

**Cour
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**International
Criminal
Court**

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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

URGENT

Public

**Judge Fernández de Gurmendi's separate and partially dissenting opinion to the
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

Registrar

Ms Silvana Arbia

Detention Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Others

**Victims Participation and Reparations
Section**

Ms Fiona McKay

I. INTRODUCTION

1. The Majority of Pre-Trial Chamber III (the “Majority” and the “Chamber”), having examined the “Request for authorization of an investigation pursuant to article 15” (the “Prosecutor’s request”) authorised the commencement of an investigation in Côte d’Ivoire with respect to crimes within the jurisdiction of the Court committed since 28 November 2010 in the decision issued on 3 October 2011¹ (the “Majority decision”).
2. It also authorised the commencement of an investigation 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”.²
3. Furthermore, the Majority decided that, in accordance with Rule 50(4) of the Rules of Procedure and Evidence (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.”³
4. In light of the information available to the Chamber, I have no doubt that there is a reasonable basis to proceed with an investigation in Côte d’Ivoire. Therefore, I fully agree with the decision of the Majority to authorise the commencement of an investigation into the situation at hand.
5. However, I am unable to agree with the overall approach of the Majority as to the role of the Chamber under the procedure envisaged under Article 15 of the Rome Statute (the “Statute”), as mainly reflected in the analysis on jurisdiction contained in

¹ 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, ICC-02/11-14, paragraph 212.

² *Ibid.*

³ *Ibid.*, paragraph 213.

Section V of its decision, as well as with some aspects of the content of such analysis. For the reasons developed below, I believe that this approach has no basis within the legal framework of the Court, insofar as it appears to exceed the supervisory role granted to the Chamber under Article 15 of the Statute, and exceeds the Chamber's proper (and limited) function in relation to the commencement of an investigation and case selection within a situation.

6. In addition, I am unable to agree with the decision made by the Majority with respect to the temporal scope of the authorised investigation. I regret that the Majority decided to restrict the authorisation to crimes committed since 28 November 2010. I believe that the Majority could have expanded the starting date to encompass, as suggested by the Prosecutor, alleged crimes committed since 2002, instead of ordering him to revert back with additional information on such crimes. I also regret that the Majority chose to limit the future scope of the investigation to "continuing crimes that may be committed in the future". In my view, the limitation of jurisdiction to "continuing crimes" has no statutory basis and may unduly restrict the ability of the Prosecutor to conduct investigations into future crimes arising from the same ongoing situation of crisis in Côte d'Ivoire.

II. THE SUPERVISORY ROLE OF THE CHAMBER UNDER ARTICLE 15 OF THE STATUTE

A) The Authorisation Procedure

7. As already noted by Pre-trial Chamber II, Article 15 of the Statute is one of the most delicate provisions of the Statute.⁴ The *travaux préparatoires* reflect that the provision was the product of extensive debates and division of views throughout the drafting

⁴ 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, ICC-01/09-19, paragraphs 17-18.

process and, until the end of the Rome Conference, the main point of controversy was whether the Prosecutor should be empowered to trigger the jurisdiction of the Court on its own motion, in the absence of a referral from a State Party or the Security Council.⁵

8. By the end of the negotiations, there was growing recognition that there were some real risks of abuse of power and that some checks and balances were needed, both in order to prevent arbitrary decisions taken in a solitary fashion by the Prosecutor, and to help insulate the Prosecutor from external pressure.⁶ In the last session of the Preparatory Committee held in April 1998, Argentina and Germany proposed a system of judicial control, to be exercised by the Pre-trial Chamber⁷, over the Prosecutor's decision to open an investigation. With minor changes introduced during the last days of the Rome Conference, the proposal became the current form of Article 15 of the Statute.
9. It is clear from the negotiating history that the drafters wanted to grant a supervisory role to the Pre-trial Chamber solely over the intention of the Prosecutor to initiate an investigation. This supervisory role was intended to provide judicial "internal" safeguards for the Prosecutor's decision and compensate for the absence of a referral from external actors.
10. Such a role was not meant to affect, in any other way, the exclusive functions of the Prosecutor to investigate and prosecute under the Statute and there is nothing in the terms of Article 15 (or any other provisions of the Statute) to suggest otherwise. The terms of Article 15 of the Statute are part of a multilateral treaty and must therefore be interpreted in their context and in light of their object and purpose, in accordance

⁵ *Ibid.*, see paragraph 18.

⁶ For a history of the negotiating process see Morten Bergsmo and Jelena Pejić, *Article 15 Prosecutor*, in: O. Triffterer(ed), *Commentary on the Rome Statute of the International Criminal Court*, 583 (2008).

⁷ See Proposal submitted by Argentina and Germany, article 46, Information Submitted to the Prosecutor, UN Doc. A/AC.249/1998/WG.4/DP.35 (1998).

with the customary rules of treaty interpretation as embodied in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties of 1969.⁸

11. Under Article 15(2) and (3) of the Statute, the Prosecutor, after having analysed the seriousness of the information received from different sources, may conclude that there is a reasonable basis to proceed with an investigation. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit a request for authorisation of an investigation, together with any supporting material collected, to the Pre-trial Chamber.
12. The Pre-trial Chamber, in turn, is mandated to review the conclusions of the Prosecutor by examining the request and its supporting material (Article 15(4) of the Statute) as well as the victims' representations, if any. If, upon examination, the Chamber considers that the "reasonable basis to proceed" standard is met, it shall authorise the commencement of the investigation.
13. As indicated by Pre-trial Chamber II, the same "reasonable basis to proceed" standard applies to both the Prosecutor and the Pre-trial Chamber.⁹ This means that the Chamber must first consider whether the requirements set out in Article 53(1)(a) – (c) of the Statute are satisfied before deciding whether to authorise the Prosecutor to commence an investigation.¹⁰
14. I share this view and concur with the view of the Majority¹¹ that, in order to authorise an investigation, the Pre-trial Chamber has to examine the material available to it in order to assess whether the requirements of Article 53(1) of the Statute are met.

⁸ United Nations Treaty Series, volume 1155, page 331. In support of this view see, ICC-01/09-19, paragraph 19 and Judgement of the Appeals Chamber on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, paragraph 33.

⁹ ICC-01/09-19, paragraph 21.

¹⁰ ICC-01/09-19, paragraph 24.

¹¹ Majority decision, paragraph 21.

15. However, while the Chamber and the Prosecutor need to examine the same factors and apply the same “reasonable basis to proceed” standard, the examination by the Chamber should not become a duplication of the preliminary examination conducted by the Prosecutor.
16. By virtue of the limited purpose of the procedure under Article 15 of the Statute (explored in greater detail below), as well as the distinct mandates and competences of the Chamber and the Prosecutor respectively, the examination to be undertaken by the Chamber, in exercising its supervisory role, is solely a review of the request and material presented by the Prosecutor. During such review, the Chamber’s application of the “reasonable basis” standard should be guided by the underlying purpose of providing a judicial safeguard against frivolous or politically-motivated charges.¹²

B) The Pre-trial Chamber’s Powers Under the Authorisation Procedure

17. The Majority decision acknowledges this limited purpose in paragraph 21, when it indicates that the Chamber “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”. However, despite this indication, the Majority does not appear in its analysis to have fully taken into account the implications of such a limited purpose.
18. As already noted, I believe that the Chamber is only mandated (and indeed, only permitted) to review the Prosecutor’s conclusions (as contained in the request) in order to confirm: (i) that the statement of facts is accurate, and (ii) that the legal reasoning applied to establish that there is a reasonable basis to believe that the facts

¹² *Ibid.*, note 6, M. Bergsmo and J. Pejić, page 591.

may constitute crimes within the jurisdiction of the Court, and that cases would be admissible, is correct under the ICC legal texts and the jurisprudence of the Court.

19. Therefore, the Chamber should not attempt to duplicate the preliminary analysis conducted by the Prosecutor for the purpose of initiating an investigation, in particular by seeking to identify additional alleged crimes and suspects on its own. The analysis by the Prosecutor at this stage is a preliminary but inseparable part of his exclusive investigative functions.

20. It should be recalled that although the establishment of the Pre-trial Chamber stems from the Romano Germanic law tradition (where prosecutorial and investigative activities frequently undergo judicial scrutiny), it is clear from the drafting history, and the current language contained in the Statute and the Rules, that the Pre-trial Chamber is not an investigative chamber.¹³ The Pre-trial Chamber has no investigative powers of its own, nor is it responsible for directing the investigation of the Prosecutor.¹⁴ Indeed, a proposal by France at the Preparatory Committee on the establishment of an International Criminal Court that pre-trial functions be carried out by “Preliminary Investigation Chambers”¹⁵ was not adopted in the Statute.

21. It is clear that within the ICC legal framework, in particular Articles 42, 53(1) and 53(2) of the Statute, it is the Prosecutor who is responsible for conducting the preliminary examination of information available in order to determine whether a situation meets the legal criteria established to warrant investigation by the Court.

¹³ See A. Cassese, *International Criminal Law* 386 (2003); also see Mirielle Delmas-Marty, *The ICC and the Interaction of International and National Legal Systems*, in: A. Cassese (ed.), *The Rome Statute of the International Criminal Court* 1915, 1926 (2002).

¹⁴ *Ibid.*, also see Michela Miraglia, *The First Decision of the ICC Pre-trial Chamber*, *Journal of International Criminal Justice* 190 (2006); *Defining the case against the accused before the International Criminal Court: whose responsibility is it?*, War Crime Research Office, American University, Washington College of Law, November 2009, page 41.

¹⁵ Draft Statute for the International Criminal Court, Working Paper titled “Draft Statute of the International Criminal Court” submitted by France to the Preparatory Committee on the Establishment of an International Criminal Court, 6 August 1996: “Article 10 Preliminary Investigations Chambers 1. The Preliminary Investigations Chambers perform pre-trial functions, in accordance with Part 4 of this Statute [...]”.

22. Indeed, the Appeals Chamber has stated that:

[...] the assessment of information reaching the Prosecutor and in relation to the initiation by the Prosecutor of *investigations proprio motu* are the exclusive province of the Prosecutor (see, *inter alia*, articles 14, 15, 53, and 54 of the Statute).

The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not see or act on instructions from any external source.¹⁶

23. As a consequence, the Appeals Chamber concluded that, “[m]anifestly, authority for the conduct of investigations vests in the Prosecutor”¹⁷.
24. The preliminary examinations of information for the purpose of determining whether or not to initiate an investigation are always conducted by the Prosecutor in the same way and considering the same factors, regardless of whether it is prompted by a referral of by a *proprio motu* decision. I note in this regard that, after the Rome Conference, Rule 48 of the Rules clarified that, in reaching a conclusion that there is a reasonable basis to proceed with an investigation, the Prosecutor must consider the same factors he or she assesses upon reception of a referral by a State or the Security Council, which are contained in Article 53, paragraph 1 (a) to (c).
25. The difference between these triggering mechanisms arises only at the end of the examination process, when the Prosecutor reaches the conclusion that there is a reasonable basis to proceed with an investigation. In the absence of a referral, the

¹⁶ Situation in the Democratic Republic of the Congo, Judgment of the Appeals Chamber on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, 19 December 2008, ICC-01/04 OA4 OA5 OA6, paragraphs 51-52.

¹⁷ *Ibid.* paragraph 52.

Prosecutor cannot act alone, but needs to obtain the authorisation of the Pre-trial Chamber first.

26. For this purpose, as already noted, the Prosecutor must submit to the Pre-trial Chamber a request for authorisation, “together with any supporting material collected”, in accordance with Article 15(3) of the Statute.

27. The Chamber then examines this request and accompanying material. With respect to the authorisation by the Chamber, the Rules and the Regulations of the Court (the “Regulations”), confirm that the Pre-trial Chamber’s review is rooted in, and limited by, the scope of the request submitted by the Prosecutor. In particular:

- Rule 50(5) of the Rules specifies the scope of the Chamber’s decision by indicating that the Chamber shall authorise (or not authorise) all or any part of the request by the Prosecutor:

The Pre-trial Chamber shall issue its decision, including its reasons, as to whether to authorize the commencement of the investigation in accordance with article 15, paragraph 4, with respect to all or any part of the request by the Prosecutor. The Chamber shall give notice of the decision to victims who have made representations. (emphasis added);

- Regulation 49 of the Regulations gives specific guidance on what is expected from a Pre-trial Chamber under Article 15 of the Statute by detailing the necessary content of the authorisation request. In accordance with Regulation 49, the authorisation request must be done in writing and must contain:

[...]

- (a) a reference to the crimes which the Prosecutor believes have been or are being committed and a statement of the facts being alleged to provide the reasonable basis to believe that those crimes have been or are being committed;

- (b) A declaration of the Prosecutor with reasons that the listed crimes fall within the jurisdiction of the Court. (emphasis added).

2. The statement of the facts referred to in sub-regulation 1 (a) shall indicate, as a minimum:

- (a) The places of the alleged commission of the crimes, e.g. country, town, as precisely as possible;
- (b) The time or time period of the alleged commission of the crimes; and;
- (c) The persons involved, if identified, or a description of the persons or groups of persons involved.

- Paragraph 3 of Regulation 49 further affirms the limited scope of the scrutiny of the facts expected from the Pre-trial Chamber, in that it requires the Prosecutor only to produce an appendix, “if possible” of pertinent factual details, including a chronology of relevant events, maps showing relevant information (including the location of alleged crimes) and an explanatory glossary of relevant names of persons, locations and institutions.

28. For the above reasons, it is clear, in my view, that the examination to be conducted by the Chamber is of a limited nature, namely to ascertain the accuracy of the statement of facts and reasons of law advanced by the Prosecutor with regard to crimes and incidents identified in his own request and determine, on this basis, whether the requirements of Article 53 of the Statute are met.

C) The collection of information by the Prosecutor and the presentation of material to the Chamber

29. During the preliminary phase, the Prosecutor cannot deploy all his investigative powers under the Statute but has, nonetheless, some fact-finding capabilities. In accordance with Article 15(2) of the Statute and Rule 104 of the Rules, the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations, or other reliable sources that he or she deems appropriate. In addition to obtaining this type of information from external sources, the Prosecutor can also deploy some of his own evidence-gathering powers by receiving written or oral testimony at the seat of the Court, in accordance with Article 15(2) of the Statute.
30. In compliance with Article 15(3) of the Statute, and in addition to the material required by Regulation 49 of the Regulations, the Prosecutor attached the information collected in the situation in hand to his authorisation request. This information came in the form of voluminous annexes containing multiple reports from open sources (international organisations, non-governmental organisations and the media, as well as certain confidential information).
31. Necessarily, the information gathered by the Prosecutor for the purpose of the commencement of the investigation and presented to the Chamber is non-exhaustive. Indeed, as noted by the Majority in paragraph 24 of its decision, Pre-trial Chamber II indicated, taking into account that the standard of "some reasonable basis" is the lowest evidential standard provided for in the Statute, that 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.¹⁸
32. For the same reason, the facts and incidents identified in the Prosecutor's request are not and could not be expected to be exhaustive either, but are intended solely to give

¹⁸ ICC-01/09-19-Corr, paragraph 27.

concrete examples to the Chamber of the gravest types of criminality that appear to have occurred in the situation.

33. These non-exhaustive examples, substantiated through the Prosecutor's request and supporting material, are nonetheless essential in order for the Chamber to determine whether the requirements of Article 53 of the Statute are met because this analysis cannot be conducted in the abstract.
34. It must be emphasised however, that this early and necessarily non-comprehensive identification of incidents serves only as the basis for determining whether the requirements of Article 53 of the Statute are met and are not determinative of the case selection that will take place later, upon further investigation. On the contrary, it may well be that, upon investigation, the Prosecutor deviates from the request, both in relation to the crimes to be addressed and their legal characterisation, as is his prerogative.

D) The Assessment by the Chamber of the Material presented by the Prosecutor

35. In contrast with the Prosecutor, the Chamber has neither investigative powers nor any fact-finding capabilities at this stage. Therefore, in order to conduct its examination under Article 15 of the Statute, the Chamber must rely entirely on the request and material collected by the Prosecutor and further information that he might provide upon request by the Chamber in accordance with Rule 50(4) of the Rules.

36. As a further consequence of this lack of evidence-gathering capabilities, at this stage, the Chamber has no independent way to assess the reliability, credibility or completeness of the information available to it.
37. For this reason, great caution is required in assessing the relevance and weight of the material provided to the Chamber. To the extent possible, the material should be considered in its entirety in order for the Chamber to determine whether the documents corroborate each other and whether, as a whole, they substantiate the main conclusions of the Prosecutor.
38. For the above reasons, I disagree with the method used by the Majority by which it singled out elements (such as individual reports or portions of reports) from the supporting material presented by the Prosecutor in order to establish facts, additional acts, and draw further conclusions on criminal responsibility.
39. For instance, under the heading "Other underlying acts not presented by the Prosecutor", incidents of torture and inhumane treatment were identified through a search of the material accompanying the request.¹⁹ This led to the conclusion in paragraph 86 that, on the basis of such material, "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."
40. Similarly, through a search of the material presented by the Prosecutor as well as victims representations²⁰, the Majority identified other underlying acts of war crimes not presented by the Prosecutor and concluded in paragraph 148 that: "In light of the information provided, the Chamber concludes that there is a reasonable basis to

¹⁹ Majority decision, paragraphs 83 to 86.

²⁰ Majority decision, paragraphs 146 and 147.

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”.

41. The same method was used to analyse the “Acts allegedly committed by Pro-Ouattara forces”,²¹ leading to the conclusion in paragraph 116 that: “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.”
42. On the basis of the supporting material and victims’ representations, the Chamber also concluded, beyond the underlying acts of war crimes identified by the Prosecutor, that pro-Ouattara forces committed crimes of pillage²² and acts of torture and cruel treatment.²³
43. I respectfully contend that such findings of the Majority, based on a fragmentary approach to the supporting material presented by the Prosecutor and victims’ representations (explored further below), cannot be considered to be sufficiently substantiated, even if the evidentiary threshold to be met is the lowest one in the Statute.
44. Moreover, I consider that this exercise, by which the Majority sought to identify other potential crimes and suspects, was unnecessary, taking into account that the incidents already identified in the Prosecutor’s request were sufficient to satisfy the Chamber

²¹ Majority decision, paragraphs 92 to 116.

²² Majority decision, paragraph 165.

²³ Majority decision, paragraph 169.

that the requirements of Article 53 of the Statute had been met and that there was a reasonable basis to proceed with an investigation.

45. Finally and most importantly, for all the reasons already given, I believe that such exercise exceeded the supervisory role of the Chamber under Article 15 of the Statute and is incompatible with the neutrality that the Chamber needs to maintain with regard to the selection by the Prosecutor of persons and acts to be addressed in the investigation.

E) The Assessment of Victims' Representations

46. In addition to the request and material to be submitted by the Prosecutor, Article 15(3) of the Statute indicates that: "Victims may make representations to the Chamber, in accordance with the Rules of Procedure and Evidence". The procedure to be followed to this effect has been developed in Rule 50 of the Rules.
47. It is not specified, either in the Statute or the Rules, as to what subjects victims are expected to provide views. However, given the context in which the procedure is established, it can be inferred that its purpose is to assist the Chamber in reaching a decision on whether or not to authorise the commencement of an investigation and, more particularly, assist in assessing issues that could arise under Article 53(1)(c) of the Statute.
48. Undoubtedly, the views expressed by victims need to be taken into account by the Chamber. However, as already stated, the Chamber has no investigative powers and the possibility granted to victims to express their views should not become the vehicle for a fact-finding exercise by the Chamber that has no basis in the ICC legal framework.

49. In addition, the Chamber has no means of assessing the reliability of the information that may be provided by victims at this stage. I note in this context, the difficulties expressed by the Registry in their Report on Victims' Representations (the "Victims' Report").²⁴ The Registry emphasises that it is not in a position to comment on the extent to which the victims who have participated in this process are representative of the overall victim population.²⁵ Furthermore, concerning the events reported, the Registry has again noted that some caution is required, given the lack of information about the manner in which representations were collected²⁶, the difficulties in verifying the identity or background of persons submitting representations²⁷, the lack of information regarding the circumstances in which victims were assisted to provide representations, and the lack of information as to the identity and trustworthiness of persons who provided assistance.²⁸
50. These difficulties do not undermine the great importance of the victims' representations received by the Chamber for the purposes of deciding whether to authorise an investigation. On the contrary, these representations, considered as a whole, served to confirm the gravity of the situation, the widespread character of the alleged crimes and the fact that they appear to have been directed against civilians.²⁹ Also, the fact that a very large number of persons decided to contact the Court may be considered as an indicator of the level of interest among victims in Côte d'Ivoire in the ICC's involvement in their country.³⁰ Most importantly, none of the victims who

²⁴ 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.

²⁵ Victims' Report, paragraph 27.

²⁶ Victims' Report, paragraph 65.

²⁷ Victims' Report, paragraph 75.

²⁸ Victims' Report, paragraph 75.

²⁹ Victims' Report paragraph 64.

³⁰ Victims' Report, paragraph 72.

submitted representations, whether individually or collectively, expressly rejected the idea of having an investigation opened in Côte d'Ivoire.³¹

51. However, again great caution is required when assessing the content of representations with regard to specific facts or alleged crimes, taking into account the material difficulties in assessing the reliability of information and the legal limitations of the Chamber in relation to information-gathering.
52. For the above reasons, I disagree with the "non-restrictive manner" in which the Majority decided to consider the victims' submissions.³² Moreover, I am also unable to accept its decision to single out specific submissions and use them as a source to identify alleged criminal acts and suspects.³³

III. THE TEMPORAL SCOPE OF THE INVESTIGATION

A) The starting date of the investigation

53. The Prosecutor requested the Chamber to authorise the commencement of the investigation into the situation in the Republic of Côte d'Ivoire for the period following 28 November 2010. In the Prosecutor's request, it is indicated that the situation of Côte d'Ivoire has been under preliminary examination by his Office since the receipt of the Declaration accepting jurisdiction on 1 October 2003.³⁴ However, the Prosecutor proposed to conduct investigations of crimes committed since 28 November 2010 only, as opposed to requesting authorisation to investigate crimes over the entire period (over which the ICC could exercise jurisdiction) because: (i) the

³¹ Victims' Report, paragraph 67.

³² Majority decision, paragraph 20.

³³ This was done systematically as part of the analysis of jurisdiction as reflected in numerous paragraphs of the Majority decision. See, for instance, paragraphs 61, 66, 71, 81, 104, 107, 110, 113, 126, 133, 147, 156, 160, 164 and 168.

³⁴ Prosecutor's Request, ICC-02/11-3, paragraph 15.

violence in the period following 28 November 2010 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.³⁵

54. However, the Prosecutor also suggested 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”.³⁶
55. In light of the above, the Chamber had to decide whether to authorise an investigation into crimes committed following 28 November 2010 only, or authorise an investigation into crimes committed before that date as well.
56. I disagree with the Majority decision only to authorise the investigation since 28 November 2010, and order the Prosecutor to revert to the Chamber with additional information available to him on any relevant crimes committed between 2002 and 2010 within a month, in accordance with Rule 50(4) of the Rules.
57. I believe that, bearing in mind the suggestion by the Prosecutor that the Chamber may broaden the temporal scope of the investigation to events that occurred since 19 September 2002, the Majority could have expanded the temporal scope of the authorised based on its own reasoning contained in paragraphs 181 and 182 of the decision. In particular, I note the conclusion reached at paragraph 181, in which the Majority affirms that, “[w]hile 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”. This crisis, according to the

³⁵ Prosecutor’s Request, ICC-02/11-3, paragraph 44.

³⁶ Prosecutor’s Request, ICC-02/11-3, paragraph 42.

Majority, was devastating from the point of view of human rights and punctuated by atrocities committed by both sides.³⁷

58. If indeed, as indicated by the Majority, the context of violence, which reached a critical point in November 2010, is not a new situation but rather the “continuation” and “culmination” of a political crisis that started long before that date, the Chamber could have authorised an investigation of the entire situation on the basis of the incidents already presented, since, as already noted, they serve only as samples of the gravest types of criminality in this situation. However, the Majority concluded, at paragraph 185, that sufficient information on specific crimes committed between 2002 and 2010 is an essential prerequisite for the Chamber to be able to assess whether there was a reasonable basis to proceed. Therefore it decided, in accordance with Rule 50(4) of the Rules, that 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.”
59. As noted, I do not believe that such information is at all necessary. However, if indeed that information is considered to be essential, the order, as formulated by the Majority, does not appropriately reflect what the Chamber would need in order to “determine whether the reasonable basis threshold has been met with regard to any specific crimes committed between 2002 and 2010.”³⁸
60. As already indicated, in the exercise of its supervisory role under Article 15 of the Statute, the Chamber is only mandated to review the assessment of facts and law made by the Prosecutor when considering whether there is a reasonable basis to proceed under Article 53 of the Statute.

³⁷ Majority decision, paragraph 182.

³⁸ Majority decision, paragraph 184.

61. Therefore, the request by the Chamber to be provided with “any information” on “potentially relevant crimes” does not seem consistent with the needs of the Chamber to conduct such review. The information should at least contain the statement of facts and reasons of law of the Prosecutor and, unless already presented to the Chamber, the other minimum requirements contemplated in Regulation 49 of the Regulations.

B) The end date of the investigation

62. Pursuant to Article 53(1)(a) of the Statute, in deciding whether to initiate an investigation, the Prosecutor shall consider 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”. This provision raises the question of whether an end date should be established for the investigation into the situation.

63. Pre-Trial Chamber II, in its decision to authorise the investigation in Kenya, held that it would be erroneous to widen the time limit of the investigation to include events subsequent to the date of the Prosecution’s request, as follows:

Since article 15(4) of the Statute subjects the Chamber's authorization of an investigation to an examination of the Prosecutor's Request and supporting material, it would be erroneous to leave open the temporal scope of the investigation to include events subsequent to the date of the Prosecutor's Request. Article 53(1)(a) of the Statute, by referring to "a crime [which] has been or is being committed", makes clear that the authorization to investigate may only cover those crimes that have occurred up until the time of the filing of the Prosecutor's Request.³⁹

64. The Majority implies that there is a need for a broader interpretation in the situation in hand when it indicates, in paragraph 179, “[b]earing in mind the volatile environment in Côte d’Ivoire, the Chamber finds it necessary to ensure that any grant

³⁹ ICC-01/09-19 paragraph 206.

of authorisation covers investigations into “continuing crimes” – those whose commission extends past the date of the application.”

65. However, by introducing the notion of “continuing crimes”, the Majority adopts, in fact, a highly limitative approach. The Majority specifies that “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 include the investigation of any ongoing and continuing crimes that may be committed after the 23 June 2011 as part of the ongoing situation.”⁴⁰
66. The Majority notes that “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”.⁴¹
67. However, the jurisprudence relied upon by the Majority refers to a different matter. The question addressed by the ICTR was whether factual allegations (not constituting independent crimes) contained in the indictment were admissible even though they occurred before 1 January 1994 (starting date of the temporal jurisdiction of the ICTR). These allegations were admitted only for evidentiary purposes in order to prove crimes that occurred *within* the temporal jurisdiction of the Tribunal and not before it.⁴² Indeed, in the decision referred to by the Majority, the ICTR Trial Chamber

⁴⁰ Majority decision, paragraph 179.

⁴¹ Majority footnote 279.

⁴² Prosecutor v Nsengiyumva, Decision on the Defence Motions Objecting to the Jurisdiction of Trial Chamber on the Amended Indictment, No. ICTR-96-12-I, 13 April 2000, paragraph 27: “*Temporal Jurisdiction*. The parties do not

explicitly ruled out that it may exercise jurisdiction over crimes which do not fall within the temporal jurisdiction of the tribunal.⁴³

68. As noted, the Majority requires that the crimes are “continuing”, as well as “on-going”, in order to be included in the investigation to be authorised. In my view, it is useful to recall the ICTR Appeals Chamber jurisprudence on the definition of “continuing crimes”:

“[. . .] crimes that imply an ongoing criminal activity. According to Black’s Law Dictionary, ‘continuing crime’ means: (1) A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...] (2) A crime (such as driving a stolen vehicle) that continues over an extended period”.⁴⁴

69. This definition might leave out of the investigation underlying acts of war crimes and crimes against humanity that could not be considered as “continuing crimes”, even if they were part of the same attack or same armed conflict. Indeed, examples of continuing crimes under the Statute include those of enforced disappearance of persons, enslavement, imprisonment, or other severe deprivation of physical liberty, sexual slavery, enforced prostitution, persecution and the crime of apartheid.⁴⁵

dispute that the temporal jurisdiction of the Tribunal is limited to crimes committed in the year 1994. Articles 1 and 7 of the Statute are clear in this regard. The matter in dispute is whether the indictment’s concise statement of facts may or may not include allegations dating before 1994 and, subsequently, whether such allegations are admissible at trial. The Trial Chamber accepts the Prosecution’s submission that allegations dating before 1994 do not constitute independent crimes. These allegations merely represent what the Prosecution intends to offer as relevant and admissible evidence of crimes occurring in 1994, or relate to the continuation of events, clarify, and are supplementary to the substantive charges.”

⁴³ Similarly, the literature relied upon by the Majority discusses the question as to whether even though the temporal jurisdiction of the Court may be limited by the terms of the Article 12(3) declaration, the ICC can rely on events that occurred before the specified timeframe for evidentiary purposes; see 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.

⁴⁴ See the ICTR Appeals Judgment in *The Prosecutor vs. Nahima et. al.*, Case N°. ICTR-99-52-A paragraph 721. A more restrictive definition of “continuous crimes”, or *delictum continuatum*, includes only those crimes involving a multiplicity of individual acts of the same perpetrator, each of them satisfying the legal elements of crimes of similar kind, which should be treated as only one act as a result of their tight internal and external connection, Stratenwerth, *Strafrecht Allgemeiner Teil I*, 4th edition, §17/12. More broadly, the definition adopted by the ICTR Appeals Chamber includes the so called “enduring crimes”, in which the criminal activity endures past the formal consummation; see Emiliano Borja Jimenez, *La terminación del delito*, ADPCP, T. XLVIII, Fasc.I, January-April 1995, p.153 and ff.

70. I believe there should be no requirement for a crime to be a “continuing crime” in order to fall within the authorised investigation. There is no legal basis for the Majority’s interpretation in the statutory provisions. In my view, the Majority should have instead adopted the approach taken by Pre-trial Chamber I in its decision on the “Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana” related to war crimes and crimes against humanity allegedly committed by FDLR soldiers in the North and South Kivu Provinces in the Democratic Republic of Congo (“DRC”) after 20 January 2009. The question arose as to whether the case could be said to have arisen from the situation in the DRC referred to the Prosecutor on 3 March 2004.⁴⁶
71. Pre-trial Chamber I concluded that the case fell within the context of the “ongoing situation of crisis that triggered the jurisdiction of the Court...”⁴⁷ Specifically, Pre-trial Chamber I noted:
- “In the view of the Chamber, for the case at hand not to exceed the parameters defining the DRC situation under investigation, the crimes referred to in the Prosecutor’s Application must have occurred in the context of the ongoing situation of crisis that triggered the jurisdiction of the Court through the above mentioned referral.”⁴⁸
72. In so doing, Pre-trial Chamber I established that a situation can include not only crimes that have already been or are being committed at the time of the referral, but

⁴⁶ Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10, dated 28 September 2010, re-classified “Public” pursuant to ICC-01/04-01/10, dated 11 October 2010, paragraph 5. Pre-Trial Chamber I held, at paragraph 5, as follows: “The situation under investigation, relating to the territory of the DRC, from which the case against Callixte Mbarushimana arises, was referred to the Prosecutor by the DRC in accordance with articles 13(a) and 14 of the Statute on 3 March 2004. In the letter of referral, the DRC President, Mr Joseph Kabila, requested the Prosecutor to investigate « la situation qui se déroule dans mon pays depuis le 1 juillet 2002, dans laquelle il apparaît que des crimes relevant de la compétence de la Cour Pénale Internationale ont été commis ». On 17 June 2004 the Prosecutor informed the ICC President that – after having considered all the criteria in accordance with article 53 of the Statute – he had determined that there was a reasonable basis to initiate an investigation. The situation under investigation was therefore defined by the Prosecutor as encompassing the territory of the DRC since 1 July 2002.

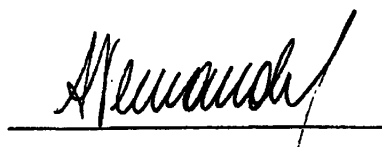
⁴⁷ Paragraph 6.

⁴⁸ Paragraph 6.

crimes committed after that time, insofar as the crimes are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.⁴⁹

73. This broader interpretation would have better served the declared objective of ensuring that the investigation covers those crimes whose commission extend past the date of the application, and enhance the preventative impact of the intervention of the Court in the situation in hand.

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



Judge Silvia Fernández de Gurmendi

Dated this 3 October 2011

⁴⁹ Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana. 28 September 2010. ICC-01/04-01/10-1-US, reclassified as public on 11 October 2011, paragraphs 6 and 7. Pre-trial Chamber I held: "Having analysed the additional information provided by the Prosecutor, the Chamber is satisfied that at least since 4 December 2002, hostilities involving regular forces and armed groups were ongoing in the east of the DRC, in particular in South Kivu and Ituri. The Chamber is further satisfied that, around the time of the referral, the FDLR were already actively involved in military activities in the eastern part of the DRC, with alleged involvement in the commission of crimes within the jurisdiction of the Court. The Chamber is therefore satisfied, on a *prima facie* basis that the case against Callixte Mbarushimana falls within the context of the DRC situation of crisis encompassed by the referral that triggered the Prosecutor's investigation."