the Statute and Rule 48 of the Rules.<sup>299</sup>

191. The Chamber considers that the concept of "potential cases" in the context of a situation, as identified by Pre-Trial Chamber II in the Situation of Kenya, involves

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<sup>298</sup> ICC-02/11-3, paragraph 43.

<sup>299</sup> ICC-01/09-19-Corr, paragraphs 40-50 and 181-182.

two main elements: (i) the groups of individuals involved that are likely to be the focus of the investigation; and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation.<sup>300</sup>

#### **A. COMPLEMENTARITY**

192. Article 17 (1)(a) and (b) of the Statute provides that the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it; or (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned. However, the case is admissible if, regardless of the existence of proceedings under (a) and (b) above, the State is unwilling or unable genuinely to carry out the investigation or prosecution.

193. In its judgment of 25 September 2009, the Appeals Chamber interpreted this provision as involving a twofold test:

[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.<sup>301</sup>

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<sup>300</sup> ICC-01/09-19-Corr, paragraphs 50 and 182.

<sup>301</sup> Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, paragraph 78. See also Appeals Chamber, *Corrigendum* to the Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, 19 October 2010, ICC-01/05-01/08-962-Corr, paragraphs 107-109.

194. Accordingly, the Chamber is required to review whether the information provided by the Prosecutor reveals that the Republic of Côte d'Ivoire or any other State with jurisdiction is conducting or has conducted national proceedings in relation to the individuals and crimes that are likely to constitute the Court's future case(s), in this context. If the Court finds that no such proceedings exist, the investigation of the situation in Côte d'Ivoire would be authorised at this stage, provided that the element of gravity under Article 17(1)(d) of the Statute is met.
195. In the Request, the Prosecutor contended that because no national investigations or proceedings are pending in Côte d'Ivoire against the individuals who are most responsible for the crimes committed during the post-election violence, potential cases following the Prosecutor's investigation of the situation would be admissible.<sup>302</sup> The Prosecutor observed, however, that lawyers for Laurent Gbagbo have lodged a complaint in France for crimes against humanity committed in Duékoué on 29-30 March 2011.<sup>303</sup> As a result, the Prosecutor indicated that he would clarify with the French authorities whether any proceedings have followed this complaint and he intended to continue to assess any emerging national proceedings should the Chamber authorise the investigation.<sup>304</sup>
196. In his filing of 21 July 2011 providing additional information in relation to the request for authorisation, the Prosecutor indicates that he has obtained further information in relation to national proceedings and proceedings in other states (i.e. France).<sup>305</sup> The Prosecutor contends that that none of the events he refers to affect the admissibility

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<sup>302</sup> ICC-02/11-3, paragraph 52.

<sup>303</sup> ICC-02/11-3, paragraph 53.

<sup>304</sup> ICC-02/11-3, paragraph 53.

<sup>305</sup> ICC-02/11-7-Red, paragraph 5.

before the ICC of potential cases that could follow its investigation of the Situation in Côte d'Ivoire.<sup>306</sup>

197. The Prosecutor submits that proceedings by the Abidjan Prosecutor relate to (a) economic crimes; (b) crimes against state security; and (c) so called "blood crimes" (genocide, crimes against the civilian population and murders, killings and voluntary injuries).<sup>307</sup> The investigations for economic crimes focus on conduct that is clearly different from the crimes over which the ICC has jurisdiction.<sup>308</sup> With respect to crimes against state security, the individuals indicted and placed under arrest are not among those listed in Annex 1B of the Prosecutor's Request.<sup>309</sup> It is submitted as regards the blood crimes that the investigations do not extend to those who appear to bear the greatest responsibility for the most serious crimes falling within the Court's jurisdiction, with the exception of one individual, whose investigation is limited to an isolated incident and does not extend to any crimes committed in the context of an armed conflict or as part of a widespread or systematic attack against a civilian population.<sup>310</sup>

198. As regards the investigations and proceedings by the Military Prosecutor in Côte d'Ivoire, the Prosecutor submits that the individuals for whom authorisation to proceed with indictments was granted do not fall in the category of those who may bear the greatest responsibility for the most serious crimes falling within the Court's jurisdiction.<sup>311</sup> The Prosecutor further submits that the Military Prosecutor is currently not investigating alleged crimes committed by pro-Ouattara forces.<sup>312</sup>

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<sup>306</sup> ICC-02/11-7-Red, paragraph 6.

<sup>307</sup> ICC-02/11-7-Red, paragraphs 10, 13.

<sup>308</sup> ICC-02/11-7-Red, paragraph 11.

<sup>309</sup> ICC-02/11-7-Red, paragraph 12.

<sup>310</sup> ICC-02/11-7-Red, paragraph 13.

<sup>311</sup> ICC-02/11-7-Red, paragraph 16.

<sup>312</sup> ICC-02/11-7-Red, paragraph 16.



199. The Prosecutor submits that the Daloa Prosecutor, who is overseeing and directing investigations into alleged crimes committed in the west of Côte d'Ivoire in relation to the post-election violence, does not intend to prosecute or request warrants of arrests before receiving further instructions on the overall prosecutorial strategy of the Ministry of Justice.<sup>313</sup> The Prosecutor also submits that it is the understanding of the Daloa Prosecutor that the individuals with greatest responsibility for the most serious crimes will be prosecuted before the ICC.<sup>314</sup>
200. With regard to the proceedings in France, the Prosecutor submits that the investigations conducted by the French judicial authorities are limited to two distinct incidents and they do not relate to the most serious crimes under the jurisdiction of the Court.<sup>315</sup>

## **B. GRAVITY**

201. As regards the "gravity" element under Article 17(1)(d) of the Statute, all crimes that fall within the jurisdiction of the Court are serious, and thus the reference to the lack of gravity is an additional safeguard which prevents the Court from investigating, prosecuting and trying peripheral cases. In the case of the Prosecutor v. Thomas Lubanga, Pre-Trial Chamber I adopted a similar approach when it stated:

[The] gravity threshold is in addition to the drafters' careful selection of crimes included in articles 6 to 8 of the Statute [...]. Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.<sup>316</sup>

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<sup>313</sup> ICC-02/11-7-Red, paragraphs 17, 18.

<sup>314</sup> ICC-02/11-7-Red, paragraph 18.

<sup>315</sup> ICC-02/11-7-Red, paragraph 19.

<sup>316</sup> Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ICC-01/04-01/06-8-Corr, paragraph 41.

202. As with the preliminary assessment of admissibility under Article 17(1)(a) and (b) of the Statute, an evaluation of “gravity” should be conducted in a general sense, as regards the entire situation, but also against the backdrop of the potential case(s) within the context of a situation.
203. This assessment must be carried out following a quantitative as well as a qualitative approach.<sup>317</sup> However, the assessment should be general in nature and compatible with the pre-investigative stage of a situation.
204. In relation to “potential cases”, the Chamber agrees with the parameters adopted by Pre-Trial Chamber II, namely that the Chamber should establish: (i) whether the individuals or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes committed within the incidents which are likely to be the object of an investigation (including, *inter alia*, their scale and nature, the manner in which they were carried out, their impact on the victims, and any aggravating circumstances).<sup>318</sup>
205. The Prosecutor submits that the individuals likely to be the focus of the Prosecutor’s future investigations are high-ranking political and military figures who allegedly played a role in the violence.<sup>319</sup> In relation to crimes allegedly committed within the incidents that are likely to be the object of the Prosecutor’s investigations, the Prosecutor submits that serious crimes such as murder, rape and enforced disappearance were committed on a large scale, as part of a plan or in furtherance of

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<sup>317</sup> Pre-Trial Chamber I, Decision on the confirmation of charges, ICC-02/05-02/09-243-Red, paragraph 31.

<sup>318</sup> ICC-01/09-19-Corr, paragraphs 188-189.

<sup>319</sup> ICC-02/11-3, paragraph 57.

a policy, or in the context of, or in association with, an armed conflict.<sup>320</sup> The criterion of gravity in relation to these potential cases is thus met.

206. Addressing the issues raised above under complementarity and gravity, due to the absence of national proceedings against those appearing to be most responsible for the crimes committed during the post-election violence, and in light of the gravity of the acts committed, the Chamber is satisfied that there are potential cases that would be admissible in the situation in the Republic of Côte d'Ivoire, if the investigation is authorised.

### ***C. SUBSTANTIAL REASONS TO BELIEVE THAT AN INVESTIGATION WOULD NOT SERVE THE INTERESTS OF JUSTICE***

207. The final requirement that the Chamber is called upon to review under Article 53(1)(c) of the Statute is whether "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". Unlike sub-paragraphs (a) and (b) of Article 53(1) of the Statute, which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under an obligation to notify the Chamber of the reasons for the decision, to enable the

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<sup>320</sup> ICC-02/11-3, paragraph 58.

Chamber to exercise its power of review in accordance with Article 53 (3) (b) of the Statute.<sup>321</sup>

208. The Prosecutor submits that, based on the available information, he has no reasons to believe that the opening of an investigation into the situation would not be in the interests of justice.<sup>322</sup> The Chamber further notes that there is no indication in the victims' representations that the authorisation of the investigation would not serve the interests of justice.

## VII. FURTHER STEPS

209. The Registry noted in its Report that pursuant to Rule 50(5) of the Rules, that the Chamber shall give notice of its decision under Article 15(4) of the Statute to victims who have made representations. The Registry proposes, amongst other steps, to carry out a general-information campaign for the benefit of the entire Ivorian population, but focussing particularly on the affected communities; it will hold meetings with victims, victims' groups and the lawyers and associations who are representing them in this process; and it will write directly to those victims whose addresses are known.

210. The Chamber agrees that these represent the appropriate means by which the Registry is able to assist the Chamber in implementing the Court's obligations under Rule 50(5) of the Rules.

211. The Chamber notes that the victims' representations are predominantly from men (423 men as opposed to 179 women) and they only come from particular ethnic groups: Krou, Akan and Mande. Most of the victims are aged between 31-50 years.

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<sup>321</sup> ICC-01/09-19-Corr, paragraph 63. Pre-Trial Chamber II referred to Rule 105(5) of the Rules and to Regulation 48 of the Regulations. It stated that the Chamber may, in accordance with Regulation 48 of the Regulations, request the Prosecutor to present information in order to exercise its review power.

<sup>322</sup> ICC-02/11-3, paragraph 60.

Furthermore, whilst there are 347 representations that allege pillage and 256 that concern murder, only 20 representations refer to rape.<sup>323</sup> Indeed, the Registry has noted in its report that it is not currently in a position to inform the Chamber as to whether the representations received could be said to reflect, at least approximately, the pattern of violence that occurred in Côte d'Ivoire.<sup>324</sup> In the result, the Chamber requests the Registry, pursuant to the principle of non-discrimination enshrined in Article 21(3) of the Statute and Rule 86 of the Rules, to pay particular attention to the needs of any potentially under-represented groups of victims, such as victims from other ethnic groups, children, women, and those who suffered sexual violence, when it carries out its general-information campaign amongst the affected communities, and including any meetings that are organised with victims and victims' groups and other associations. It is to be noted that this request extends to those who have already provided representations. The Registry is to report thereafter to the Chamber if it considers that a group of victims or a series of crimes have not been included or reflected sufficiently in the victims' representations received thus far.

## **VIII. CONCLUSION**

212. In light of the above considerations, the Chamber authorises the commencement of an investigation in Côte d'Ivoire with respect to crimes within the jurisdiction of the Court committed since 28 November 2010. The investigation is also authorised with respect to continuing crimes that may be committed in the future, as set out in paragraph 179 above, insofar as they are part of the context of the ongoing situation in Côte d'Ivoire.

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<sup>323</sup> ICC-02/11-11-Red, paragraphs 34, 36 and 38.

<sup>324</sup> ICC-02/11-11-Red, paragraph 76.

213. In accordance with Rule 50(4) of the Rules, the Prosecutor is to revert to the Chamber within one month with any additional information that is available to him on potentially relevant crimes committed between 2002 and 2010.

A separate and partially dissenting opinion of Judge Silvia Fernández de Gurmendi will follow in due course.

Done in both English and French, the English version being authoritative.



Judge Elizabeth Odio Benito



Judge Adrian Fulford

Dated this 3 October 2011

At The Hague, The Netherlands