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Date: **27 September 2013**

THE APPEALS CHAMBER

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

SITUATION IN IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO

Public

Observations of the Common Legal Representative on the "Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'"

Source: **Office of Public Counsel for Victims**

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

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I. PROCEDURAL BACKGROUND

1. On 3 June 2013, the Chamber issued a "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (the "Impugned Decision"), [1] wherein it decided by majority, Judge Fernández de Gurmendi dissenting,[2] to adjourn the confirmation of charges hearing and to request the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges.[3]

2. On 10 June 2013, the Prosecution submitted a request for leave to appeal the Impugned Decision (the "Prosecution's Request").[4] The Defence requested leave to appeal said decision on 25 June 2013 (the "Defence's Request").[5] The Common Legal Representative filed a response to both requests on 17 June 2013 and 1 July 2013, respectively.[6]

3. On 31 July 2013, the Chamber by majority, Judge Fernández de Gurmendi dissenting,[7] rejected the Defence's Request and granted the Prosecution's Request only with respect to one reformulated issue.[8]

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[1] See the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (Pre-Trial Chamber I), No. ICC-02/11-01/11-432, 3 June 2013 (the "Impugned Decision").

[2] See the "Corrigendum - Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute - Dissenting opinion of Judge Silvia Fernández de Gurmendi", No. ICC-02/11-01/11-432-Anx-Corr, 6 June 2013.

[3] See the Impugned Decision, *supra* note 1, p. 22.

[4] See the "Prosecution's application for leave to appeal the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", No. ICC-02/11-01/11-435, 10 June 2013) (the "Prosecution's Request").

[5] See the "Demande d'autorisation d'interjeter appel de la « décision d'ajournement de l'audience de confirmation des charges conformément à l'article 67-7-c-i du Statut » (ICC-02/11-01/11-432-tFRA) du 3 juin 2013", No. ICC-02/11-01/11-439, 25 June 2013 (the "Defence's Request").

[6] See the "Response of the Common Legal Representative to the 'Prosecution's application for leave to appeal the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", No. ICC-02/11-01/11-437, 17 June 2013; and the "Réponse du Représentant légal commun des victimes à la 'Demande d'autorisation d'interjeter appel de la 'décision d'ajournement de l'audience de confirmation des charges conformément à l'article 67-7-c-i du Statut » (ICC-02/11-01/11-432-tFRA) du 3 juin 2013' déposée par la Défense le 25 juin 2013", No. ICC-02/11-01/11-442, 1 July 2013.

[7] See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges - Dissenting opinion of Judge Silvia Fernández de Gurmendi", No. ICC-02/11-01/11-464-Anx, 31 July 2013.

4. On 12 August 2013, the Prosecution submitted the "Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'" (the "Prosecution's Appeal").[9]

5. On 29 August 2013, the Appeals Chamber granted the 199 victims represented by the Common Legal Representative the right to participate in the current appeal proceedings and allowed them to file observations on the issue raised on appeal by 27 September 2013.[10]

II. COMMON LEGAL REPRESENTATIVE'S OBSERVATIONS

6. The Common Legal Representative fully supports the Prosecution's appeal and its line of reasoning in identifying the two grounds of appeal put before the Appeals Chamber and how they relate to the issue at hand. Accordingly, the Common Legal Representative fully endorses the arguments of the Prosecution and she will not repeat said argumentation.

7. Notwithstanding, the Common Legal Representative deems it necessary to underline and elaborate on specific aspects of the errors identified by the Prosecution.

A. On the Prosecution's First Ground of Appeal

8. The Common Legal Representatives concurs with the Prosecution that the Majority erred in considering an "*attack*" as encompassing a certain number of "*incidents*",[11] rather than a "*course of conduct involving a multiple commission of acts*" as established by article 7(2)(a) of the Rome Statute.[12]

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[8] See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, p. 33.

[9] See the "Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", No. ICC-02/11-01/11-474 OA5, 12 August 2013 (the "Prosecution's Appeal").

[10] See the "Decision on the participation of victims in the Prosecutor's appeal against the 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'" (Appeals Chamber), No. ICC-02/11-01/11-492 OA5, 29 August 2013, operative para. 1.

[11] See the Impugned Decision, *supra* note 1, paras. 21-23.

[12] See the Prosecution's Appeal, *supra* note 9, paras. 45-46.

9. Indeed, Mr. Gbagbo is not suspected of having committed the war crime of directing "*attacks against individual civilians*",[13] but rather the Prosecution is seeking to demonstrate his responsibility with regard to the commission of "*acts*" which are "*part of a widespread or systematic attack directed against any civilian population*" under article 7 of the Rome Statute.[14] An "*attack*" under the latter provision is not the same as the particular '"*acts*" with which a person is charged. As expressly defined in article 7(2)(a) of the Rome Statute, an "*attack*" is a "*course of conduct involving the multiple commission of acts*". More precisely, an "*attack directed against any civilian population*" is not restricted to a "*military attack*'[15] and refers to "*a campaign or operation carried out against the civilian population*",[16] which involves the multiple commission of acts referred to in article 7(1) of the Rome Statute against the whole population "*of any nationality, ethnicity or with another common distinguishing feature*",[17] including its (perceived) political affiliation.[18] Accordingly, the existence of an armed conflict is

[13] See articles 8(2)(b)(i) and (e)(i) of the Rome Statute.
[14] *Idem*, *chapeau* of article 7(1). See also the Prosecution's Appeal, *supra* note 9, para. 40.
[15] See the Elements of Crimes, Introduction to article 7 of the Statute, para. 3.
[16] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" (Pre-Trial Chamber II), No. ICC-01/05-01/08-424, 15 June 2009, para. 75; the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 31 March 2010, para. 80; the "Corrigendum to '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'" (Pre-Trial Chamber III), No. ICC-02/11-14-Corr, 14 November 2011, para. 31; the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Pre-Trial Chamber II), No. ICC-01/09-01/11-373, 23 January 2012 (the "Ruto *et al.* Confirmation Decision"), paras. 162 and 164; and the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (Pre-Trial Chamber II), No. ICC-01/09-02/11-382-Red, 23 January 2012 (the "Muthaura *et al.* Confirmation Decision"), para. 109.
[17] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", *supra* note 16, para. 76, and the "Corrigendum to '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'", *supra* note 16, para. 32. See also the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 30 September 2008, para. 399; the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 16, para. 81; the "Ruto *et al.* Confirmation Decision", *supra* note 16, para. 162; and the "Muthaura *et al.* Confirmation Decision", *supra* note 16, para. 110.
[18] See the "Ruto *et al.* Confirmation Decision", *supra* note 16, para. 164, and the "Muthaura *et al.* Confirmation Decision", *supra* note 16, para. 110.

not necessary to determine the commission of a crime against humanity under the Rome Statute.[19]

10. An analysis of the preparatory works on the definition of the contextual elements of the crimes against humanity demonstrates that the drafters of the Statute, as early as 1994, contemplated that the term "*directed against any civilian population*" should refer to acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The particular acts referred to in the definition were defined as acts deliberately committed as part of such an attack.[20]

11. In 1995 the *Ad Hoc* Committee supported the use of "*widespread*" and "*systematic*" as a key aspect of the definition of an attack directed against a civilian population.[21] Within the Preparatory Committee in 1996, "*widespread*" was suggested to cover an attack that "*is massive in nature and directed against large numbers of individuals*"; and "*systematic*" to cover an attack that "*constitutes, or is part of, consistent with, or in furtherance of, a policy or concerted plan, or repeated practice over a period of time*".[22] Similarly, both terms were discussed within the Preparatory Commission in 1999 by reference to an attack that "*is carried out on a large scale and directed against a substantial number of victims*", or that "*is thoroughly organized and that follows a regular pattern or involves the use or planned use of substantial public or private resources*".[23]

12. At the Rome Conference in 1998, it was also suggested that the threshold referred to in the preceding paragraph indicates that "*an individual perpetrator need not commit numerous offences to be held liable*", so long as those actions are committed

[19] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", *supra* note 16, para. 75.
[20] See the Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), UN doc. Supplement No. 10 (A/49/10), September 1994, p. 76, para. 14.
[21] See the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN doc. A/50/22(SUPP), 6 September 1995, paras. 77-78.
[22] United States of America, For Annex to Statute, Elements Related to Article on Crimes Against Humanity (2 April 1996).
[23] See the Proposal Submitted by Canada and Germany on Article 7, UN doc. PCNICC/1999/WGEC/DP.36, 23 November 1999, para. A.3.

"*within the context of a widespread or systematic attack against a civilian population*".[24] Subsequently, during the Preparatory Commission in 1999, it was proposed as a general element common to all crimes against humanity that "*the accused committed a prohibited act*", meaning "*an act referred to in paragraph 1 of article 7 of the Statute*".[25] The drafters also indicated that the existence of the policy required under article 7(2)(a) of the Rome Statute may be inferred from available evidence related to the facts and circumstances and that it is not necessary to prove that a policy has been formally adopted.[26]

13. The drafting history of the Rome Statute and the Elements of Crimes strongly indicates that the drafters envisioned responsibility for a crime against humanity to be engaged without the suspect's involvement in every act perpetrated as part of the widespread or systemic attack committed against a civilian population pursuant to or in furtherance of a State or organisational policy. Responsibility for a crime against humanity arises instead where a person's participation in at least one of the acts included said attack is demonstrated. Accordingly, the drafters did not wish to impose the highest level of scrutiny when considering the contextual element of crimes against humanity. Had the drafters wished to establish a high level of scrutiny in this regard, they would have required demonstrating the suspect's involvement in the implementation of all aspects of the widespread or systematic attack, including the implementation of the policy supporting said attack. However, they distinctly rejected requiring the proof of this level of participation.

14. Moreover, the preparatory works referred to *supra* clearly disclose the drafters' wish to define crimes against humanity as an offence encompassing a range of levels of participation. By choosing to define "*attack*" as a general campaign or operation against a civilian population instead of developing a more stringent

[24] See the International Commission of Jurists, ICJ Brief No. 1 to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998), "Definition of Crimes", June 1998, pp. 12-13.
[25] See the Proposal Submitted by Canada and Germany on Article 7, *supra* note 23, para. A.1.
[26] *Idem*, para. A.2.

definition of a pure military action in an armed conflict, the framers clearly intended to include perpetrators who might fall outside a stricter definition of "*attack*".

15. Furthermore, it should be noted that the preparatory works referred to *supra* never used the term "*incident*" in the context of crimes against humanity. Instead, the preparatory works used the term "*act*" when referring to specific incidents of violations or attacks against a civilian population.[27] The choice of the term "*act*" over the term "*incident*" demonstrates the drafters' intention to focus specifically on the actions of the suspect/accused and not solely on how the actions of a group of individuals resulted in a particular "*incident*". It is equally worth noting that the drafters chose to use the term "*attack*" when referring to the use of force against a civilian population, giving this term a broad definition.[28] Therefore, it can be logically inferred that several incidences of force could be included under a single "*attack*", thus making the use of the term "*incident*" unnecessary for the full definition of crimes against humanity.

16. The definition of "*attack*" in article 7(2)(a) of the Rome Statute does not refer to a singular incident, but it does not imply either that a singular act may not be considered part of a larger "*campaign*", "*operation*" or "*use of force*" against a civilian population. Accordingly, the drafters did not envisage the need to address the question as to whether each proven incident in a case must be "*taken together*" to amount to an "*attack*". To the contrary, the drafters adopted the determination by the ICTY according to which "[a]*s long as there is a link with the widespread or systematic attack against a civilian population, a single act could quality as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above*".[29] Consequently, the determination of the

[27] See, for instance, the Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994), *supra* note 20, p. 76.
[28] See article 7(2)(a) of the Rome Statute.
[29]See ICTY, *The Prosecutor v. Mskšić, Radić and Šljivančanin*, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 (Trial Chamber I), 3 April 1996, para. 649 as referred to in the International Commission of Jurists, *supra* note 24, pp. 12-13.

appropriateness of a charge of crimes against humanity in a particular factual scenario does not hinge on the participation of the suspect/accused in multiple acts, but only and exclusively on whether the suspect/accused participated in at least one act which is found to be part of the widespread or systemic attack at hand.

17. In the jurisprudence of the Court, the term "*attack*" has been repeatedly understood to cover "*a course of conduct involving the multiple commission of acts, enumerated in article 7(1) of the Statute, against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*".[30]

18. In the *Bemba* case, Pre-Trial Chamber II further clarified that "[t]*he commission of the acts referred to in article 7(1) of the Statute constitute the 'attack' itself and, besides the commission of the acts, no additional requirement for the existence of an 'attack' should be proven*".[31]

19. Moreover, the term "*incident*" is almost inexistent in the jurisprudence of the Court dealing with the contextual elements of crimes against humanity. In the *Katanga and Ngudjolo Chui* case, Pre-Trial Chamber I made no reference to it.[32] In the case against *Ruto, Kosgey and Sang*, Pre-Trial Chamber II used the term "*incident*" three times in its decision on confirmation of charges.[33] Each time, the Chamber meant to refer to the context in which the criminal acts took place and did not require a high level of evidentiary detail, those "*incidents*" being established mainly by NGOs reports and press articles. In the confirmation decision concerning *Muthaura, Kenyatta and Ali*, Pre-Trial Chamber II used the word "*incident*" five times.[34] When employing this term, the Pre-Trial Chamber mainly made reference to events

[30] See the "Decision on the confirmation of charges", *supra* note 17, para. 392. See also the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", *supra* note 16, paras. 75, 84-86; the "Ruto *et al.* Confirmation Decision", *supra* note 16, para. 164; and the "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 16, paras. 77-99.
[31] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", *supra* note 16, para. 75.
[32] See the "Decision on the confirmation of charges", *supra* note 17, paras. 389-417.
[33] See the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", *supra* note 16, paras. 187-188 and 199.
[34] See the "Muthaura *et al.* Confirmation Decision", *supra* note 16, paras. 105, 139, 234, 235 and 305.

contextual to the commission of specific acts of violence. In order to establish the existence of an attack against a civilian population, as required by the founding texts of the Court, the Pre-Trial Chamber looked at evidence proving "*a course of conduct involving the multiple commission of acts*" and not the particular incidents alleged by the Prosecutor.

20. In this regard, the *ad hoc* tribunals have clarified that an "*attack*" as the contextual element of crimes against humanity refers to the perpetration against the civilian population of a "*series of acts of violence, or of the kind of mistreatment referred to in* [the ICTY/ICTR Statutes]",[35] "*the event in which the enumerated crimes must form part*",[36] and that the scope of said "*attack*" may be broader than a related armed conflict.[37] Against this background, the "*acts*" of the suspect are only required to be related to or constitute "*a part of*" said "*attack*".[38] As emphasised by the ICTY Appeals Chamber, "*the acts of the accused need only be a part of this attack* [against the civilian population] *and, all other conditions being met* [the attack being widespread or systematic], *a single or relatively limited number of acts on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random*".[39]

21. Consequently, whereas both the "*acts*" of the suspect/accused and the "*attack*" - which said acts are alleged to be part of - must be proven to the required standard,

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[35] See ICTY, *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgement (Appeals Chamber), 12 June 2002, para.89; and ICTR, *Nahimana, Barayagwiza and Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement (Appeals Chamber), 28 November 2007, para. 918.

[36] See ICTR, *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment (Trial Chamber II), 21 May 1999, para. 122.

[37] See ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, para. 251; and ICTY, *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgement (Appeals Chamber), 12 June 2002, para. 86. See also ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction (Appeals Chamber), 31 August 2004, para. 13.

[38] See ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement (Appeals Chamber), 15 July 1999, para. 271; ICTY, *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgement (Appeals Chamber), 12 June 2002, para. 99; ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement (Appeals Chamber), 29 July 2004, para. 101; ICTR, *The Prosecutor v. Gacubmitsi*, Case No. ICTR-2001-64-A, Judgement (Appeals Chamber), 7 July 2006, para. 102; and ICTY, *The Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Judgement (Appeals Chamber), 5 May 2009, para. 41.

[39] See ICTY, *The Prosecutor v. Kunarac, Kovac and Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgement (Appeals Chamber), 12 June 2002, para. 96; and ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement (Appeals Chamber), 29 July 2004, para. 101.

the manner in which both allegations are proven is not necessarily the same: temporal, geographical, personal and/or material circumstances must be referred to in detail only to establish the acts of the suspect/accused; the same level of detail is not necessary to prove the *context* in which said acts have been carried out. In other words, the "*incidents*" alleged to constitute an "*attack*" need not be addressed in as much evidentiary detail as the "*acts*" of the suspect/accused.

22. The *ad hoc* tribunals have followed this approach in their rulings on allegations of crimes against humanity. They have determined that the "*acts*" of a person allegedly responsible for the commission of crimes against humanity need only form part of an "*attack*" on some essential level.[40] Accordingly, the required connection between the "*acts*" of the suspect and the "*attack*" which they are part of has been found to exist in temporal or geographical terms alone or even where the "*acts*" of the person were not committed against the same population as the broader "*attack*".[41]

23. In light of the above, the Common Legal Representative concurs with the Prosecution's reasoning[42] and submits that the Majority of the Pre-Trial Chamber misinterpreted the notion of "*attack*" as encompassing a number of "*incidents*", and consequently erred in requiring individual findings to be made in relation to each of the 45 incidents described by the Prosecutor, for the existence of an "*attack*" to be established. Indeed, as demonstrated *supra*, the Prosecutor is required to prove to the requisite threshold the existence of an attack, as a contextual element of crimes against humanity, and the underlying crimes for which Mr Gbagbo is suspected and which were allegedly committed at least during the four out of those 45 "*incidents*", chosen by the Prosecution as examples of the attack.

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[40] See ICTR, *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (Trial Chamber III), 15 May 2003, para. 326 ("[a]*lthough 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*").

[41] See ICTR, *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (Trial Chamber III), 15 May 2003, para. 330; and ICTR, *Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Judgement (Appeals Chamber), 8 May 2012, para. 62.

[42] See the Prosecution's Appeal, *supra* note 9, paras. 45-52.

24. Therefore, the Common Legal Representative requests the Appeals Chamber to uphold the Prosecution's contentions in this regard.

B. On the Prosecution's Second Ground of Appeal

1. The Majority erred in finding that the Prosecutor must largely complete her investigation and present all her evidence and her strongest possible case at the confirmation of charges hearing in order to meet the standard of proof under article 61(7) of the Rome Statute

25. The Common Legal Representative concurs with the Prosecution that the Majority erred in considering that the Prosecutor has to present her strongest possible case based on a largely completed investigation[43] and that it is necessary to present all her evidence in order to meet the evidentiary threshold for the confirmation of the charges.[44]

26. The Common Legal Representative submits that these finding disregard the specific purpose and scope of the confirmation stage, as well as its evidentiary features, as underlined by the Prosecution.[45]

27. Both Pre-Trial Chambers I and II have so far shown a consistent approach in understanding the limited scope of the confirmation hearing. In particular, they both have agreed on the fact that this stage should not be interpreted as being a "*mini-trial*" or a "*trial before the trial*",[46] and that the evidentiary threshold at this stage is lower than the one applicable at trial.[47]

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[43] See the Impugned Decision, *supra* note 1, para. 25.
[44] *Idem*, para. 37.
[45] See the Prosecution's Appeal, *supra note* 9, para. 61.
[46] See the "Decision on the Schedule for the Confirmation of Charges Hearing (Single Judge, Pre-Trial Chamber II), No. ICC-01/09-02/11-321, 13 September 2011, para. 8; the "Decision on the confirmation of charges", *supra* note 17, para. 64; the "Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12" (Single Judge, Pre-Trial Chamber II), No. ICC-01/04-01/07-412, 18 April 2008, p. 4; the "Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses" (Pre-Trial Chamber II), No. ICC-01/09-01/11-221, 25 July 2011, para. 9 and the "Corrigendum of the 'Decision on the Confirmation of Charges'" (Pre-Trial Chamber I), No. ICC-02/05-03/09-121-Corr-Red, 7 March 2011, para. 31.
[47] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", *supra* note 16, para. 28. See also the "Decision on the confirmation of charges", *supra* note 17, para. 63; "[t]*he purpose of the confirmation hearing is to ensure*

28. In the case of *The Prosecutor v. Bahar Idriss Abu Garda*, the Pre-Trial Chamber further reiterated this principle[48] and added that "[a]*t no point should Pre-Trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to sustain a future conviction. Such a high standard is not compatible with the standard under article 61(7) of the Statute*".[49] This principle was further clarified by the Pre-Trial Chamber in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*[50].

29. Against this background, a detailed explanation of the "*attack*" of which the "*acts*" of the suspect allegedly form part is meant to be provided during the trial, not at the confirmation hearing. Said explanation will address the particulars of the "*attack*", referring more in detail to the evidence supporting its existence. The *ad hoc* tribunals have consistently followed this approach, making detailed findings of fact on the alleged "*attack*" in their judgements on the guilty or innocence of the accused.[51] In some cases, a detailed explanation of the "*attack*" within said judgements has been relied upon to adjudicate upon the alleged "*acts*" of the accused. For instance, in the *Martić* case, the ICTY ruled in a general manner on incidents alleged in sixteen villages of the *Krajina* between June and December 1991 to conclude that there was an "*attack directed against the Croat and other non-Serb civilian population in the relevant territories of Croatia and BiH during the time relevant to*

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that no case proceeds to trial without sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which he has been charged. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges". See also para. 64.

[48] See the "Decision on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/05-02/09-243-Red, 8 February 2010, para. 39.

[49] *Idem*, par. 40. See also the "Corrigendum of the 'Decision on the Confirmation of Charges'", *supra* note 46, para. 40.

[50] The relevant part of the decision reads as follows: "[G]*iven the limited purpose of the confirmation hearing, the evidentiary threshold at the pre-trial stage is lower than that applicable at the trial stage. Accordingly, article 61(5) of the Statute expressly provides that the Prosecutor may, for the purposes of the confirmation hearing, 'rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial'. In more general terms, the Prosecutor is not required to tender into the record of the case more evidence than is, in his view, necessary to convince the Chamber that the charges should be confirmed*". See the "Corrigendum of the 'Decision on the Confirmation of Charges'", *supra* note 46, para. 40.

[51] See, *e.g.*, ICTY, *The Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment (Trial Chamber II), 15 March 2002, par. 61, referring *inter alia* to paras. 20 and 22-49.

the crimes charged in the Indictment".[52] Thereafter, the Chamber pinpointed relevant findings within its discussion on the contextual elements to rule upon the alleged acts of the accused.[53]

2. The Majority erred in its "general disposition towards certain types of evidence" for the confirmation of charges stage

30. The Common Legal Representatives concurs with the Prosecution that the Majority erred in expressing its "*general disposition towards certain types of evidence*",[54] and announcing its preference for some types of evidence over others.

31. Article 61(5) of the Rome Statute expressly provides that the Prosecutor may, for the purpose of the confirmation hearing, "*rely on documentary or summary of evidence and need not to call the witnesses expected to testify at the trial*".[55]

32. The above-mentioned provision has found consistent application in the ICC jurisprudence relevant to the stage of the confirmation of the charges. In the *Katanga and Ngudjolo Chui* case, Pre-Trial Chamber I, in assessing whether the attack against the civilian population of Bogoro was part of a widespread campaign of military attacks against civilians in the large geographical area of Ituri, heavily relied on NGOs and UN reports.[56] In particular, the Chamber defined the context surrounding the Bogoro attack on the basis of facts reported by Human Rights Watch[57] and the UN Security Council,[58] regarding previous killings of civilians throughout the region. Furthermore, it referred to killings that occurred in the same region during the month following the attack against Bogoro, as described in the above-mentioned documents as well as in reports from the UN General Assembly and the DRC Panel

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[52] See ICTY, *The Prosecutor v. Martić*, Case No. IT-95-11-T, Judgement (Trial Chamber I), 12 June 2007, para. 352.
[53] *Idem*, paras. 354-432, 471 and 473.
[54] See the Impugned Decision, supra note 1, para. 26.
[55] Article 61(5) of the Rome Statute.
[56] See the "Decision on the confirmation of charges", *supra* note 17, paras. 409-411.
[57] *Idem*, para. 410; and footnote 535, referring to Human Rights Watch report: Ituri: "Covered in Blood" - Ethnically Targeted Violence In Notheastern DR Congo, vol. 15, No. 11 (A), New York, July 2003.
[58] *Ibid.*, para. 410, footnote 536, referring to UN Security Council, Special report on the events in Ituri, January 2002 - December 2003, UN doc. S/2004/573, 16 July 2004.

on Exploitation of Natural Resources.[59] The Chamber also found that there were substantial grounds to believe that further killings were committed in the same region more than five months after the attack against Bogoro – *i.e.* until July 2003. In reaching this conclusion, once again the Chamber made explicit reference to (i) two reports from the UN Security Council[60]; (ii) two further reports from Human Rights Watch[61]; (iii) a report from the MONUC[62]; and (iv) a report from the UN General Assembly[63]. Reference to other kind of evidence, *i.e.* witnesses statements and transcripts thereof, in establishing the context in which the attack against Bogoro took place is very limited in the decision.

33. The reports mentioned were deemed to constitute sufficient proof of the necessary context to establish an "*attack against any civilian population*". Indeed, it is mainly through facts stemming from NGO reports and official UN documents that the Pre-Trial Chamber reached the conclusion in the *Katanga and Ngudjolo Chui* case that there was sufficient evidence to establish substantial grounds to believe that the attack against the civilian population of Bogoro was part of a systematic attack directed against the civilian population in the region of Ituri in the DRC.[64]

34. Moreover, in the *Bemba* case, Pre-Trial Chamber II found that there was sufficient evidence with regard to the existence of an "*attack*" in the CAR territory

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[59] *Ibid.*, para. 410, footnote537, referring to UN General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo*, UN doc. A/58/534, 24 October 2003; and the DRC Panel on Exploitation of Natural Resources, Ituri Province Follow Up, 28 July 2003.

[60] *Ibid.*, para. 411; and footnote 539, referring to UN Security Council, *Troisième rapport spécial du Secrétaire général sur la Mission de l'Organisation des Nations Unies en République démocratique du Congo*, UN doc. S/2004/640, 16 August 2004; and UN Security Council, Special report on the events in Ituri, January 2002-December 2003, UN doc. S/2004/573, 16 July 2004.

[61] *Ibid.*, para. 411; and footnote 539, referring to Human Rights Watch, *Le Fléau de l'Or*, June 2005; and footnote 540, referring to Human Rights Watch report: Ituri: "Covered in Blood" - Ethnically Targeted Violence In Notheastern DR Congo, vol. 15, No. 11 (A), New York, July 2003.

[62] *Ibid.*, para. 411; and footnote 540, referring to MONUC, Special investigations on Human Rights Situation in Ituri, June 2003.

[63] *Ibid.*, para. 411; and footnotes 537 and 540, referring to UN General Assembly, *Rapport intérimaire de la Rapporteuse spéciale sur la situation des droits de l'homme en République démocratique du Congo*, UN doc. A/58/534, 24 October 2003.

[64] *Ibid.*, para. 411.

from on or about 26 October 2002 to 15 March 2003.[65] In particular the Chamber stated that "*the existence of an attack was demonstrated by the commission of many criminal acts referred to in article 7(1) of the Statute,* [and] *established by numerous reliable direct and indirect pieces of evidence*".[66] In making this determination, the Chamber examined the disclosed evidence relevant to the means and methods used in the course of the attack, the status of the victims, their number, the nature of the crimes committed and the resistance to the assailants at the time.[67] In particular, the Chamber relied on witness statements, as well as on several reports, radio broadcasts and press articles.[68] In establishing the existence of a widespread attack against the civilian population, the Chamber also referred succinctly to attacks by the *Mouvement pour la Libération du Congo* in various locations reported by direct witnesses and corroborated by indirect evidence.[69]

35. In the case of *The Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II assessed the widespread nature of the attack against the civilian population by referring *inter alia* to the Final Report from the Commission of Inquiry into the Post Election Violence (the "CIPEV")[70] to establish that there was a number of victims in the Nandi and Uasin Gishu Districts.[71] Moreover, the Chamber relied on the statements from two witnesses, the above-

[65] See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", *supra* note 16, para. 91.
[66] *Idem*, para. 92.
[67] *Ibid.*, para. 95.
[68] *Ibid.*, para. 94, footnote 118, referring to theUnited Nations Development Programme project, United Nations Resident Coordinator weekly reports, AI and FIDH reports, BBC press articles, press articles of "Le Quotidien" and "]eune Afrique", and Radio France International radio broadcasts, including, for instance, the *Federation Internationale des Ligues des Droits de l'Homme*, "Central African Republic, Forgotten, stigmatised: the double suffering of victims of international crimes", 1 October 2006, available at http://www.fidh.org/Forgotten-stigmatised-the-double.
[69] *Idem*, par. 94, footnotes 117-118.
[70] CIPEV Report, 16 October 2008, available at http://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report.
[71] See the "Ruto *et al.* Confirmation Decision", *supra* note 16,, para. 177 and in particular footnote 254.

mentioned report from the CIPEV and one press article from the Daily Nation[72] to establish further killings in Turbo Town and the Eldoret area.[73]

36. Indeed, Pre-Trial Chamber II attributed sufficient probative value to NGOs reports and press articles to establish at least three "*incidents*", which took place in three different places, when assessing the contextual elements of the crimes against humanity of which Mr Ruto and Mr Sang were suspected.[74]

37. Furthermore, in the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II referred to only two statements by two Prosecution witnesses, one non-ICC witness statements placed before it in form of a summary[75] and heavily relied on reports.[76]

38. Once again, the Chamber attributed sufficient probative value to NGOs reports and press articles to establish substantial grounds to believe that the contextual elements common to all crimes against humanity were fulfilled.

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[72] *Idem*, par. 178, footnote 255, referring to Daily Nation, "Kenya: Darkest Day in History of a Humble Church", 26 October 2008, available at http://www.nation.co.ke/News/politics/-/1064/484326/-/item/0/-/o12pc1/-/index.html.

[73] *Ibid*., para. 178 and in particular footnote 255.

[74] *Ibid*., paras. 176-180; footnotes 254-256.

[75] See the "Muthaura *et al.* Confirmation Decision", *supra* note 16, para. 120.

[76] *Idem*., paras. 120-122, referring to the National Security Intelligence Service Situation Report for 28 January 2008 that reported "*allegations that armed Mungiki sect members wearing AP Police uniforms have been moving from house to house in Nakuru posing as Police Officers in search of members of certain communities whom they then attack/kill*", available at http://allafrica.com/stories/201201260177.html; the Commission of Inquiry into Post-Election Violence Final Report, 16 October 2008, which refers to a "*second wave of violence" in Nakuru which "started on 24 January 2008 and took a more planned and systematic nature*", available at http://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report; the Kenya National Commission on Human Rights Final Report equally reports Mungiki involvement in a wave of violence which erupted on 25 January 2008 http://www.marsgroupkenya.org/Reports/OtherReports/KNCHR_REPORT_REPORT_ON_THE_BRINK_OF_THE_PRECIPE.pdf ; Human_Rights Watch report entitled "*Ballots to Bullets*" refers to "*co-ordinated attacks of January 24-26*" in Nakuru, and attributes these attacks to the Mungiki, http://www.hrw.org/reports/2008/03/16/ballots-bullets, 17 March 2008; the United Nations Office of the High Commissioner for Human Rights report entitled "Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008", http://www.ohchr.org/Documents/Press/OH CHRKenyareport.pdf; the International Crisis Group Report entitled "*Kenya in Crisis*", http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/137-kenya-in-crisis.aspx, 21 February 2008. Pre-Trial Chamber II relied on the same reports to establish the attacks in or around Naivasha, see the "Muthaura *et al.* Confirmation Decision", *supra* note 16, para. 136.

39. The same approach has constantly been taken by the *ad hoc* Tribunals. For instance, in the *Dragomir Milošević* case, the ICTY was satisfied that the requirement of an "*attack against a civilian population*" was met on the general basis of "*abundance of evidence of attacks by SRK troops*",[77] referring without evidentiary detail to several incidents of sniping and shelling.[78] In the *Lukić and Lukić* case, the ICTY determined that "*evidence on specific non-indicted crimes will be taken into account when determining whether the Prosecution has satisfied the general requirements of Article 5 of the Statute* [crimes against humanity]".[79] Accordingly, relying on ICRC reports and the testimony of a demographic expert, the Trial Chamber concluded the existence of an "*attack*" against the Muslim civilian population in Višegrad during June and July 1992 which the crimes allegedly committed by the accused were part of.[80] In *Mrkšić, Radić and Šljivančanin*, an ICTY Chamber followed the same approach and referred to particular periods of time and particular locations to conclude that "*the Serb forces were, in part, directing their attack on Vukovar, which included much difficult building-by-building fighting, and the immediately surrounding villages (some in truth more like suburbs of the city of Vukovar), as well at the comparatively small and very poorly armed and organised Croatian forces that were against them*".[81] The Chamber did not refer to specific "*incidents*" to analyse the contextual element of the alleged crime against humanity, after concluding that "*no exact count of the number of civilians or of the number of members of the opposing forces who were killed can be given*".[82] Instead, the Trial Chamber considered that "[t]*he events, <u>when viewed overall</u>, disclose an attack* […] *directed against the Croat and other non-Serb civilian population in the wider Vukovar area*".[83] The ICTR adopted a similar approach in the *Bagosora* et al. case, where it "*considered <u>the totality of the evidence</u>, in particular concerning the ethnic composition of the individuals who sought*

[77] See ICTY, *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgement (Trial Chamber III), 12 December 2007, para. 917.
[78] *Idem*, paras. 927-928.
[79] See ICTY, *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement (Trial Chamber III), 20 July 2009, para. 890.
[80] *Idem*, paras. 890-895.
[81] See ICTY, *The Prosecutor v. Mrkšić, Radić and Šljivančanin*, Case No. IT-95-13/1-T, Judgement (Trial Chamber II), 27 September 2007, para. 470.
[82] *Idem*, para. 469.
[83] *Ibid*., para. 470 (emphasis added).

refuge at various sites as well as the actual or perceived political leanings of many of those killed or singled out at roadblocks in the days after President Habyarimana's death" to conclude the existence of "*attacks against the civilian population on ethnic and political grounds between April and July 1994*".[84]

40. It is worth noting that when referring to several "*incidents*" constituting the alleged "*attack against a civilian population*" in their judgements, the *ad hoc* tribunals did not refer to the relevant facts in an exacting level of detail. By contrast, the level of detail in which the acts of the accused were addressed is significantly higher. The *ad hoc* tribunals have referred to "*incidents*" defined in general terms as means of proof of the existence of an "*attack against a civilian population*". For instance, in the *Krnojelac* case, the ICTY addressed the crimes committed in and around the municipality of Foca between April and October 1992 and identified the particular details of a limited number of these crimes relying on different types of evidence.[85] The judges concluded that an "*attack by the Serb forces against the non-Serb civilian population took place in and around Foca in the period covered by the Indictment, and that the acts which took place at the KP Dom* [of which the accused was the warden] *were part thereof*".[86] By contrast, the "*underlying acts*" of the crimes, namely the acts constituting the "*crime base*" of the particular crimes against humanity allegedly committed in the KP Dom and with which the accused was charged, were discussed in a much more detailed manner in subsequent parts of the judgement, relying on more specific types of evidence.[87]

41. In light of the above, the Common Legal Representative concurs with the Prosecution and submits that the Majority erred in disregarding the evidentiary requirements under articles 61(5) and 68(5) of the Rome Statute, which reflect the

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[84] See ICTR, *The Prosecutor v. Bagosora et al*., Case No. ICTR-98-41-T, Judgment and Sentence (Trial Chamber I), 18 December 2008, para. 2167 (emphasis added). This approach was ratified by the Appeals Chamber. See *Bagosora and Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement (Appeals Chamber), 14 December 2011, para. 390.
[85] See ICTY, *The Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment (Trial Chamber II), 15 March 2002, paras. 20 and 22-49.
[86] *Idem*, para. 61.
[87] *Ibid*., paras. 437-485.

limited scope and peculiar features of the confirmation of charges stage as well as the flexible approach to evidence provided for by article 69(4) of the Rome Statute and rule 63(2) of the Rules of Procedure and Evidence.

42. Therefore, the Common Legal Representative requests the Appeals Chamber to uphold the Prosecution's contentions in this regard.

43. In light of the foregoing, the Common Legal Representative endorses the Prosecution's arguments and submits that the Prosecution's Appeal should be granted in its totality. In particular, the Common Legal Representatives wishes to reiterate that the Majority committed a clear error of law in defining the term "*attack*" as being constituted by a number of "*incidents*" to be proved at the evidentiary standard of article 61(7) of the Rome Statute. The Majority departed from the wording of the legal texts of the Court with no explanation and, as shown *supra*, from the consistent jurisprudence of the Court as well as of the international *ad hoc* tribunals. By the same token, the Majority erred in interpreting and applying in the case at hand the standard of proof under article 61(7) of the Rome Statute. As demonstrated *supra*, the approach that has consistently been followed by the Chambers of the Court, matched by the practice of the *ad hoc* tribunals, is to freely admit and assess all type of evidence presented before it; the Chamber being endowed with a discretionary power to attribute the relevance and probative value that a certain piece of evidence deserves.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Appeals Chamber to grant the Prosecution's Appeal in its entirety.

Paolina Massidda
Principal Counsel

Dated this 27th day of September 2013

At The Hague, The Netherlands