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No.: ICC-02/11-01/11
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APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

Public

**Prosecution's Response to Amicus Curiae Observations of Professors Robinson,
deGuzman, Jalloh and Cryer**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution agrees with the Observations of Professors Robinson, deGuzman, Jalloh and Cryer (“Amicus Curiae”)¹ that an “attack” under Article 7(2)(a) merely requires ‘multiple’ acts, which must not be conflated with “widespread”² and that the Majority misinterpreted and misapplied the evidentiary requirements to establish an “attack”, in particular for its policy element.³
2. These Observations go to the heart of the grounds of appeal raised by the Prosecution⁴ and corroborate some of the arguments advanced by the Prosecution in its appeal.⁵

The Observations support the Prosecution’s First Ground of Appeal

3. As observed by the Amicus Curiae, in order to establish an “attack” pursuant to Article 7(2)(a), it is sufficient for the Prosecution to establish “the multiple commission of acts referred to in paragraph 1 against any civilian population”.⁶ Therefore, as submitted under its First Ground of Appeal, in this case, the Prosecution does not have to establish any of the Incidents as such, but it must simply prove that multiple individual criminal acts were committed in the context of the Four Charged Incidents.⁷
4. The Prosecution notes that the position of Pre-Trial Chamber I on this matter appears to have evolved since it issued the appealed Decision. In a recent

¹ ICC-02/11-01/11-534 OA5 (“Observations”).

² Observations, paras.3, 7-13.

³ Observations, paras.4-5, 14-42.

⁴ The Appeals Chamber has already found that the proposed observations of the Amicus Curiae “appear to be of relevance to the grounds of appeal set out by the Prosecutor”: ICC-02/11-01/11-516 OA5, para.10.

⁵ ICC-02/11-01/11-474 OA5 (“Prosecution Appeal”).

⁶ Observations, paras.3, 8-9.

⁷ In the Prosecution Appeal, the Prosecution alleges that at least 294 individual criminal acts were committed during the Four Charged Incidents taken together; see paras.17, 47-51.

decision on admissibility, the Chamber unanimously found that an “incident” referred to in a charging document may either “overlap[...] fully with the alleged conduct” or it may merely be “of assistance to prove the alleged conduct to the requisite threshold without however exhausting it”.⁸ It therefore implied that an incident falling into the latter category does not need to be established to the requisite threshold.

5. The Prosecution agrees with the Amicus Curiae that the term “multiple” under Article 7(2)(a) should be interpreted in accordance with its ordinary meaning and with past jurisprudence, and that “dozens” of acts under Article 7(1) suffice to meet the threshold.⁹ This term is different from, and must not be conflated with the notion of “widespread” under Article 7(1) that entails a higher numeric threshold.¹⁰ Beyond these general features, it is not necessary for the Appeals Chamber to determine precisely what the lowest possible threshold of “multiple” is, as the error in this case is demonstrated by the fact that the Decision requires the Prosecution to establish “Incidents” as opposed to “acts referred to in paragraph 1 against any civilian population”.
6. In addition, the Observations by the Amicus Curiae that the policy need not be proven on an incident-by-incident basis¹¹ further support the Prosecution’s argument that the error regarding proof of the Incidents raised under its First Ground of Appeal is a consequence of the Majority’s misinterpretation and misapplication of the term “attack” under Article 7(2)(a).¹²

⁸ ICC-01/11-01/11-466-Red, para.75.

⁹ Observations, paras.11-12. See also ICC-01/05-01/08-424, para.81, where the Chamber found that “[t]he legal requisite of ‘multiple commission of acts’ means that more than a few isolated incidents or acts as referred to in article 7(1) of the Statute have occurred.” The Chamber in that case relied on R. Dixon in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court - Observer’s Notes, Article by Article* (Nomos Verlag, 2nd ed., 2008), pp. 234-235. See further ICC-01/04-01/10-465-Red, Diss.Op Judge Monageng, para.22, where the Judge concluded that the requirements for an attack were met where “dozens of civilians were murdered [and] civilians were raped and subjected to mutilation and cruel treatment”.

¹⁰ Observations, paras.9-13.

¹¹ Observations, paras.40-42.

¹² Prosecution Appeal, para.52.

The Observations support the Prosecution's Second Ground of Appeal

7. As its Second Ground of Appeal, the Prosecution argues that the Majority erred in its interpretation and application of the standard of proof under Article 61(7) of the Statute.¹³ The Amicus Curiae provide three examples from the Decision where the Majority's expectations that Prosecution provide evidence on specific issues are additional indicators of the Majority's incorrect understanding of the evidentiary requirements to establish an attack, and in particular its policy element. The Amicus Curiae observe that contrary to the Decision, (a) direct evidence of formal adoption of a policy is not required - a policy need not be formalized and can be inferred from the manner in which the acts occur; (b) it is not required to prove that particular perpetrators were motivated by the policy - the policy can also be deduced from an examination of objective patterns; and (c) the policy need not be proven on an incident-by-incident basis.¹⁴
8. The Prosecution agrees with these Observations and submits that evidence on these specific issues is *never* required to establish an attack, irrespective of the standard of proof that is applied at the different stages of the proceedings. Therefore, an expectation to provide such evidence creates an excessively high burden on the Prosecution under Article 61(7).
9. In its Decision, the Majority found that in this case there are "difficulties in the evidentiary record of the Prosecutor",¹⁵ but nevertheless "out of fairness" it was "prepared to give [the Prosecutor] a limited amount of additional time [...] to present or collect further evidence".¹⁶ In order to overcome these evidentiary difficulties, the Majority invited the Prosecution to "consider providing", among

¹³ Prosecution Appeal, paras.54-81.

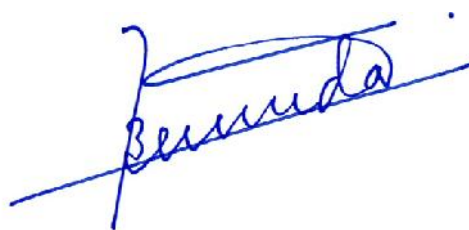
¹⁴ Observations, paras.14-42.

¹⁵ Decision, para.37.

¹⁶ Decision, para.37.

others, evidence on the above issues.¹⁷ As observed by the Amicus Curiae, the Majority did not set firm legal rules with respect to such evidence.¹⁸ However, having set out in the Decision a set of stringent rules for its general “approach to evidence”,¹⁹ an expectation that evidence on these issues be presented further demonstrates the Majority’s incorrect understanding of the evidentiary requirements to establish substantial grounds to believe as to the existence of an attack. This directly goes to proof of the Core Error raised by the Prosecution under its Second Ground of Appeal.

10. The Prosecution recalls that its appeal does not concern the question whether the evidence before the Chamber is sufficient to establish substantial grounds to believe that Mr Gbagbo committed each of the crimes.²⁰ Rather it is about the interpretation of the legal standards applied by the Majority in its Decision against which the evidence was assessed. Therefore, as observed by the Amicus Curiae,²¹ it is necessary for the Appeals Chamber to clarify all legal issues raised in this appeal in order to provide directions to the Prosecution for its presentation of additional evidence and its updated Document Containing the Charges and to the Pre-Trial Chamber for its upcoming decision under Article 61(7).



Fatou Bensouda, Prosecutor

Dated this 18th day of October 2013

At The Hague, The Netherlands

¹⁷ Decision, para.44.

¹⁸ Observations, para.15.

¹⁹ Decision, paras.24-35.

²⁰ Prosecution Appeal, para.7.

²¹ Observations, paras.4, 6, 15-17.