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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 CÔTE D'IVOIRE

IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO

Public Document
With public annex

Defence response to "Prosecution's appeal against the 'Decision adjourning the hearing on the confirmation of charges'" (ICC-02/11-01/11-474)

Source: **Defence team for President Gbagbo**

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

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I. Procedural background

1. The Defence adverts to the procedural background in its 6 August 2013 response.[1]

II. Introduction

2. In its 3 June 2012 decision, the Pre-Trial Chamber held that the Prosecution had not provided sufficient evidence in support of the allegations made in its Document Containing the Charges ("DCC").[2] What distinguishes the "adjournment" decision (this is a formal adjournment decision within the meaning of article 61(7)(c)(i)) from a decision declining to confirm charges pursuant to article 61(7)(b) is the Chamber's finding that the Prosecution may have been unfamiliar with the present state of the law and previous decisions in respect of evidence.[3] On this basis alone, the Chamber authorised it to recommence its investigations *ab initio*.

3. The 3 June 2013 decision is therefore clear: on the basis of the evidence currently before it, the Pre-Trial Chamber cannot but decline to confirm the charges.

4. The Prosecution is seeking to draw a veil over this finding of the Pre-Trial Chamber, resorting to all manner of ploys in its appeal in its bid circumvent it; the Appeals Chamber must not condone this.

5. Firstly, the Prosecution rewrites the 3 June 2013 decision in order to interpret it in accordance with its interests. In the process, it ascribes to the Pre-Trial Chamber reasoning and findings that do not belong to it. For instance, contrary to the Prosecution's submissions, the Pre-Trial Chamber never considered that an attack is "a mechanical aggregate of 'incidents'";[4] nor, more generally, did it make any legal determination as to the contextual elements of crimes against humanity. It simply recalled that such contextual elements cannot be established absent evidence to prove the alleged facts.

6. Realising it is unable to address the real issue raised by the Pre-Trial Chamber, namely the failure to adduce evidence in sustenance of its allegations, the Prosecution ascribes to the Pre-Trial Chamber statements which the latter never made in a bid to challenge findings which do not feature anywhere in the decision. In the meantime, it does not address the real issue, i.e. its failure to tender evidence, but instead proceeds to resubmit other issues such as the standard of proof and the definition of crimes against humanity.

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[1] ICC-02/11-01/11-470.
[2] ICC-02/11-01/11-432, para. 37.
[3] *Idem*.
[4] ICC-02/11-01/11-474, para. 40.

7. By the same token, the Prosecution has reinterpreted and rewritten the decision granting it leave to appeal. Whereas the Pre-Trial Chamber allowed it to appeal on a single, very specific issue which the Chamber was careful to reformulate, the Prosecution has resubmitted another issue on appeal which, according to it, relates to the issue,[5] one that the Pre-Trial Chamber[6] expressly excluded from the scope of the appeal, namely the standard of proof.

8. In this respect the Defence notes the approach adopted by the Prosecution. After invoking the complexity and importance of the issue under appeal in seeking an extension of its page limit,[7] the Prosecution then went on to use the bulk of the additional pages accorded to it to raise grounds of appeal which the Pre-Trial Chamber has already rejected instead of addressing the subject matter of the appeal.

9. Finally, and more generally, using an approach which further reflects its shortcomings and its bid to make up for them by any means possible, the Prosecution proceeds to present the case *de novo*, and in the process, "correcting" *a posteriori* any errors it committed in its DCC and at the confirmation of charges hearing.[8] The Prosecution now wants to persuade the Appeals Chamber that it has never alleged that the 45 incidents mentioned in its DCC and regarding which it spoke at length at the confirmation hearing were intended to establish the contextual elements of crimes against humanity.[9] However, the DCC and the transcripts of the confirmation hearing reveal otherwise. Moreover, the Prosecution even claims that its DCC and in-court submissions were founded on the distinction between "material facts" and "subsidiary facts".[10] This is not quite true, no such distinction features anywhere in its DCC or in-court submissions.

10. By this course of action, the Prosecution has departed from the spirit of the confirmation proceedings, and from the letter and spirit of the Court's decisions.

11. The Prosecution's unwillingness to follow the proper procedure is clearly reflected in its deliberate tendency to not distinguish between a decision declining charges and a decision adjourning the proceedings. It treats the 3 June 2013 decision as a decision declining charges, on the assumption that it will be in a better position to raise more issues and in greater detail than in an appeal on adjournment alone. Yet, technically speaking, the impugned decision is

[5] *Idem*, para. 15.
[6] ICC-02/11-01/11-464, para. 19.
[7] ICC-02/11-01/11-467, paras. 4-5.
[8] See *infra*.
[9] ICC-02/11-01/11-474, para. 29.
[10] *Idem*, para. 23.

an adjournment decision, in which the Chamber has not made a definitive ruling on the charges. By deliberately confusing those two issues, the Prosecution believes, it will be justified to raise issues which do not belong in an appeal brief, such as the exact definition of the contextual elements of crimes against humanity or the standard of proof to be applied at the confirmation stage. Such issues are not admissible until the Pre-Trial Chamber has made a final decision on the charges. Asking the Appeals Chamber to enter a decision prematurely amounts to a departure from the proper procedure.

12. Finally, the tenor of its appeal brief seems to indicate that the Prosecution considers the confirmation stage to be unnecessary. In a bid to circumvent the obligation to prove its allegations, it misrepresents the spirit of the confirmation proceedings, which is to protect the rights of the defence, and their purpose, which is precisely to allow the Pre-Trial Chamber to test the evidence underpinning the allegations. The Prosecution is seeking to avoid its obligations towards the Defence and the Chamber.

13. In reality, the Prosecution's complaint is that the Pre-Trial Chamber assessed the facts underpinning the allegations against President Gbagbo by systematically "testing" the evidence before it.

14. The Prosecution's bid to ignore the facts in order to avoid having to explain the merits of its allegations and its subsequent tendency to manipulate the debate so as to avoid any discussion of the evidence it has presented were so abundantly clear already in its application for leave to appeal that the Pre-Trial Chamber felt compelled to remind it of the obvious: "The real question is whether the Chamber can expect the Prosecutor to back up her allegations with sufficient evidence, or whether it is permissible for her to make factual allegations without sufficient evidence and still propose them as a basis for drawing inferences about the charges."[11]

15. The Prosecution's forays into semantics and its digressions on matters of law are only aimed at drawing attention away from this core issue, as the Defence will now demonstrate.

III. <u>Discussion</u>

1. The Prosecution seeks to extend the scope of its appeal impermissibly

16. The Prosecution raises two grounds of appeal, contending that they arise from the issue which the Pre-Trial Chamber certified for appeal.

[11] ICC-02/11-01/11-464, para. 37.

17. However, it is quite clear that in raising these two grounds of appeal, the Prosecution is seeking to extend the scope of its appeal impermissibly, either by reinterpreting the issue or by inferring a non-existent nexus between the issue and the ground of appeal. The Appeals Chamber must not condone this course of action, and should in respect of the first ground of appeal, restrict the discussion to the scope which was authorised by the Pre-Trial Chamber and, as for the second, reject it in its entirety as it is outside the scope of the appeal authorised.

1.1 <u>The issue determining the scope of the appeal</u>

18. The Pre-Trial Chamber authorised the Prosecution to appeal solely on the issue of: "[w]hether the Pre-Trial Chamber erred in holding that, when the Prosecutor alleges that an 'attack against any civilian population' consists of multiple smaller incidents, none of which alone rises to the level of the minimum requirements of article 7 of the Statute and which allegedly took place at different times and places, a sufficient number of these incidents must be proved to the requisite standard, meaning that each of these incidents must be supported with sufficient evidence before the Chamber can take them into consideration to determine whether those incidents, taken together, indicate that there are substantial grounds to believe that an 'attack' took place."[12]

1.2 <u>The first ground of appeal</u>

19. The Prosecution contends that "the Majority erred in requiring that in this case a sufficient number of Incidents underlying the contextual elements, including the 41 Incidents, must be established to the standard of proof enshrined in Article 61(7) and by applying that standard of proof to the subsidiary facts and evidence that relate to the 41 Incidents".[13]

20. However, a reading of the appeal brief reveals that this ground arises from a partial re-writing or reinterpretation of the issue as formulated by the Pre-Trial Chamber.

21. Firstly, the Prosecution reinterprets the issue on the pretext of clarifying the "context of this case". It asserts that the Pre-Trial Chamber's understanding of part of its demonstration is incorrect. To the statement that "the Prosecutor alleges that 'an attack' against any civilian population' *consists* of multiple smaller incidents"[14] it responds that it merely argued that the attack is established by "four charged incidents" alone, distinct from

[12] *Idem*, para. 36.
[13] ICC-02/11-01/11-474, para. 6.
[14] *Idem*, para. 13 (Prosecution's italicisation).

the other 41 cited.[15] Yet this is untrue (see *infra*), and the Prosecution is here seeking to introduce a new argument, different from the one it raised in the DCC and at the confirmation hearing.

22. More specifically, in its first ground of appeal, the Prosecution attempts to resubmit the issue of the definitions of "material facts" and "subsidiary facts", a point that it had already raised in its application for leave to appeal.[16] Yet, the Pre-Trial Chamber explicitly excluded this point from the issue which it certified for referral to the Appeals Chamber. In the decision granting leave to appeal, the Chamber clearly stated that "the answer to this question does not depend on whether the incidents are considered as being part of the 'facts and circumstances' of the charges or whether they are categorised as 'subsidiary facts'. The real question is whether the Chamber can expect the Prosecutor to back up her allegations with sufficient evidence, or whether it is permissible for her to make factual allegations without sufficient evidence and still propose them as a basis for drawing inferences about the charges."[17] Therefore, the Appeals Chamber cannot agree to such a debate.

23. The Defence wishes at this juncture to remind the Appeals Chamber that the issue of whether in its DCC the Prosecution actually drew a distinction between the essential elements underpinning the charges and subsidiary elements is the subject of an oral motion currently pending before the Pre-Trial Chamber. At the start of the confirmation hearing, the Defence moved that the Pre-Trial Chamber reject the DCC in its entirety owing to the failure to distinguish between material and subsidiary facts.[18] The Pre-Trial Chamber indicated that it was due to address this request in its decision on the confirmation of the charges.[19] It is therefore impermissible for the Prosecutor to use the present appeal as a means to ask the Appeals Chamber to rule prematurely on matter which is pending before the Pre-Trial Chamber. That amounts to an abuse of process, and is thus impermissible.

1.3 <u>The second ground of appeal</u>

24. In its second ground of appeal, the Prosecution contends that "[t]he Majority erred in its interpretation and application of the standard of proof under Article 61(7) of the Statute".[20]

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[15] *Idem*, para. 13.
[16] *Idem*, para. 14.
[17] ICC-02/11-01/11-464, para. 37.
[18] ICC-02/11-01/11-T-14-FRA, p. 19.
[19] *Idem*, p. 47.
[20] ICC-02/11-01/11-474, para. 6.

25. After having sought to use its first ground of appeal to surreptitiously resubmit issues which the Pre-Trial Chamber excluded from submissions on appeal, the Prosecution now goes even further in its second ground of appeal, using it as a means to resubmit an issue which the Pre-Trial Chamber has rejected in its entirety.

26. In its application for leave to appeal, the Prosecution enumerated three "issues," the first of which was: "[w]hether the Decision correctly interpreted and applied the evidentiary standard under Article 61(7)".[21] That is how its ground of appeal is formulated.[22] This ground of appeal revolves around a number of sub-errors which correspond exactly to the various elements comprising the Prosecution's application for leave to appeal against this very issue.[23] This would seem indicate that Prosecution considers that simply because the term "ground of appeal" is substituted for "issue", the Appeals Chamber will not realise that the Pre-Trial Chamber has already issued a crystal-clear decision by which it unequivocally rejected *in toto* the issue raised by the Prosecution: "[…] the First Issue presented by the Prosecutor is not formulated with sufficient clarity and does not arise from the Adjournment Decision as currently framed."[24]

27. The Prosecution is asking the Appeals Chamber to reconsider the Pre-Trial Chamber's decision simply on the basis of proof of a "nexus" between this ground of appeal and the certified issue. It thereby misinterprets the Pre-Trial Chamber's decision and builds a legal framework to suit its case.

28. The Defence notes in this regard the lack of a legal basis for the so-called legal principle put forward by the Prosecution, whereby it claims that for a ground of appeal to be admissible, it suffices to establish a nexus with the certified "issue". The only legal basis for this appears, in a footnote, to be a Pre-Trial Chamber decision, which, in the Prosecution's estimation, is to the same effect.[25] However, a reading of the footnote reveals that it is not so, in that the Pre-Trial Chamber merely sets out the requirements that the parties must meet in order to be granted leave to appeal, and does not discuss the question of whether, once leave to appeal has been granted, the issue under appeal is to be formulated as a ground of appeal.[26]

29. Ignoring this, the Prosecution avers that "the Appeals Chamber has accepted as properly raised on appeal specific questions raised by an appellant even when leave to appeal

[21] ICC-02/11-01/11-435, para. 3.
[22] ICC-02/11-01/11-474, para. 6.
[23] ICC-02/11-01/11-435, paras. 4 and 6.
[24] ICC-02/11-01/11-464, para. 19.
[25] ICC-02/11-01/11-474, para. 10.
[26] ICC-02/11-01/11-307, para. 72.

was neither sought nor granted in respect of them, as long as this question was 'directly related to the issues for which leave to appeal was granted'. It also accepted a question that was not expressly referred to in the issue certified for appeal, but that was 'implicitly contained' therein".[27] The Defence notes that by its use of the word "also", the Prosecution seems to suggest that many a decision has been issued to this effect, whereas its footnotes all refer to one and the same Appeals Chamber decision in *Lubanga*,[28] on the application of regulation 55 of the Regulations of the Court. However, it bears noting that the said decision is quite exceptional and that the context in which it was issued is quite different from that of the present trial, in that on appeal the Defence raised the question of the legality of regulation 55 without having sought leave to appeal on this point. This explains why the Appeals Chamber held that "while it is true that leave to appeal was neither sought nor granted in respect of this specific question, it is the Appeals Chamber's view that this question is nevertheless fundamental to the appeals, as it is directly related to the issues for which leave to appeal was granted".[29]

30. It therefore follows from the above that it is only when a ground is not raised in the application for leave to appeal that the Appeals Chamber may consider whether it relates to the issue under consideration as determined by the Pre-Trial Chamber. Now, in this instance, the issue of the evidentiary standard applicable at the confirmation hearing was explicitly raised by the Prosecution in its application for leave to appeal, and the Pre-Trial Chamber was equally explicit in rejecting it.

31. Previous decisions of the Appeals Chamber are clear that an appeal cannot exceed the scope of the certified issue, and the appellate bench will reject any ground which exceeds the scope of the appeal.[30]

32. Even if an appeal were to be admissible solely on the basis of an alleged nexus with the certified issue, the fact still remains that the Prosecution fails to demonstrate any such nexus.[31] It was open to the Chamber to find that there was a lack of sufficient evidence to support the Prosecution's allegations, without having to address the issue of the standard of proof, since the two issues are unrelated. Moreover, even the structure of the Prosecution's brief attests to the fact that the two issues are unrelated, in that the arguments the Prosecution

[27] ICC-02/11-01/11-474, para. 10.
[28] ICC-01/04-01/06-2205, para. 20
[29] *Idem*.
[30] ICC-01/05-01/08-1019, para. 61; ICC-01/04-01/06-1433, para. 51; ICC-01/04-01/06-2205, para. 100; ICC-02/04-01/05-371, para. 32.
[31] ICC-02/11-01/11-474, para. 16.

expounds in relation to the first ground of appeal are far removed from the ones relating to the second.[32] In the process, it undermines its own case.

33. What the Prosecution is actually saying is that it disagrees with the substance of the Pre-Trial Chamber's finding of 3 June 2013, is unwilling to follow the Pre-Trial Chamber's express instructions of 31 July 2013 concerning the scope of the appeal. The Prosecution must not be allowed to use the present appeal proceedings as an opportunity for a veiled appeal against the 31 July 2013 decision denying it leave to appeal on two issues, which it is now trying to reintroduce. To do so would constitute an abuse of process.

2 On the merits of the first ground of appeal

2.1 <u>The Prosecution is now seeking to put forward a different case from the one it did in its DCC and at the confirmation hearing</u>

34. In its DCC, the Prosecution avers that the existence of a "widespread or systematic attack" would be proven by the existence of 45 individual "attacks" which were manifestations of a more widespread attack.[33] The Prosecution opened its case at the confirmation hearing by enumerating 45 "attacks".[34] At the very end of the hearing[35] and in its written submissions[36] the Prosecution, no doubt aware – following the Defence's criticism of its evidence – of the weakness of its arguments, asserted out of the blue that four of the 45 incidents it had described were sufficient to constitute an attack within the meaning of article 7(2) of the Statute.

35. This tendency to go back on statements it made earlier is a common feature of the appeal brief. In its brief, the Prosecution states that "in this case, the facts and circumstances included in the DCC refer to the Charged Incidents, but not to the 41 Incidents. The latter are subsidiary facts and evidence referred to in the *descriptive* part of the DCC from which proof as to the material facts may be inferred".[37]

36. This assertion is contrary to the facts, as a reading of the DCC does reveal. The "descriptive" segment referred to by the Prosecution, in which the attacks are mentioned, is the section of the DCC entitled "Facts relevant to the Chapeau elements of article 7".[38] This

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[32] *Idem*, paras. 32-37.
[33] ICC-02/11-01/11-357-Conf-Anx1-tENG, part E.
[34] ICC-02/11-01/11-T-15-CONF-FRA, p. 40.
[35] ICC-02/11-01/11-T-21-FRA, p. 2.
[36] ICC-02/11-01/11-420-Conf, para. 30.
[37] ICC-02/11-01/11-474, para. 23 (emphasis added).
[38] ICC-02/11-01/11-357-Conf-Anx1-tENG, part E.

heading, in itself a legal characterisation, shows that in the mind of its author, it is not a "descriptive" segment. As a matter of fact, this segment is anchored on a purported detailed legal evidence of the contextual elements of crimes against humanity, which are analysed in terms of the widespread or systematic nature of the attack[39] and the existence of a State or organisational policy.[40] Furthermore, the Prosecution considers this segment of such *legal* significance that it does not even bother to demonstrate the existence of a common plan, even though this is required to establish President Gbagbo's criminal responsibility, but merely adverts to its conclusions on the alleged existence of an organisation.[41]

37. The confirmation proceedings were testimony to the importance the Prosecution attached to the 45 incidents in the Prosecution, in that it announced that it was going to present 45 incidents as "[TRANSLATION] evidence of the widespread and systematic nature of the attacks".[42] The Prosecution opened its presentation saying, "[TRANSLATION] I will present 44 incidents",[43] and after enumerating the 45 incidents, concluded by saying "[TRANSLATION] this was an attack on the civilian population which must be recognised as having been widespread".[44] At no point during its submissions did the Prosecution single out four incidents from the other 41.

38. As far as the Prosecution is concerned, the 45 incidents constitute a series of attacks establishing the existence of a widespread and systematic attack. Its aim in giving example after example was to make up for the weakness in its evidence on each incident; it tried to make up for quality with quantity. In fact, the Prosecution failed to show any proof of the alleged attacks, as the Pre-Trial Chamber noted in its 3 June 2013 decision. That is why the Prosecution is now seeking to draw attention away from its initial strategy by adopting another one, with focus on the four main incidents.

39. But to do so, it must now justify its distinguishing between two categories of events; it must therefore prove that from the outset, it distinguished "material" facts from "subsidiary" facts. From this standpoint, its appeal is based on the premise that the Appeals Chamber accepts that the Prosecution did make this distinction in its DCC and at the confirmation hearing. However, this premise does not stand up to scrutiny.

39 *Idem*, paras. 30-31.
40 *Idem*, paras. 32-42.
41 *Idem*, para. 59.
42 ICC-02/11-01/11-T-15-CONF-FRA, p. 32.
43 *Idem*, p. 40.
44 *Idem*, p. 48.

2.2 The issue of "material facts" and "subsidiary facts"

40. The Defence wishes to begin by recalling that this issue was explicitly excluded from the appeal by the Pre-Trial Chamber;[45] therefore, Appeals Chamber should not address it, especially given that it is the subject of an oral motion pending before the Pre-Trial Chamber.[46]

41. In the unlikely event that the Appeals Chamber should entertain the Prosecution's arguments, the Defence would make the following submissions:

42. Firstly, the Prosecution would have the bench believe that the DCC made a clear distinction between material facts underpinning the charges and subsidiary facts,[47] but it is not so. As the Defence highlighted at the hearing[48] and in its written submissions,[49] nowhere in its DCC did the Prosecution draw this distinction; in fact, the terms "material facts" and "subsidiary facts" do not feature anywhere in the DCC.

43. With specific reference to the 45 incidents, the Defence has shown that the Prosecution has not made any distinction between them – in the DCC or at the hearing – as to their importance in establishing the contextual elements of crimes against humanity.

44. Even if one were to focus on section H of the DCC, as the Prosecution invites the Chamber to do,[50] the Prosecution's argument is hardly more persuasive. In section H, the Prosecution quotes paragraph 97 of the DCC, concluding that "by referring to paragraphs 93-95 and 101-103, the facts related to the Charged Incidents are included into the charges regarding the chapeau elements under Article 7".[51]

45. The issue is not whether the "Charged Incidents" are included in the charges. This is a matter of common sense and is not the subject of the present appeal. This is yet another attempt by the Prosecution to skirt the real issue and not have to deal with its present predicament. The real issue is whether the other 41 "incidents" are also included in the charges in order to establish the contextual element of the crime against humanity.

46. With regard to that, the Prosecution is particularly evasive in a bid to draw attention away from the fact that these events were included in the charges in the DCC. It merely

[45] See *supra*.
[46] See *supra*.
[47] ICC-02/11-01/11-474, paras. 13 and 27.
[48] ICC-02/11-01/11-T-14-FRA, p. 20.
[49] ICC-02/11-01/11-429-Conf, paras. 12 and 14.
[50] ICC-02/11-01/11-474, paras. 27-28.
[51] *Idem*.

points out in a footnote that “[t]o support these allegations, the Footnoted DCC refers to the ‘facts and evidence’ in paragraphs 20-42, 59 and 85 of the Footnoted DCC (see, fns. 438-439, 462-463)”[52] and “[t]hese latter facts are supported by the ‘facts and evidence’ in footnotes 427- 436 of the Footnoted DCC”.[53] However, verification of these references reveals that they relate to the section of the DCC containing the list of the 45 attacks establishing the existence of the contextual element of crimes against humanity, where no distinction is made between the four main incidents and the other 41. The Prosecution’s claim that it pleaded the existence of a widespread or systematic attack against the civilian population solely on the basis of the four “charged incidents” is thus without foundation.

47. The reality that the Prosecution is seeking to obscure is much more straightforward. A “subsidiary” fact is defined as a fact which “does not support the legal elements of the crimes charged”.[54] And yet, both in the DCC and at the hearing, the Prosecution did “support” the existence of a widespread or systematic attack against the civilian population, which is obviously part of the “legal elements of the crime charged”, by means of all of the 45 incidents. So these incidents actually constitute “material” facts, despite the belated change in the Prosecution’s position. The Appeals Chamber must not endorse the Prosecution’s reasoning, as it is simply aimed at evading the logical consequences arising from the manner in which it has presented its own case.

2.3 <u>The Prosecution contends that no standard of proof applies to the 41 incidents</u>

48. The Prosecution is suggesting that the Chamber erroneously applied the same standard of proof to all 45 incidents. It advances that this standard of proof should only have been applied to the four main incidents to establish the existence of an attack: “The Prosecutor must prove the facts that are essential to establish the elements of the crimes, which in this case do not include the 41 incidents”.[55] In support of its assertion the Prosecution states, “As a matter of law, the standard of proof under Article 61(7) exclusively applies to the elements of the crimes (including the contextual elements) and to findings of fact that are essential to establish these elements. In this case, the subsidiary facts that relate to the 41 Incidents are not essential to establish the existence of the attack. The Majority

[52] *Idem*, footnote 62.
[53] *Idem*, footnote 63.
[54] ICC-01/04-01/06-2205, footnote 163.
[55] ICC-02/11-01/11-474, heading (iii) of the first ground of appeal.

erred by nevertheless requiring that these subsidiary facts be established to the standard of proof under Article 61(7) and by applying this standard of proof to them."[56]

49. The Prosecution's "demonstration" on this point raises a number of questions.

2.3.1 The applicable "law" relied upon by the Prosecution

50. In contending that the standard of proof at the confirmation stage applies to the "essential facts" alone, in the instant case the four main incidents, the Prosecution asserts that none of the various standards of proof in the Rome Statute "requires the appropriate standard of proof to apply to individual pieces of evidence or to every single factual assessment made by a Chamber during the process leading to confirmation of charges or to conviction".[57]

51. While this assertion makes sense, it has nothing do with the issue at hand, given that the Pre-Trial Chamber has not required the Prosecution to establish all the facts alleged in its DCC based on any particular standard of proof, in this instance the one applicable at the confirmation stage. It merely has found that since the contextual elements of crimes against humanity must be proven to the stipulated standard, it stood to reason that the Prosecution must be required to provide sufficient evidence in respect of the acts underpinning a widespread or systematic attack against the civilian population. So here again, the Prosecution is simply trying to avoid the real issue.

52. Furthermore, the Defence notes the legal authorities provided by the Prosecution are not only disparate but irrelevant. For instance, it cites a single ICC judgment,[58] judgments of the Supreme Courts of Australia[59] and Canada,[60] appeal judgments from New Zealand[61] and the United States,[62] and several appeal judgments from the ICTY.[63]

53. The Defence notes that all of these judgments relate to the guilt of the accused and are not concerned with the pre-trial, confirmation of charges phase, where, moreover, the standard of proof applied differs from that which is applied at the trial stages.

54. Furthermore, all of the Prosecution's examples are from jurisprudence of the common law tradition, where there is no confirmation of charges phase adhering to such stringent rules

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[56] *Idem*, para. 30.
[57] *Idem*, para. 31.
[58] *Idem*, para. 32.
[59] *Idem*, para. 33.
[60] *Idem*, para. 34.
[61] *Idem*, para. 35.
[62] *Idem*, para. 36.
[63] *Idem*, para. 37.

as at the ICC. Significantly, the Prosecution did not cite more relevant jurisprudence, such as that of French courts.

55. Finally, the Prosecution fails to indicate the legal force of the "sources" it cites, whereas – and this is a first in the history of international criminal law – there is an article specifically relating to the applicable law, namely article 21 of the Rome Statute.[64] A reading of this article clearly reveals that whilst previous decisions of the Court can be a source of applicable law,[65] the jurisprudence relied upon by the Prosecution cannot. At best, the decisions of national courts can indicate the existence of a general principle of law;[66] however in this case the Prosecution should have stated and demonstrated so.[67]

56. Interestingly, in a section on applicable law, the Prosecution does not explain the legal relevance of the sources it cites, not even in light of the Statute.

2.3.2 The confusion of "material fact" and "essential fact"

57. The Appeals Chamber will note that in this entire section of its appeal brief, the Prosecution systematically fails to distinguish between "material facts" and "essential facts", even though these are two different concepts. Now, whilst it is for the Prosecution to clearly distinguish between "material facts" and "subsidiary facts" in its DCC – which, in fact, it fails to do in this instance – it is not for the Prosecution but, rather, for the Chamber to decide what constitutes an "essential fact".

58. The confusion it creates allows the Prosecution to usurp the powers of the Pre-Trial Chamber by evaluating its own evidence, for instance when it asserts, "In this case, the subsidiary facts that relate to the 41 Incidents are not essential to establish the existence of the attack"[68] or "Accordingly, these material facts provide 'sufficient […] factual basis to bring the person […] to trial' pursuant to Regulation 52(b)".[69] It is not for the Prosecution but, rather, for the Pre-Trial Chamber to assert that the alleged facts are sufficient to bring the case to trial.

59. It is clear from the 3 June 2013 decision that the Pre-Trial Chamber considered it "essential" for the Prosecution to provide proof of a sufficient number of the incidents among the ones it presented to the Chamber to establish the existence of a widespread and systematic

[64] Article 21 of the Rome Statute.
[65] Article 21(2) of the Rome Statute.
[66] Article 21(1)(c) of the Rome Statute.
[67] *Idem*.
[68] ICC-02/11-01/11-474, para. 30.
[69] *Idem*, para. 40.

attack. That the Prosecution disagrees with the Pre-Trial Chamber and believes that it has presented persuasive evidence is irrelevant to the present proceedings. The appeal concerns an adjournment decision, not a confirmation decision; moreover, the Prosecution will have the opportunity to appeal against such a decision at the appropriate time. An attempt to secure a decision of the Appeals Chamber on a matter which is still pending before the Pre-Trial Chamber amounts to an abuse of process.

2.4 Definition of the contextual elements of crimes against humanity

60. One of the errors the Pre-Trial Chamber committed, the Prosecution alleges, concerns the interpretation of an "attack" as a crime against humanity.

61. It is worth noting that here again, the Prosecution misapprehends the nature of the 3 June 2013 decision. As it is an adjournment decision and not a final decision on the confirmation of the charges, the bench had no obligation to determine the legal elements of crimes against humanity, as such determination is made in the final decision on the charges.

62. That is why the Chamber does not refer to an attack as being a "mechanical aggregate of incidents", contrary to what the Prosecution seems to be suggesting,[70] borrowing the words of the dissenting judge.[71] The Pre-Trial Chamber avoids falling into the trap of affirming that an "attack", in the legal sense of the word, took place, simply based on the number of incidents reported by the Prosecution.[72] The Pre-Trial Chamber's cautious approach is reflected in the language it uses when referring to the issue under appeal when it states that the obligation to prove a sufficient number of incidents is a *prerequisite* for the establishment that an "attack" took place.[73]

63. By requiring the Prosecution to prove the existence of a significant number of incidents and to provide details about their nature, the Chamber's message is that this is a requirement for establishing the "attack" which the Prosecution has not satisified; whereas it is a pre-condition for the subsequent review of other criteria such as the legal standard applicable as to whether these facts amount to an "attack" within the meaning of article 7(2); the reason is because since "*in this case* […] the Prosecutor identifies particular incidents that *constitute* the attack against the civilian population",[74] it is for her to prove them. The

[70] *Idem*.
[71] ICC-02/11-01/11-432-Anx-Corr, para. 43.
[72] *Idem*, para. 22.
[73] ICC-02/11-01/11-464, para. 36.
[74] ICC-02/11-01/11-432, para. 21 (emphasis added).

Chamber has noted the Prosecutor's argument and is asking her to substantiate it. The Chamber has not entered a legal finding, contrary to what she alleges.

64. Moreover, a reading of the DCC confirms that the Pre-Trial Chamber's reasoning is based on the manner in which the Prosecution presented its case, and not on some abstract definition of "attack". In fact, it was the Prosecution itself which raised the idea in the introduction to the section of the DCC regarding the contextual elements of crimes against humanity, stating that the 45 incidents "constitute" crimes against humanity, when, having regard to those incidents, it asserted: "Murder, rape and other forms of sexual violence, persecution and other inhumane acts are crimes against humanity as defined in article 7 of the Statute."[75]

65. It is easy to see what the Prosecution is trying to achieve by way of its DCC. It reports a large number of attacks[76] alleging that they are widespread and systematic[77] in order to conclude from there that a "widespread or systematic attack against the civilian population"[78] took place. This is exemplified by the Prosecution's in-court submissions.[79] By its approach, the Prosecution is simply attempting to "mechanically" demonstrate – using a "mishmash" of isolated attacks – that an "attack" within the meaning of article 7(2) did take place.

66. The fact is that the case the Prosecution is making here lacks foundation, given that the Pre-Trial Chamber did not discuss the *legal* definition of an attack. It merely found that the Prosecution itself was advancing a number of incidents and, based thereupon, drew a clear and logical conclusion that for those incidents to be taken into account, the Prosecution must provide proof that they took place and describe their nature.

2.5 <u>The Prosecution is now contending that it should not be required to prove the existence of 41 of the 45 incidents on which it relied in the DCC and at the confirmation of charges hearing</u>

67. The Prosecution's semantics in its appeal brief is simply aimed at disguising the weaknesses in its case, and the fact that it no longer wishes to rely on 41 of the 45 incidents.

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[75] ICC-02/11-01/11-357-Conf-Anx1-tENG, para. 19.
[76] *Idem*, paras. 20-29.
[77] *Idem*, para. 30.
[78] *Idem*, para. 97.
[79] ICC-02/11-01/11-T-15-CONF-FRA, p. 48.

2.5.1 The Prosecution's exercise in semantic confusion

68. The most striking example of this is that it confuses "fact" with "evidence", and in many instances it uses "fact" while referring to "evidence". Already in the first sentence of its brief, the Prosecution states, "this appeal concerns the questions as to what *facts* must be established in this case to the requisite standard of proof and how these facts are to be distinguished from *evidence* that is adduced to support the relevant *facts*".[80] This sentence is confusing, and is not explained further; instead it is rendered even more confusing by the introduction of an unclear distinction between "material facts", "subsidiary facts" and "essential facts", concepts which appear to bear a relation to the "relevant facts", but that relation is not elaborated upon.

69. The fact of the matter is that using the words "fact" and "evidence" interchangeably enables the Prosecution to convey the message that it need not establish the existence of the 41 incidents it reported.

70. This is reflected in paragraph 39 of the appeal brief :

> In relation to the above legal requirement, the DCC alleges the material facts pleaded at paragraphs 97 and 105 of the DCC, as well as the material facts that relate to the four Charged Incidents pleaded at paragraphs 93-95 and 101-103 of the DCC. These are the only facts to which the Chamber must apply the standard of proof under Article 61(7) to establish the legal element of the attack. All subsidiary facts included in the explanatory part of the DCC, including those related to the 41 Incidents merely describe the evidence from which proof of the material facts may be inferred.[81]

71. According to the Prosecution, the 41 incidents are "subsidiary facts" and therefore constitute "evidence" of the "material facts". For the Defence, the question is when the Prosecution is expected to provide evidence in relation to the "subsidiary facts", given that they are merely allegations until they are proven. Moreover, the Prosecution's assertion that "facts" "described the evidence" is simply a contradictory play with words, as facts do not prove or describe anything unless and until they are established. The truth of the matter is that the Prosecution is yet to prove that the 41 incidents took place, and this is precisely the reason for the Pre-Trial Chamber's admonishment.

72. The Prosecution is seeking to convince the Appeals Chamber that it need not prove that the 41 incidents took place:

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[80] ICC-02/11-01/11-474, para. 1 (emphasis supplied).
[81] *Idem*, para. 39.

> During the confirmation of charges hearing, the Prosecution emphasized that the facts included in "the four charged incidents alone, in and of themselves, are sufficient to establish the existence of a widespread or systematic attack against the civilian population", *thereby further clarifying that it did not plead facts that relate to the 41 Incidents*. The sole purpose of the evidence relating to the 41 Incidents was to support the evidence from the Charged Incidents that goes to proof of the features of the attack, such as the attacker's pattern of conduct as well as the pattern of victimization.[82]

How can the Prosecution claim that it did not "plead facts that relate to the 41 incidents" and then in the same breath go on to say that the same 41 incidents could constitute "evidence" of the attack? Absent persuasive evidence, it is quite simply impossible to prove that the 41 incidents took place, and therefore they cannot be invoked as "evidence" of anything.

73. One other good example of the Prosecution's reluctance to prove any of the 41 incidents is the language it uses: "The Prosecution must prove the facts that are essential to the elements of the crimes, which in this case do not include the 41 incidents".[83]

2.5.2 The Prosecution attempts to disguise the lack of persuasive evidence in support of its case by resorting to an abstract concept which can be interpreted as a broad assessment

74. The Prosecution uses another ploy to draw attention away from the weakness of its case by resorting to a subjective notion based on the possible impact of presenting information in large quantities. Quantity over quality. The Prosecution is trying to make sure that the Chamber does not dwell on each individual alleged fact but, rather, that it draws subjective conclusions based on an overall impression deriving from the Prosecution's allegations.

75. For instance, in its submissions on the "essential elements", the Prosecution asserts that "the Chamber must cumulatively look at all the evidence that the Prosecution provided in support of the material facts related to the attack".[84]

76. However, an overall subjective assessment is no substitute for an analysis of the evidence adduced by the Prosecution in support of its obligations. It is for the Chambers to test the evidence the Prosecution introduces in support of its case. If none of the facts is proven or if the evidence is inconclusive, an overall assessment cannot be undertaken, because it would be based on nothing.

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[82] *Idem*, para. 29 (emphasis added).
[83] *Idem*, item (iii) of the first ground of appeal.
[84] *Idem*, para. 41.

77. Examples of overall impression and overall assessment can be found in the Prosecution submissions on the definition of the contextual elements of crimes against humanity: "the notion of 'multiple commission of acts referred to in paragraph 1 against a civilian population' does not require proof of the individual Incidents".[85] In the Prosecution's view, an "incident" is of no legal relevance, and only the commission of "acts", the term used in the Statute, has relevance. On this basis, the Prosecution draws the conclusion that "acts" must be proven, but not "incidents".[86]

78. This tendency to use words interchangeably – "act" and "incident" – makes no difference, in that if the Prosecution has failed to prove that the "incidents" during which "acts" were committed took place, this means that it has failed to prove that those "acts" took place.

79. Finally, also in relation to the definition of crimes against humanity, the Prosecution is of the view that the Pre-Trial Chamber erred by requiring it to provide further information about the alleged perpetrators of the incidents in order for it to determine whether they acted pursuant to a State or organisational policy.[87] Here again, the Prosecution is of the view that the identities of the perpetrators in each incident are immaterial; all that matters is whether an attack viewed as a whole took place.[88]

80. This is yet another ploy employed by the Prosecution to avoid having to prove the facts relating to the contextual elements of crimes against humanity. For the attack to be considered as having been conducted in pursuance of a State or organisational policy, each of the factual elements of the attack must arise from such a policy. However, the Prosecution wants to make sure that the Pre-Trial Chamber does not focus on this issue, which is key in that it helps distinguish between isolated acts of violence and a crime against humanity.

81. Ultimately, pleading an overall subjective assessment eliminates the need to prove the contextual elements of crimes against humanity. The Prosecution is seeking to persuade the Appeals Chamber to allow it to resort to purely abstract reasoning instead of providing concrete evidence. In other words, it submits that any incident which took place at a given time in a given place constitutes evidence of a widespread or systematic attack, even in the absence of proof of such an incident, the identities of the perpetrators and victims or an explanation of their motives.

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[85] *Idem*, para. 49.
[86] *Idem*, para. 51.
[87] *Idem*, para. 52.
[88] *Idem*, para. 52.

82. The Prosecution's bid to avoid discharging its burden of proof in respect of the 41 incidents is reflective of where it stands on the standard of evidence at the confirmation stage; it believes that the standard should be nominal or even that there should be none.

3 On the Prosecution's second ground of appeal.

83. In the event that the Appeals Chamber should consider the second ground of appeal on the merits, the Defence would make the following observations:

3.1 Preliminary observation as to whether the ground should be raised at this stage of the proceedings

84. The Prosecution does not explain anywhere in its brief how the adjournment decision relates to the issue of the standard of proof, which it is seeking to place at the centre of the debate. The essence of the 3 June 2013 decision relates to a different issue, namely "evidentiary matters" and the probative value of the Prosecution evidence, or lack thereof.

85. It is premature to raise the question of whether the correct standard of proof is applied given that the 3 June 2013 decision is not a final decision on the charges but, rather, a decision to adjourn the proceedings. So technically speaking, no standard of proof has been *applied*, and the issue of its application will not arise until the final decision. Here again, the Prosecution is apprehensive, and wants the Appeals Chamber to rule on a matter which does not arise from the adjournment decision and is thus not definitive.

3.2 The first and second "sub-errors": The Prosecution's investigative and evidentiary obligations at the confirmation of charges hearing

86. The Prosecution contends that the Pre-Trial Chamber erred in requiring the Prosecutor to "largely complete her investigation"[89] (first sub-error). In particular, it argues that whilst some chambers have preferred the Prosecution to have largely completed its investigations, this constitutes not a legal obligation but a mere "policy objective".[90]

87. The Prosecution also considers that the Pre-Trial Chamber erred in requiring it to present all of its evidence at the confirmation hearing[91] (second sub-error).

88. These two sub-errors in fact relate to the same point, namely what the Chambers expect from the Prosecution before and during the confirmation of charges hearing, that is,

[89] *Idem*, para. 57.
[90] *Idem*, para. 59.
[91] *Idem*, para. 61.

whether the Prosecution should have largely completed its investigation by the time the hearing starts, and whether it should present its best evidence before the Pre-Trial Chamber.

3.2.1 The spirit of the confirmation of charges: the requirement of fairness incumbent upon the Prosecution

89. In spirit, the Defence cannot but agree with the investigative and evidentiary requirements set out by the Pre-Trial Chamber in its adjournment decision. Indeed, it is a matter of common sense to expect that after two years of investigations, the Prosecution should have developed a coherent line of reasoning, presented probative evidence in support of its allegations, determined a mode of liability and that is does not change depending on the circumstances. However, the Prosecution seems to believe that the accusations alone are sufficient ground for a trial to be held. It is operating on the assumption that regardless of the allegations it makes at the confirmation stage, it still has the option of changing them right up to the eleventh hour, that is to say, up until the commencement of the trial. In other words, the Prosecution considers itself exempt from any legal obligations prior to the commencement of the trial per se and believes that it has no responsibilities towards the accused or the chamber.

90. Yet it is not only common sense, but also the purpose of the confirmation hearing and the spirit of the Statute for the Prosecution to be required to submit its evidence to adversarial scrutiny for the first time. This is an opportunity for the accused person to express any views, and for the judges to weigh the submissions of both parties.[92] Adversarial proceedings are an opportunity to gauge the nature and strength of the Prosecution case. The purpose of the confirmation hearing is to protect the individual against groundless, unsubstantiated accusations, to avoid holding a needless trial and to ensure respect for the rights of the individual. However, by definition, such proceedings cannot take place at the commencement of the investigation or the issuance of the warrant of arrest. Confirmation proceedings are the first opportunity for the charges against an accused person to be tested and challenged. As the Pre-Trial Chamber stated in the adjournment decision, “This approach ensures continuity in the presentation of the case and safeguards the rights of the Defence, which should not be presented with a wholly different evidentiary case at trial.”[93]

91. In other words, safeguarding the rights of the Defence requires applying a minimum standard to the assessment of the evidence, which arises from a broader obligation, namely the duty of fairness incumbent on the Prosecution.

[92] Article 61 (6) of the Statute.
[93] ICC-02/11-01/11-432, para. 25.

92. By refusing to play by the rules or to honour this obligation, the Prosecution reveals the extent of its shortcomings, the weakness of its case, its misapprehension of the nature of the confirmation proceedings and, lastly, its determination to go to trial regardless of the Chamber's position.

93. Interestingly enough, the Prosecution attempts to downplay the role of the Pre-Trial Chamber, asserting that it exercises a "gatekeeper function".[94] In fact, the Prosecution even seems to suggest that the Chamber merely exercises a "rubberstamping function". Needless to say that gatekeepers are entitled to ask questions, questions like that the Sphinx put to those seeking to solve a riddle to which the answers decided their fate. In this regard, it is worth noting that the Prosecution case collapsed under questioning by the Defence and later by the "gatekeepers", i.e. the Pre-Trial Chamber. It is not Prosecution's attempt in its brief to downplay their role that will change this.

3.2.2 The Prosecution's freedom of action and the responsibility attached thereto

94. The requirement of fairness is one thing; the Prosecution's freedom in the conduct of its investigation and the presentation of its case is yet another. As such, the manner in which the Prosecution presented its case and the evidence in support of its allegations clearly reveals a deliberate strategy on its part and is not the result of misapprehension of its investigative obligations or its duties in making its case. A reading of the appeal brief militates in its entirety reveals that the Prosecution is fully satisfied with the way it has presented its case.

95. For that reason, instead of absolving the Prosecution, the Pre-Trial Chamber should therefore have taken note of the Prosecution's conduct and drawn consequences, as necessary. For example, since the Chamber noted in the adjournment decision the lack of a "full and proper" investigation[95] by the Prosecution and the lack of a "clear line of reasoning underpinning [the] specific allegations",[96] it should have reached a clear, logical conclusion, i.e., declined to confirm the charges.

3.3 <u>Third "sub-error": The issue of the existence of more or less forgiving jurisprudence is irrelevant</u>

96. The Prosecution contends that the Pre-Trial Chamber erred by finding that recent decisions of the Appeals Chamber modified past jurisprudence.[97] This argument is based on

[94] ICC-02/11-01/11-474, para. 56.
[95] ICC-02/11-01/11-432, para. 35.
[96] *Idem*, para. 17 footnote 30.
[97] ICC-02/11-01/11-474, para. 66.

its earlier submissions on the issue of the completion of the investigation and on presenting its evidence in the most complete form possible. The Prosecution asserts that the decisions cited by the Pre-Trial Chamber do not change the applicable law, and that it will always have the freedom to present its evidence without any obligation to substantiate it.[98]

97. The Prosecution misses the whole point. It is the view of Defence that the question as to whether recent decisions are more forgiving is of no relevance.

98. The real issue is whether the Prosecution should have known that the evidence it was pleading in support of its allegations was likely to be rejected due to lack of probative value. Previous decisions of the Court are clear in that the Chambers have many times, in various cases, highlighted the Prosecution's investigative shortcomings and weaknesses in its case, such as the use of NGO reports in lieu of full and proper witness statements. In *Mbarushimana*, Pre-Trial Chamber I stated in its assessment of the probative value of the Human Rights Watch reports that, "as a general principle, the Chamber finds that information based on anonymous hearsay must be given a low probative value in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information".[99] The Chamber further stated, "Accordingly, such information will be used only for the purpose of corroborating other evidence".[100]

99. In light of such decisions, it is difficult to understand why the Prosecution seems surprised by the Pre-Trial Chamber's refusal to confirm the charges on the basis of the evidence it submitted to it. Proof of 32 of the 45 incidents is based solely on reports by NGOs or UN agencies, as well as press articles (see Annex). This shows that Prosecution did not conduct investigations (in fact, eight of the other 13 incidents are only based on the assertions of a single witness); so how can the Prosecution claim that "[it] did not primarily rely on 'anonymous hearsay from NGO Reports, United Nations reports and press articles'"?[101]

100. The Pre-Trial Chamber highlighted the failure to investigate, saying that it "note[d] with serious concern that […] the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such evidence cannot in any way be presented as the fruits of a full and proper investigation."[102]

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[98] *Idem*, paras. 67-68.
[99] ICC-01/04-01/10-465-Red, para. 78.
[100] *Idem*.
[101] ICC-02/11-01/11-474, para. 7.
[102] ICC-02/11-01/11-432, para. 35.

101. In allowing the Prosecution additional investigative time, the Pre-Trial Chamber seems to have accepted the idea that the Prosecution may not have been familiar with applicable law or with its obligations towards the Chamber and the Defence. This relieves the Prosecution of any responsibility even though quite importantly, the parties, like the judges, are supposed to be in step with the state of the law. It is noteworthy that the decisions which, according to the Pre-Trial Chamber, the Prosecution may not have been familiar with, date back to May 2012, meaning the Prosecution had more than a year to acquaint itself with them. The Pre-Trial Chamber committed an error of law by omitting to take note of the Prosecution's failure, which it referred to in its 3 June decision, and to draw the logical conclusion therefrom by declining to confirm the charges.

3.4 Fourth "sub-error": the Chamber's approach to evidence

102. The Prosecution complains that the Pre-Trial Chamber adopted a "general disposition towards certain types of evidence";[103] the Prosecution considers this inconsistent with the principle that the Chamber is free to assess the evidence as it deems fit[104] and that the Prosecution is free to decide whether or not to present certain types of evidence.[105]

103. Concerning the first point, it will be noted that it is normal practice for chambers of international courts to state at the beginning of a judgment the value they attach to each type of evidence examined.[106] That practice is by no means incompatible with the freedom in the assessment of evidence; it derives from the fundamental requirement that all judicial decisions must be reasoned.

104. Concerning the second point, namely whether as a result of the Chamber's reasoning the Prosecution should not be permitted to present certain types of evidence at the confirmation hearing, it will be noted that the Prosecution seems to confuse the content of an item of evidence with its form, as is revealed in its submissions on hearsay.

105. Whether evidence can be characterised as hearsay depends on its content. The account of a person who has witnessed an accident is eyewitness evidence. On the other hand, the account of a person concerning what a friend told them about an accident is hearsay evidence, in the sense that it is based on the account of the person who witnessed the incident. This simple distinction has nothing to do with the form of the evidence. For instance, oral

[103] ICC-02/11-01/11-474, para. 70.
[104] *Idem*, paras. 72 and 73.
[105] *Idem*, paras. 71 and 74.
[106] See, for example, for the ICC: ICC-01/04-01/06-2842, p. 50; ICC-01/09-02/11-382-Red, p. 30; ICC-01/05-01/08-424, p. 12.

testimony can derive from hearsay, whilst direct testimony may be in written form (e.g. summary of a witness statement).

106. The fact that the Prosecution fails to discern such a basic distinction in criminal law shows that it has misunderstood the adjournment decision. For instance, the Pre-Trial Chamber never stated that the Prosecution should give precedence to *viva voce* testimony over documentary evidence; it merely stated that regardless of the *form* of the evidence (oral or written), it would attach lesser probative value to its *content* if it was hearsay.

107. The 3 June 2013 decision is quite clear on this point: "Although there is no general rule against hearsay evidence before this Court, it goes without saying that hearsay statements in the Prosecutor's documentary evidence will usually have less probative value. Reliance upon such evidence should thus be avoided wherever possible. This is all the more so when the hearsay in question is anonymous, in the sense that insufficient information is available about who made the observation being reported or from whom the source (irrespective of whether the source is a witness interviewed by the Prosecutor or a documentary item of evidence) obtained the information."[107]

108. Even so, the Prosecution continues to advance arguments in which it casually refers to form and content interchangeably.

109. For instance, it asserts that, "accordingly, testimonial evidence may well be presented by way of a summary prepared by the Prosecution, which transforms the testimony of a witness into hearsay evidence".[108] Now, a summary prepared by the Prosecution cannot be treated the same as hearsay testimony given that the two have nothing in common. Whether evidence is presented in the form of in-person testimony or in the form of a summary of the person's statement to the Prosecution has no bearing on the nature of the evidence itself, which may be direct, if the person was an eye-witness to the events, or hearsay, if based on the account of another person. The Prosecution fails to distinguish between the form (physical testimony or summary) and nature (eye-witness or hearsay) of evidence.

110. Likewise, when the Pre-Trial Chamber states that "testimonial evidence […] should, to the extent possible, be based on the first-hand and personal observations of the witness",[109]

[107] ICC-02/11-01/11-432, para. 28.
[108] ICC-02/11-01/11-474, para. 74.
[109] ICC-02/11-01/11-432, para. 27.

it is certainly referring to the content of the evidence. Yet the Prosecution interprets this to mean that the Chamber is asking it to call the witness for in-person testimony.[110]

111. Accordingly, the Prosecution's arguments in regard to this "sub-error" are in fact based on two major errors, in that it misapprehends the reasoning to be adopted by the Pre-Trial Chamber and, more importantly, the definition of hearsay evidence.

3.5 "Core error"

112. The Prosecution concludes its appeal by pointing to a "core-error" comprising all the aforementioned "sub-errors". In substance, it is of the view that, collectively, these "sub-errors" led the Chamber to misapprehend and improperly apply the standard of proof set out in article 61(7),[111] thereby elevating the substantial-grounds-to-believe test and, hence, preventing the Prosecution from making its case.[112]

3.5.1 Weaknesses in the Prosecution's reasoning

113. On the basis of the four "sub-errors" it identifies, the Prosecution draws conclusions without explaining how they relate to the reasoning adopted in committing the four "sub-errors".

114. Concerning the first and second sub-errors, the Prosecution states: "the majority went beyond the evidentiary requirements of Article 61(7). It elevated the requirements for the Prosecution to meet the standard of proof for confirmation of charges and effectively equated it to that required for a finding of guilt beyond reasonable doubt".[113] The Prosecution does not explain how it arrived at this conclusion. Even assuming that the Pre-Trial Chamber committed an error by requiring the Prosecution to complete its investigation or to present the entirety of its evidence, the Prosecution does not explain how this has resulted in the application of a higher standard of proof. What the Chamber is asking the Prosecution is to present convincing evidence; it is when the Chamber is in possession of such evidence that it will be in a position to assess it in accordance with a particular standard of proof. It will then be open to the Prosecution to challenge the standard of proof applied.

115. As regards the third sub-error, the Prosecution contends that, as a result of an erroneous interpretation of the jurisprudence, "the Chamber departed from the 'more forgiving' approach taken by Pre-Trial Chambers previously and adopted a more stringent, or

[110] ICC-02/11-01/11-474, para. 71.
[111] *Idem*, part (vi) of the second ground of appeal.
[112] *Idem*, para. 80.
[113] *Idem*, para. 76.

at least a 'less forgiving' approach in the application of the standard of proof under Article 61(7)".[114]

116. However, in the instant case the Pre-Trial Chamber did not apply a less forgiving standard, contrary to the Prosecution's allegation, but rather merely applied the jurisdiction of the Appeals Chamber on evidentiary matters to its assessment of the Prosecution evidence.

117. Finally, as regards the fourth sub-error, the Prosecution contends that the Chamber's decision to exclude "*ab initio*"[115] certain types of evidence "results in an elevated threshold of proof under Article 61(7)".[116]

118. Yet the Chamber certainly did not exclude "*ab initio*" certain types of evidence. A reading of the adjournment decision reveals that the Pre-Trial Chamber proceeded with utmost caution in its assessment of the evidence. It introduces its discussion as follows: "In relation to the quality of individual items of evidence, the Chamber considers that it would be unhelpful to formulate rigid formal rules, as each exhibit and every witness is unique and must be evaluated on its own merits. Nevertheless, the Chamber does consider it useful to express its general disposition towards certain types of evidence."[117] Thereafter, it refrains from adopting an overly strong and rigid position, only using expressions such as "it is preferable",[118] "wherever possible"[119] and, more generally, the conditional tense. This is a far cry from the Prosecution's caricature of the decision.

3.5.2 The Prosecution misapprehends the 3 June 2013 decision

119. The Prosecution seems to suggest that the 3 June 2013 is inherently unfavourable to it and that the points raised in its appeal brief clearly show that the Chamber is bent on finding against it. The truth of the matter is that the 3 June 2013 decision is far from being entirely negative; in fact, it provides the Prosecution with a golden opportunity to get out of its present predicament.

120. This is particularly true of the third "sub-error", in that the Prosecution misconstrues the purpose of the Chamber's reflections on "past jurisprudence". The reason why the Pre-Trial Chamber draws a distinction between more forgiving past jurisprudence and more demanding recent jurisprudence in regard to the Prosecution is not to elevate the standard of

[114] *Idem*, para. 77.
[115] *Idem*, para. 78.
[116] *Idem*, para. 78.
[117] ICC-02/11-01/11-432, para. 26.
[118] *Idem*, para. 27
[119] *Idem*, para. 28.

proof applicable to the Prosecution but rather, to "save" the Prosecution by identifying a reason which might "explain" the weakness of the prosecution evidence and to "justify" the Prosecution's failure to put forward a more convincing case. So by raising this "sub-error", the Prosecution is, so to speak, sawing off the – thin – branch on which it is sitting, obviously not seeming to realise that its case is on very shaky ground.

3.5.3 The spirit of the confirmation hearing

121. The Prosecution concludes its submissions by stating that the confirmation hearing should not be a "mini-trial"[120] and that the Pre-Trial Chamber "usurped"[121] the functions of the Trial Chamber by exceeding the limited powers which it exercises as part of its "gatekeeper function".[122]

122. A reading of the appeal brief in its entirety clearly reveals that the Prosecution believes that it is required neither to present its best evidence nor to prove anything at the confirmation stage. In its appeal brief, the Prosecution seems to suggest that the confirmation hearing is just a minor procedural step akin to issuing an arrest warrant. It would seem to perceive the confirmation hearing as an opportunity for a detailed presentation of its charges to the Chamber without actually having to substantiate them.

123. It is noteworthy that the Prosecution completely ignores the fact that the confirmation hearing serves the purpose of safeguarding the rights of the Defence. For instance, when recalling the "principles" applicable to the confirmation hearing, it is careful to avoid any reference to the confirmation proceedings as being above all intended to protect the suspect against wrongful prosecution, even though the Pre-Trial Chamber highlights this in its 3 June 2013 decision.[123]

4 Conclusion

124. Upon reading the Prosecution's appeal brief, one even forgets the real subject of the present appeal, because the Prosecution goes far off-topic instead of addressing the issue reformulated by the Pre-Trial Chamber.

125. The question was whether the Prosecution could rely on the alleged 41 incidents, in addition to the four main incidents, to demonstrate the existence of an "attack", without leading any evidence that they took place or, in the event that they were shown to have taken

[120] ICC-02/11-01/11-474, para. 79.
[121] *Idem*, para. 80.
[122] *Idem*.
[123] ICC-02/11-01/11-432, para. 18.

place, without leading any evidence that they relate to the elements of crimes against humanity,

126. The Prosecution's current position is that the Chamber should not take into account the reality and nature of the 41 incidents because these incidents are not relevant to its demonstration of the existence of an attack. In a way, they are further proof that the attack did take place. And yet 10 per cent of the Prosecution's DCC is about these 41 incidents;[124] they form the cornerstone of its demonstration of the existence of an attack; and at the confirmation hearing, it tried to make up for the weakness of its arguments about the four main incidents by repeatedly referring to the other 41 incidents in a bid to sound credible.[125] It is now changing its tune. The Appeals Chamber must take note of this, because it implies far-reaching changes to the charges. But then, it means that the entire Prosecution case falls apart, including the four main incidents, since it argues that the 45 incidents are interlinked.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER,

In respect of the First Ground of Appeal:

- To find that the Pre-Trial Chamber committed no legal or factual error in considering that the Prosecution should present evidence of a sufficient number of incidents underpinning the allegation of the existence of the contextual elements of crimes against humanity.

In respect of the Second Ground of Appeal:

- To reject the appeal because it exceeds the authorised scope; or

Alternatively, to find that in its adjournment decision the Pre-Trial Chamber committed no error of law or of fact with respect to the standard of proof applicable at the confirmation stage.

[124] ICC-02/11-01/11-357-Conf-Anx1, paras. 20-29.
[125] Hearing of 19 February 2013, ICC-02/11-01/11-T-15-CONF-FRA, pp. 37-48.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 20 September 2013, at The Hague, The Netherlands