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APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO

**Public document
with confidential Annex 1 and public Annex 2**

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 the Prosecutor

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

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INTRODUCTION

1. This appeal concerns the question 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. In addition, it concerns the proper interpretation and application of the “substantial grounds to believe” test under Article 61(7) to the relevant facts of the case. These two questions are inextricably linked and one cannot be answered without the other.

2. On 3 June 2013, the Majority of Pre-Trial Chamber I (“Majority”) issued the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (“Decision” or “Impugned Decision”).¹ The Majority requested the Prosecution to consider providing further evidence or conducting further investigations with respect to a number of issues identified in the Decision.² The Presiding Judge appended a dissenting opinion (“Dissenting Opinion”).³

3. The Decision also requires that “each incident underlying the contextual elements” or “a sufficient number of incidents” that the Prosecution relies upon to establish the existence of the “attack” pursuant to Article 7 (“Incidents”) be established to the standard of proof under Article 61(7).⁴ In its document containing the charges, the Prosecution identified four incidents during which the crimes charged were committed (“Charged Incidents”) and which according to the Prosecution, “in and of themselves, are sufficient to establish the existence of a widespread or systematic attack against the civilian population”.⁵ It also led evidence in relation to another 41 Incidents to support evidence from the Charged Incidents that goes to demonstrating the features of the attack, but in

¹ ICC-02/11-01/11-432.

² Decision, para.44.

³ ICC-02/11-01/11-432-Anx-Corr-Anx.

⁴ Decision, paras.21-23.

⁵ ICC-02/11-01/11-420-red, para.30. See also Decision, fn.49.

relation to which the Prosecution did not plead any material facts (“41 Incidents”).

4. In addition, the Majority requires that the Prosecutor “largely complete her investigation”;⁶ and “present *all* her evidence [as well as] her strongest possible case”,⁷ in order to meet the standard of proof applicable at the confirmation stage. In addition, it provides a detailed explanation of its “general disposition towards certain types of evidence”.⁸ Although the Majority is aware that this approach departs from that previously taken by other Pre-Trial Chambers when making decisions pursuant to Article 61(7), it finds that this departure is required by recent jurisprudence of the Appeals Chamber.⁹
5. On 31 July 2013, the Majority, the Presiding Judge dissenting,¹⁰ certified the following issue for appeal (“the Issue”):¹¹

Whether 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.

6. The Prosecution submits that the Decision involves the following errors of law that are directly related to the issue for which leave to appeal was granted:

⁶ Decision, paras.25, 37.

⁷ Decision, paras.25, 37 (emphasis added).

⁸ Decision, para.26; see also paras.27-34.

⁹ Decision, para.37.

¹⁰ ICC-02/11-01/11-464-Anx.

¹¹ ICC-02/11-01/11-464.

- a) 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 (“First Ground of Appeal”); and
 - b) The Majority erred in its interpretation and application of the standard of proof under Article 61(7) of the Statute (“Second Ground of Appeal”).
7. This appeal does not concern the question whether the evidence before the Chamber is sufficient to establish substantial grounds to believe that Mr Gbagbo committed each of the crimes charged. That matter will be decided by the Pre-Trial Chamber in its upcoming ruling pursuant to Article 61(7). However, in order for the Appeals Chamber to fully appreciate the gravity of the above errors raised, the Prosecution submits that in this case it has relied on a vast amount of evidence, the quantity and quality of which was misapprehended and wrongly assessed by the Majority as a result of the errors raised in this appeal. In order to establish the existence of the “attack directed against any civilian population”, the Prosecution did not primarily rely on “anonymous hearsay from NGO Reports, United Nations reports and press articles”.¹² Instead, it relied on 166 documents that relate to four Charged Incidents¹³ as well as on 85 documents that relate to the 41 Incidents.¹⁴ These include the transcription of witness statements taken pursuant to Rule 112;¹⁵ witness statements taken pursuant to Rule 111;¹⁶ summaries of witness statement presented pursuant to Article 61(5);¹⁷ as well as audio and video material. To provide a broader context and support

¹² Decision, para.36.

¹³ ICC-02/11-01/11-357-Conf-Anx1 (Footnoted DCC), fns.180-247.

¹⁴ See evidence included or referred to in ICC-02/11-01/11-357-Conf-Anx1 (Footnoted DCC), fns.91-179.

¹⁵ Charged Incidents: 21 statements; 41 Incidents: 15 statements.

¹⁶ Charged Incidents: 14 statements; 41 Incidents, 9 statements.

¹⁷ Charged Incidents: 2 statements; 41 Incidents: 1 statement.

for this evidence, the Prosecution also relied on contemporaneous reports authored by the UN, NGOs or other entities; and on media or press articles.¹⁸

8. The Prosecution notes that the Majority seeks to clarify and to some extent modify the Impugned Decision in its decision granting leave to appeal.¹⁹ The Appeals Chamber has disapproved the issuance of subsequent clarifications of prior decision by a Chamber and has stated generally that such clarifications are “of questionable legality and are undesirable, because they affect the finality of judicial decisions”.²⁰ The Prosecution therefore submits that for the purposes of this appeal, the Appeals Chamber should focus on the Impugned Decision and disregard any subsequent interpretation of that Decision by the Majority. The leave to appeal decision is relevant only to the extent as it sets out the Issue certified for appeal.

THE GROUNDS OF APPEAL ARE RELATED TO THE ISSUE

(i) The Legal framework concerning the relation between an issue and a ground of appeal/error raised on appeal

9. The Appeals Chamber has ruled that an “issue” within the meaning of Article 82(1)(d) is “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”²¹ The Prosecution submits that the notion of “issue” is not equivalent to that of a “ground of appeal” or an “error” that an appellant may raise in an appeal. In fact, the

¹⁸ The Prosecution also relied on extensive additional evidence to support the widespread and systematic nature of the attack, as well as the policy requirement under Article 7(2)(a). See evidence included or referred to in ICC-02/11-01/11-357-Conf-Anx1 (Footnoted DCC), fns.91-179.

¹⁹ ICC-02/11-01/11-464; ICC-02/11-01/11-464-Anx, paras.7-8.

²⁰ ICC-01/04-01-06-2205, para.92.

²¹ ICC-01/04-168 OA3, para.9.

correctness of a decision is irrelevant to an issue, while a ground of appeal revolves around an identified error in the decision.²²

10. Thus, the issue certified for appeal does not define the grounds of appeal or the errors raised by an appellant. It only defines the scope within which an appellant can raise grounds of appeal, in the sense that there has to be a nexus between the issue certified for appeal and the grounds of appeal or errors raised on appeal.²³ The Appeals Chamber has accepted as properly raised on appeal specific questions raised by an appellant even when leave to appeal 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”.²⁴ It also accepted a question that was not expressly referred to in the issue certified for appeal, but that was “implicitly contained” therein.²⁵
11. Similarly, the Appeals Chamber of the ICTY has examined matters not explicitly certified for appeal by the Trial Chamber, where they were “inextricably linked” to the question under consideration.²⁶ Moreover, the Appeals Chamber of the ICTR has held that “once one such issue is identified and an interlocutory appeal is certified, allowing the Appeals Chamber to resolve related issues at the same time may cause little additional interruption and may ultimately serve the goals of fairness and expeditiousness”.²⁷ National appellate jurisdictions have also held that “questions logically antecedent and essential to the order under review” fall within the jurisdiction of a court of appeals in reviewing an order certified for interlocutory appeal. These questions include “issues that are logically

²² ICC-02/04-01/05-20-US-Exp, para.22 (unsealed pursuant to ICC-02/04-01/05-52).

²³ See for instance ICC-02/11-01/11-307, para.72.

²⁴ ICC-01/04-01/06-2205 OA15 OA16, para.20.

²⁵ *Ibid.*

²⁶ *Prosecutor v. Seselj*, IT-03-67-ar73.4, Decision on appeal against the Trial Chamber’s decision (no.2) on assignment of counsel, 8 December 2006, paras.20, 25.

²⁷ *Prosecutor v. Karemera*, ICTR-98-44-AR73(c), Decision on Prosecutor’s interlocutory appeal of decision on judicial notice, 16 June 2006, para.17.

interwoven with the explicitly identified issue and which were properly presented by the appellant.”²⁸

(ii) The First Ground of Appeal is directly related to the Issue

12. Although the Majority has reformulated the issue for which the Prosecution sought leave to appeal, the essence of the Issue that was certified remains the question of whether the Prosecution must individually establish the Incidents underlying the contextual element of the “attack” to the standard of proof under Article 61(7).²⁹ This is exactly the scope of the Prosecution’s First Ground of Appeal, which is therefore directly related to the Issue.
13. The Majority qualified the Issue by including the assumption that “the Prosecutor alleges that an ‘attack against any civilian population’ *consists* of multiple smaller incidents”.³⁰ The term “consists” is ambiguous and should be interpreted in the context of the Prosecution’s characterisation of its case, namely that the “attack” is established by the four Charged Incidents and that the evidence relating to the 41 Incidents merely supports evidence from the Charged Incidents that goes to demonstrating the features of the attack. Although the Majority eschewed the terms “in this case” from the issue as presented by the Prosecution,³¹ the Issue cannot be interpreted as being divorced from the context of this case. Otherwise the Issue would not arise out of the Decision, no error could ever materially impact on the Decision, and the reformulation of the Issue would not achieve its stated purpose that is to “receiv[e] meaningful guidance by the Appeals Chamber”.³²
14. Moreover, one of the arguments under the Prosecution’s First Ground of Appeal is that an “attack” is not a mechanical aggregate of “incidents”, but a “course of

²⁸ *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1196 (U.S.App.D.C.Cir. 2005).

²⁹ “Whether the Pre-Trial Chamber erred in holding that [...] a sufficient number of these incidents must be proved to the requisite standard [...].”

³⁰ Emphasis added.

³¹ ICC-02/11-01/11-435, para.3(ii).

³² ICC-02/11-01/11-464, para.36.

conduct” involving multiple acts under Article 7(1). To assume that the “attack” is constituted by incidents for the purposes of framing the Issue would be to preempt and decide the merits of an appeal, which is not the function of a Pre-Trial Chamber. The same can be said about the Majority’s note that “the answer to [the] question [certified for appeal] 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’”.³³ An appellant is free to raise any argument in support of its ground of appeal and it is for the Appeals Chamber to determine what arguments to consider and how to solve the question before it. The fact that the Majority comes to a different conclusion on the merits of these questions has no impact on the direct relation between the First Ground of Appeal and the Issue.

(iii) The Second Ground of Appeal is directly related to the Issue

15. As noted above, the essence of the Issue is whether the Prosecution must individually establish each of the Incidents underlying the contextual element of the “attack” to the “requisite standard”.³⁴ By reformulating the Issue, the Majority has effectively combined the constitutive elements of the issue for which it rejected leave to appeal with the constitutive elements of the issue certified for appeal. This is demonstrated most clearly by the fact that the Issue qualifies the meaning of the “requisite standard”,³⁵ thereby including the notion of the interpretation and application of the “requisite standard” of proof into the scope of the certified Issue.³⁶ Indeed, in its decision granting an extension of the

³³ ICC-02/11-01/11-464, para.37.

³⁴ Whether the Pre-Trial Chamber erred in holding that [...] a sufficient number of these incidents must be proved to the requisite standard [...].

³⁵ ICC-02/11-01/11-464, para.36: “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”. The merits of the interpretation of the term “requisite standard” is to be determined by the Appeals Chamber. The formulation of the Issue cannot pre-determine that matter.

³⁶ The “requisite standard” can only refer to that under Article 61(7), as under the Statute that is the only standard of proof for fact finding at the confirmation stage.

page limit, the Appeals Chamber did not fail to notice the “the nature and complexity of the [I]ssue”.³⁷

16. Under the terms of the Issue, the Appeals Chamber cannot decide whether certain facts need to be established without determining the meaning of the “requisite standard” to which they must be established. Therefore, the question raised under the Second Ground of Appeal (i.e. the error regarding the Majority’s interpretation and application of the standard of proof under Article 61(7)) is “directly related”, “implicitly contained” and “inextricably linked” to the Issue and it can legitimately be raised in this appeal.³⁸

THE ERRORS

A. First Ground of Appeal: 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

(i) *Overview of the First Ground of Appeal*

17. The Prosecution pleaded specific *facts and circumstances* at paragraphs 97 and 105 of the Prosecution’s updated document containing the charges (“DCC”)³⁹ that relate to the chapeau element under Article 7 of the “attack directed against any civilian population”. These paragraphs, by reference, include the facts and

³⁷ ICC-02/11-01/11-471 OA5, para.7.

³⁸ The Prosecution had argued in its application for leave to appeal that the first two issues for which it sought certification are linked to each other: ICC-02/11-01/11-435, para.13.

³⁹ ICC-02/11-01/11-357-Conf-Anx1. A footnoted version of the DCC with references to the relevant evidence and e-Court links to the evidence was sent to the Chamber, the Defence and the legal representative of victims (“Footnoted DCC”), see email from Prosecution case manager sent on 17 January 2013, at 18:20 hours (Annex 1). At the beginning of the confirmation of charges hearing, the Footnoted DCC was registered as an HNE on the record of the case (ICC-02/11-01/11-421-Conf-Anx1).

circumstances that relate to the four Charged Incidents.⁴⁰ 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”.⁴¹ From these four Charged Incidents derive at least 294 acts directed against a civilian population under Article 7(1),⁴² which constitute “acts referred to in paragraph 1” of Article 7.⁴³ Pursuant to the Chamber’s instruction to “clearly and comprehensively identif[y] and distinguish[...] [the material facts underlying the charges on which the Prosecutor seeks to bring the person to trial] from those facts of a mere subsidiary nature”,⁴⁴ the Prosecution did not plead material facts that relate to the 41 Incidents.

18. In order to establish the material facts relevant to the attack, the Prosecution relied primarily on evidence in relation to the Charged Incidents. It also relied on other evidence that relates to the 41 Incidents. The purpose of the latter was to support evidence from the Charged Incidents that goes to proof of the attacker’s pattern of conduct as well as the pattern of victimization.⁴⁵
19. The Majority correctly states that the evidentiary threshold under Article 61(7) applies to all “facts and circumstances” of the case and that accordingly it “is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the

⁴⁰ DCC, paras.93-95.

⁴¹ ICC-02/11-01/11-420-red, para.30. See also Decision, fn.49.

⁴² DCC, paras.93-95, 101-103. The Prosecution alleged that the suspect was responsible for the killing of at least 166 persons, rape of at least 34 persons and inflicting serious bodily injury and suffering on at least 94 persons.

⁴³ Article 7(2)(a).

⁴⁴ ICC-02/11-01/11-325, paras.27-28.

⁴⁵ The Prosecution further relied on additional evidence to support the widespread and systematic nature of the attack, as well as the policy requirement under Article 7(2)(a). See Footnoted DCC, paras.93-95, 97, 101-103, 105, that refer to or cross reference to evidence included in paras.30-42 (fns.91-179), 59 (fns.250) and 85(fns.395-400) of the Footnoted DCC. This evidence is used in addition that that which relates to the 45 Incidents (paras.20-26 (fns.48-90) and paras.43-56 (fns.180-247)). Moreover, the evidence that describes the attackers (i.e. pro-Gbagbo forces) must also be taken into consideration (paras.60-67, fts.251-304).

suspect”.⁴⁶ However, the Majority then goes further to find that “*each incident underlying the contextual elements* must be proved to the same threshold that is applicable to all other facts”, namely that under Article 61(7).⁴⁷ It also found that “[w]hen alleging the existence of an ‘attack directed against any civilian population’ by way of describing a series of incidents, the Prosecutor must *establish to the requisite threshold that a sufficient number of incidents* relevant to the establishment of the alleged ‘attack’ took place”.⁴⁸

20. The Majority understood this evidentiary requirement to apply to each of the 45 Incidents, namely to the facts relevant to the four Charged Incidents as well as to the evidence relating to the other 41 Incidents adduced as mere support of the evidence that relates to the Charged Incidents. It found that “the individual incidents alleged by the Prosecutor in support of her allegation that there was an ‘attack directed against any civilian population’ are part of the facts and circumstances for the purposes of article 74(2) of the Statute and therefore must be proved to the requisite threshold of ‘substantial grounds to believe’”.⁴⁹ It reiterated that “incidents [...] *constitute* the attack [and] are ‘facts’ which ‘support the [contextual] legal elements of the crimes charged’”.⁵⁰ As a result, the Majority analysed whether each of the 45 Incidents “are proven”⁵¹ to the threshold of “substantial grounds to believe”,⁵² and found that “the majority [of the 45 Incidents] are proven solely with anonymous hearsay from NGO Reports, United Nations reports and press articles”.⁵³

21. The Prosecution submits that in the context of this case, the Majority erred by requiring that a sufficient number of Incidents, including the 41 Incidents, must be established to the standard of proof enshrined in Article 61(7) and by

⁴⁶ Decision, paras.19-20.

⁴⁷ Decision, paras.21-22 (emphasis added).

⁴⁸ Decision, para.23.

⁴⁹ Decision, para.21.

⁵⁰ Decision, para.21.

⁵¹ Decision, para.36.

⁵² Decision, paras.21-23.

⁵³ Decision, paras.36.

applying that standard of proof to the subsidiary facts and evidence that relate to the 41 Incidents.

22. The Prosecution puts forward three sets of arguments, each of which individually demonstrates the error. First, the “facts and circumstances” contained in the DCC that need to be established and that are relevant to the existence of the “attack” do not refer to any “incidents” other than the four Charged Incidents. Second, 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 relevant to the 41 Incidents are not essential to establishing the “attack”. Third, the requirement that the Incidents be individually established to the threshold of Article 61(7) is a result of the Majority’s misinterpretation and misapplication of the term “attack” under Article 7(2)(a), as encompassing a certain number of “incidents”, rather than a “course of conduct involving a multiple commission of acts”.

(ii) The Prosecution must establish the “facts and circumstances”, which in this case does not include the 41 Incidents

23. 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. In this case, the full Chamber had instructed the Prosecution to “clearly and comprehensively identif[y] and distinguish[...] [the material facts underlying the charges] from those facts of a mere subsidiary nature”.⁵⁴ In that same decision the Chamber stated that “subsidiary facts may be analysed by the Pre-Trial Chamber insofar as relevant to determine the existence of material facts, but are not themselves part of the charges and are not subject to

⁵⁴ ICC-02/11-01/11-325, paras.27-28.

confirmation by the Pre-Trial Chamber under article 61(7) of the Statute.”⁵⁵ The Prosecution presented its case subject to these instructions. However, the Majority then departed from its own decision and effectively conflated the notions of material facts, and subsidiary facts and evidence, and instead of confining the application of the standard of proof to the former, it erroneously also applied it to the latter.

The applicable legal provisions

24. The “facts and circumstances described in the charges” do not refer to all facts that are contained in the narrative of the DCC. The Appeals Chamber made this clear when stating that “the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crimes charged [and] must be distinguished from the evidence put forward by the Prosecutor [...] as well as background or other information that, although contained in the [DCC], does not support the legal elements of the crimes charged”.⁵⁶
25. On the basis of this ruling, Pre-Trial Chamber I in the *Banda and Jerbo* case distinguished the “facts and circumstances described in the charges” from “other facts which are not mentioned in the charges but which are subsidiary or otherwise related to them, in particular since proof of the material facts may be inferred from them”.⁵⁷ In that same decision, Pre-Trial Chamber I also noted that “the Pre-Trial Chamber is not required to confirm or not confirm the ‘document containing the charges’ which is an instrument of an explanatory nature provided by the Prosecutor for the ultimate benefit of the Defence and the Chamber itself, and whose content, with the exception of the charges, is not the

⁵⁵ ICC-02/11-01/11-325, para.27.

⁵⁶ ICC-01/04-01/06-2205 OA15 OA16, fn.163.

⁵⁷ ICC-02/05-03/09-121-Corr-Red, paras.36-37.

subject-matter of the decision on the confirmation of charges.”⁵⁸ Pre-Trial Chamber II and Trial Chamber V endorsed this approach.⁵⁹

The facts and circumstances of the DCC in this case

26. The full Pre-Trial Chamber in this case endorsed the above jurisprudence, and, as noted above, it instructed the Prosecution to file an updated DCC in which “the material facts [are] clearly [...] distinguished from those facts of a mere subsidiary nature.”⁶⁰ In compliance with this instruction the Prosecution did not plead any material facts relevant to the 41 Incidents. Facts that relate to the 41 Incidents are “subsidiary” within the meaning of the above jurisprudence and the guidance of the Chamber in this case.
27. The DCC is structured into two main parts. Firstly, sections A to G of the DCC (paras.1-91) provide background information, describe the evidence from which proof of the material facts may be inferred. Secondly, sections H and I of the DCC (paras.92-108) set out the “charges” in accordance with Regulation 52. Each of these final two sections containing the charges consist of a first part laying out the relevant “facts and circumstances” of the case⁶¹ and a second part providing for the “legal characterisation of the facts” in relation to each count. The submissions regarding the “legal characterisation of the facts” refer to discrete portions of the “facts and circumstances”, but not to other facts and evidence included in sections A to G of the DCC.
28. As part of the Prosecution’s allegations in relation to chapeau elements of the crimes under Article 7, the DCC alleges the following facts and circumstances: “The crimes referred to under paragraphs 93-95 [and 101-103] above were committed as part of a widespread and systematic attack by pro-Gbagbo forces directed against civilians perceived to support OUATTARA, and pursuant to a

⁵⁸ ICC-02/05-03/09-121-Corr-Red, para.38.

⁵⁹ ICC-01/09-02/11-382-Red, paras.56-60; ICC-01/09-01/11-373, paras.44-48; ICC-01/09-02/11-536, paras.13-14.

⁶⁰ ICC-02/11-01/11-325, paras.27-28.

⁶¹ See titles prior to paras.92 and 101.

Policy adopted by GBAGBO, members of his inner circle, as well as other commanders and member of pro-GBAGBO forces to launch violent attacks against GBAGBO's political opponent OUATTARA, members of OUATTARA's political ground and civilians perceived to support OUATTARA in order to retain power by all means, including by lethal force".⁶² By referring to paragraphs 93-95 and 101-103, the facts related to the Charged Incidents are included into in the charges regarding the chapeau elements under Article 7.⁶³

29. 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",⁶⁴ 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.

(iii) The Prosecution must prove the facts that are essential to establish the elements of the crimes, which in this case do not include the 41 Incidents

30. 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 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.

⁶² DCC, paras.97, 105. To 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).

⁶³ These latter facts are supported by the "facts and evidence" in footnotes 427- 436 of the Footnoted DCC.

⁶⁴ ICC-02/11-01/11-420-red, para.30. See also Decision, fn.49.

The law on the limited application of the standard of proof

31. Article 61(7) provides that the standard of proof of “substantial grounds to believe” applies to the Chamber’s finding that “the person committed each of the crimes charged”. Similarly, Article 66(3) states at the end of the trial, the “beyond reasonable doubt” standard applies to the finding of “guilt”. Neither of these provisions 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. Rather, they suggest that the standards apply to the ultimate conclusions, that is, whether “the person committed the crimes charged” or whether he is “guilty” of the crimes charged. A person can be found to have committed a crime or be guilty of such crime if all the elements of the crime, including the contextual elements and the element of the applicable mode of liability are established by the evidence to the requisite threshold.
32. To date, Chambers of this Court have followed this approach. Trial Chamber I in the *Lubanga* case found that “[f]or a conviction, *each element of the particular offence* charged must be established ‘beyond reasonable doubt’”.⁶⁵ Similarly, in the *Ngudjolo* case, Trial Chamber II found that “the standard of proof ‘beyond reasonable doubt’ must be applied to establish *the facts forming the elements of the crime or the mode of liability* alleged against the accused, as well as with respect to the *facts which are indispensable for entering a conviction*”.⁶⁶ The Prosecution submits that such “indispensable facts” are those that provide “sufficient [...] factual basis”⁶⁷ to explain how the abstract legal concepts of the elements of the crime apply to the concrete case charged by the Prosecution.

⁶⁵ ICC-01/04-01/06-2842, para.92 (emphasis added).

⁶⁶ ICC-01/04-02/12-3, para.35. While Trial Chamber II in the *Ngudjolo* case correctly spelled out the legal standard, the Prosecution appealed the manner in which it was applied to the facts of the case (see ICC-01/04-02/12-39, paras.37-69).

⁶⁷ Regulation 52(b).

33. This is also how a number of domestic jurisdictions go about establishing guilt of an accused in criminal trials. The High Court of Australia ruled that “[T]he prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact — every piece of evidence — relied upon to prove an element by inference must itself be proved beyond reasonable doubt. [...] Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately. [...] In none of [the jurisprudence] was it suggested that, where the prosecution relies upon circumstantial evidence, an inference of guilt can properly be drawn only from facts which have been proved beyond reasonable doubt. Nor was it suggested that the jury should be given a direction to that effect.”⁶⁸
34. Similarly, the Supreme Court of Canada found that “[i]t is misdirection to instruct the jury to apply the standard of reasonable doubt to individual pieces of evidence. [...] The two-stage application of the criminal standard is wrong in principle because the function of a standard of proof is not the weighing of individual items of evidence but the determination of ultimate issues. [...] During the process of deliberation, the jury must consider the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. This of necessity requires that each element of the offence or issue be proved beyond a reasonable doubt.”⁶⁹
35. The New Zealand Court of Appeal also found that it is only the elements of the offence, the essential factual components or *facta probanda*, which the prosecution has to prove beyond reasonable doubt. It is an error to dissect the evidence

⁶⁸ *Shepherd v. R* (1990), 97 ALR 161 at 164-166; see also *Chamberlain v. R (No 2)* (1984), 153 CLR 521 at 626.

⁶⁹ *R v. Morin*, [1988] 2 SCR 345 at 346-347, 354-362; see also *R v. JMH*, [2011] 3 SCR 197, at para 31; *R v. MacKenzie*, [1993] 1 SCR 212.

down into its component parts and decide whether they are free from reasonable doubt.⁷⁰

36. Similarly, the US Court of Appeals, 2nd Circuit stated that “[i]t is settled that the Government's burden of proof beyond a reasonable doubt applies to each element of each offense charged. It is also true that the burden does not operate upon each of the many subsidiary facts on which the prosecution may collectively rely to persuade the jury that a particular element has been established beyond a reasonable doubt”.⁷¹

37. The Appeals Chambers of the UN *ad hoc* Tribunals also endorsed this approach. They found that “not every factual finding in the Trial Judgment must be established beyond a reasonable doubt. [...] ‘[T]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt.’”⁷²

The material facts that in this case need to be established to the threshold of Article 61(7)

38. In this case, the Prosecution alleged that the crimes charged amount to crimes against humanity pursuant to Article 7, which requires proof that they were “committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack”. Article 7(2)(a) defines “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any

⁷⁰ *Thomas v. The Queen* [1972] NZLR 34 (CA) at 37-38. This holding has been approved and adopted by Northern Ireland Court of Appeal: *R v. Meehan*, [1991] 6 NIJB 1 at 32-34; See also in *R v. Murray* (1991), [1993] NI 105 at 126-127.

⁷¹ *United States v. Viafara-Rodriguez*, 729 F.2d 912, (2d Cir. N.Y. 1984) at 913 (footnotes omitted).

⁷² *Prosecutor v. Halilovic*, Appeal Judgment, IT-01-48-A, 16 October 2007, para.125; *Prosecutor v. Blagojevic and Jokic*, Appeal Judgement, IT-02-60-A, 9 May 2007, para.226; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgment, 7 July 2006, para.174. For an application of this principle, see *Prosecutor v. Kupreskic et al*, Appeal Judgement, IT-95-16-A, 23 October 2001, para.226.

civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.

39. 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.⁷³
40. The material facts included in paragraphs 97 and 105 of the DCC identify the perpetrators of the attack, the civilian population that was targeted by the attack and the policy in furtherance of which the crimes were committed. The material facts included in paragraphs 93-96 and 101-104 of the DCC provide further detail about the “attack” including the number of victims and the type of victimization, the time and place of the alleged acts, as well as the *modus operandi* and intent of the perpetrators. Accordingly, these material facts provide “sufficient [...] factual basis to bring the person [...] to trial” pursuant to Regulation 52(b).

The correct application of the standard of proof in the fact-finding process

41. The Prosecution submits that the Chamber must cumulatively look at all the evidence that the Prosecution provided in support of the material facts related to the attack⁷⁴ and determine whether it is sufficient to establish substantial grounds to believe in relation to the material facts referred to at paragraphs 93-95, 97, 101-103 and 105 of the DCC. It must then determine whether the relevant

⁷³ ICC-02/05-03/09-121-Corr-Red, paras.36-37.

⁷⁴ ICC-01/04-01/06-803-tENG, para.39: “all the evidence admitted for the purpose of the confirmation hearing should be assessed as a whole”. See also ICC-01/04-01/07-717, para.66.

facts that have been proven to the required threshold are sufficient to establish the legal element of the attack.⁷⁵

42. Trial Chamber I in the *Lubanga* case has adopted this approach to the fact-finding in relation to the chapeau elements of the crimes charged.⁷⁶ It entered a factual finding beyond reasonable doubt in relation to the key facts,⁷⁷ while the remainder of the relevant findings analyse the evidence and enter findings in relation to subsidiary facts without applying the beyond reasonable doubt standard.⁷⁸ Most Pre-Trial Chambers in their respective confirmation of charges decision have also applied the same process. They reviewed the evidence as a whole and applied the substantial grounds to believe test only to facts that are essential to establish the chapeau elements of the crime as well as to the existence of the elements, but not to individual items of evidence or to findings in relation to subsidiary facts.⁷⁹
43. Pre-Trial Chamber III also applied this approach in this case. When it authorized the Prosecution to conduct an investigation pursuant to Article 15,⁸⁰ it examined the arguments and the material presented by the Prosecution in support of its submissions that pro-Gbagbo forces committed a widespread and systematic attack against civilians associated with Alassane Ouattara.⁸¹ The Chamber expressed what the supporting material “shows”,⁸² “indicates”⁸³ or “suggests”,⁸⁴

⁷⁵ *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgment, 7 July 2006, para.174; *Prosecutor v. Halilovic*, IT-01-48-A, Appeal Judgment, 16 October 2007, para.125. See also authorities referred to in ICC-01/04-02/12-39-Red2, paras.74-81.

⁷⁶ ICC-01/04-01/06-2842, paras.543-467.

⁷⁷ ICC-01/04-01/06-2842, para.543(first sentence).

⁷⁸ ICC-01/04-01/06-2842, para.543(second sentence)-para.467.

⁷⁹ ICC-01/09-02/11-382-Red, paras.115-229; ICC-01/09-01/11-373, paras.167-221; ICC-01/04-01/06-803-tEN, paras.167-237; ICC-01/05-01/08-424, paras.90-126; The confirmation of charges decision in the *Katanga et al.*, case constitutes an exception, as the Pre-Trial Chamber in that case applied the evidentiary threshold under Article 61(7) also to factual findings that do not appear to be essential to establish the chapeau elements of the crimes (see ICC-01/04-01/07-717, paras.239-241, 403-417).

⁸⁰ ICC-02/11-14.

⁸¹ ICC-02/11-14, paras.34-40.

⁸² ICC-02/11-14, para.37.

⁸³ ICC-02/11-14, paras.37, 38, 40.

⁸⁴ ICC-02/11-14, paras.36, 39.

and applied the standard of proof under Article 15 only to the overall factual conclusion that there is a “reasonable basis to believe that [...] an attack was committed by pro-Gbagbo loyalists against the civilian population in Abidjan and in the west of the country [...]”.⁸⁵ Moreover, the Chamber followed this approach in the arrest warrant decision against Mr Gbagbo.⁸⁶ It examined the material presented by the Prosecution in support of its allegation with respect to the existence of an attack, but did not individually address any of the “incidents” in relation to which the Prosecution led evidence to establish the attack or apply the evidentiary threshold under Article 58 to them.⁸⁷ Rather, based on the totality of the material before it, the Chamber concluded that “there are reasonable grounds to believe that [...] pro-Gbagbo forces attacked the civilian population in Abidjan and in the west of the country [...]”.⁸⁸

44. In the Impugned Decision, the Majority suddenly departs from this approach - without providing any explanation – and consequently erred when it applied the standard of “substantial grounds to believe” to each of the 41 Incidents.

(iv) The Majority’s misinterpretation and misapplication of the term “attack” under Article 7(2)(a)

45. The Decision’s requirement that the Incidents be individually established to the threshold under Article 61(7) is a result of the Majority’s misinterpretation and misapplication of the term “attack” under Article 7(2)(a). The Majority found that “[w]hen alleging the existence of an ‘attack against any civilian population’ by way of describing a series of incidents, the Prosecutor must establish to the requisite threshold that a sufficient number of incidents relevant to the establishment of the alleged ‘attack’ took place.”⁸⁹ According to the Majority, this is particularly the case were “none of the incidents, taken on their own, could

⁸⁵ ICC-02/11-14, para.41.

⁸⁶ ICC-01/11-01/11-9-Red.

⁸⁷ ICC-01/11-01/11-9-Red, para.34-35.

⁸⁸ ICC-01/11-01/11-9-Red, para.36; see also paras.37-54.

⁸⁹ Decision, para.23.

establish the existence of such an attack”.⁹⁰ The Majority therefore considers that the notion of “attack” encompasses a certain number of “incidents”, rather than a “course of conduct involving a multiple commission of acts”⁹¹ and that in this case the Incidents “*constitute* the attack”.⁹²

46. As demonstrated above, these conclusions are not based on any legal authority. The Incidents are neither contextual elements, nor are they facts underlying the elements of crimes against humanity. As observed by the Dissenting Judge, the term “incident” has no specific legal meaning within the context of the chapeau requirements of Article 7. It merely has some practical value in the analysis of the evidence and the construction of a narrative of relevant facts. It is also arbitrary, as broader or narrower “incidents” may be derived from the same evidence depending on how one defines the parameters of the “incidents”.⁹³ For instance, this same evidence could also be characterized as 294 incidents of crimes occurring in four localities if the term “incident” is attached to each of the underlying acts.

An “attack” is not a mechanical aggregate of “incidents”, but a “course of conduct” involving acts under Article 7(1)

47. Article 7(2)(a) uses the terms “course of conduct” to define an attack. This, in itself, indicates that the attack is not a mechanical aggregate of a number of “incidents”.⁹⁴ According to the consistent jurisprudence of this Court, “the term ‘attack’ [being defined as a ‘course of conduct’] refers to a *campaign or operation*

⁹⁰ Decision, para.23.

⁹¹ Article 7(2)(a).

⁹² Decision, paras.21, .44(4).

⁹³ Dissenting Opinion, paras.41-42. The Prosecution has referred to “incidents” in the context of admissibility determinations to facilitate the comparison between the domestic and ICC investigation. In that context, the notion of incident has facilitated the identification and comparison of the relevant geographical and temporal parameters of the crimes which are investigated domestically and by the ICC in order to determine their substantially identical nature (see ICC-01/11-01/11-384-RedOA4, para.69).

⁹⁴ Dissenting Opinion, para.43.

carried out against the civilian population”.⁹⁵ Moreover, in the context of Article 7, the term “attack” does not equate with a “military attack” as defined by international humanitarian law.⁹⁶ The attack may be non-violent in nature,⁹⁷ and it need not occur in relation to armed hostilities or an armed conflict.⁹⁸

48. Accordingly, the Chamber must assess whether there is a “campaign or operation carried out against the civilian population” as alleged in paragraphs 93-95, 97, 101-103 and 105 of the DCC. To that end, there is no legal or practical need to compartmentalize the evidence and to make individual findings with respect to each of the Incidents. Such an approach would amount to conflating the concepts of *facts* pleaded and *evidence* adduced to establish these facts. It could also lead to the result that the Prosecution can never meet the requisite standard of proof, because additional evidence would further be compartmentalized and the threshold would be applied to the individual pieces of evidence and not to the material facts that the Prosecution must establish.

The notion of “multiple commission of acts referred to in paragraph 1 against a civilian population” does not require proof of the individual Incidents

49. According to Article 7(2)(a) the phrase “course of conduct” is qualified by two specific conditions, namely “the multiple commission of acts referred to in paragraph 1 against any civilian population” and the requirement that it be committed “pursuant to or in furtherance of a State or organizational policy to commit such attack”. The term “incident” cannot be equated with the statutory

⁹⁵ ICC-01/05-01/08-424, para.75 (emphasis added); ICC-01/09-01/11-373, para.164; ICC-01/09-19-Corr, para.80; ICC-02/11-14-Corr, para.31; see further M. Boot, “Article 7”, in Triffterer, “Commentary on the Rome Statute of the International Criminal Court, 2008 (“Boot”)), p.124, margin.8; U.N.Doc. PCNICC/1999/WGEC/DP.36, Proposal submitted by Canada and Germany on article 7, para.2.

⁹⁶ Elements of Crimes, Article 7, Introduction, para.3. ICC-02/11-14-Corr, para.31; see also Boot, p.124, margin.8; D. Robinson, The context of Crimes against Humanity in “The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Roy Lee (ed), 2001, (“Robinson”), p.62.

⁹⁷ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para.581; See also Article 1 of the Apartheid Convention of 1973, declaring the imposing a system of apartheid a crime against humanity.

⁹⁸ *Prosecutor v. Kunarac et al.*, IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 86; Boot, p.125, margin.8.

notion of “acts referred to in paragraph 1 against any civilian population” because Article 7(2) does not require that an attack comprise “a sufficient number of incidents”.⁹⁹ The phrase merely requires that more than one act referred to in paragraph 7(1) occurs, so as to avoid that isolated offences fall within the notion of crimes against humanity.¹⁰⁰ As noted by one commentator, “[a]n attack need not necessarily be ‘widespread’ [...], but it must at least have some scale, affecting multiple victims”.¹⁰¹

50. Pre-Trial Chamber II found that “[t]he commission of the acts referred to in article 7(1) [...] constitute the ‘attack’ itself and, beside the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven.”¹⁰² Accordingly, in this case where the Prosecution has charged Mr Gbagbo to be responsible for at least 294 acts directed against a civilian population under Article 7(1) that derive from the four Charged Incidents,¹⁰³ there is no separate requirement to prove additional “acts referred to in paragraph 1” of Article 7.¹⁰⁴

51. However, in order to establish the chapeau elements under Article 7, the Prosecution must prove: (a) that a sufficient number of these 294 acts¹⁰⁵ relate to

⁹⁹ Dissenting Opinion, para.43.

¹⁰⁰ See U.S. proposal’s suggestion that the term “excludes isolated offences”: PCNICC/1999/DP4, terminology point 21). See also proposal submitted by Spain, requiring that for each crimes under Article 7, there be a “multiple commission of acts”: PCNICC/1999/DP.9/Add.1. The UN War Crimes Commission stated that “isolated offences did not fall within the notion of crimes against humanity”, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, Compiled by the United Nations War Crimes Commission, 1948, p 179; *Prosecutor v. Tadic*, IT-94-1-T, Opinion and Judgment, 7 May 1997, para.644.

¹⁰¹ Robinson, p.63; see also Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 Am.J.Int’l L.43(1999), pp.47-49 (see in particular fn.26, 28). The Prosecution acknowledges that under certain circumstances, even a single act can constitute a crime against humanity, when committed in the appropriate context, but an isolated act cannot (see *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgment, 14 January 2000, para.550). However, this scenario is not applicable in this case where the Prosecution has charged multiple acts under Article 7(1).

¹⁰² ICC-01/05-01/08-424, para.75 (emphasis added); see also ICC-01/09-02/11-382-Red, paras.106, 117.

¹⁰³ DCC, paras.93-95, 101-103. The Prosecution alleged that the suspect was responsible for the killing of at least 166 persons, rape of at least 34 persons and inflicting serious bodily injury and suffering on at least 94 persons.

¹⁰⁴ ICC-01/04-01/07-717, para.391: “Any of the acts enumerated in article 7(1) of the Statute will thus constitute a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian population”.

¹⁰⁵ Article 7(2)(a): “multiple [...] acts”.

or constitute a “course of conduct”;¹⁰⁶ and (b) that the course of conduct was carried out pursuant to or in furtherance of a State or organizational policy to commit such attack. In addition, (c) the attack must qualify as either widespread or systematic; (d) the individual acts under Article 7(1) must be committed “as part” of the attack; and (e) the suspect must act with the knowledge thereof.¹⁰⁷ These contextual elements, and not each of the Incidents, must be established to the threshold under Article 67(1).

The policy need not be inferred from each of the Incidents

52. The Majority’s misinterpretation of the term “attack” and the related error regarding proof of the Incidents is further demonstrated by its finding that the “difficulties in the evidentiary record”¹⁰⁸ “mak[e] it difficult for the Chamber to determine whether the perpetrators acted pursuant to or in furtherance of a policy to attack a civilian population as required by article 7(2)(a).”¹⁰⁹ Accordingly it ordered that the Prosecution provide evidence for each individual incident that “the alleged physical perpetrators were acting pursuant to or in furtherance of the alleged policy”.¹¹⁰ By so doing, the Majority expects to be able to infer from each individual Incident that the perpetrators acted pursuant to or in furtherance of the alleged policy. This is incorrect. The Prosecution must establish that the “attack” was committed pursuant to or in furtherance to the policy, not individual “acts” or the legally non-existent “incidents”.¹¹¹ The Elements of Crimes clarify that “‘policy to commit such attack’ requires that the State or organization actively promote or encourage *such an attack* against a civilian population”,¹¹² rather than each individual act or incident.¹¹³

¹⁰⁶ Article 7(2)(a): “a course of conduct *involving* the multiple commission of acts [...]” (emphasis added).

¹⁰⁷ Article 7(1) and 7(2)(a); ICC-01/04-01/07-717, paras.390-402; ICC-01/04-01/07-717, paras.390-402; Dissenting Opinion, para.38.

¹⁰⁸ Decision, para.37.

¹⁰⁹ Decision, para.36.

¹¹⁰ Decision, para.44(4)(a).

¹¹¹ Dissenting Opinion, para.47.

¹¹² Elements of Crimes, Article 7, Introduction, para.3 (emphasis added).

(v) *The error under the First Ground of Appeal materially impacts on the Decision*

53. Because the Majority requires that “each” or a “sufficient number” of the 45 Incidents be established to the threshold under Article 61(7),¹¹⁴ it found that the majority of these incidents are not adequately proven.¹¹⁵ Consequently, the Majority ordered the Prosecution to provide additional evidence in relation to “each of the incidents allegedly constituting the attack”.¹¹⁶ As a result of this Decision, the Prosecution must establish to the requisite threshold (and potentially also at trial) not only the material facts that relate to the four Charged Incidents, but also additional facts in relation to each of the 41 Incidents. This demonstrates that the error under the Second Ground of Appeal materially impacts on the Decision.

B. Second Ground of Appeal: The Majority erred in its interpretation and application of the standard of proof under Article 61(7) of the Statute

(i) *Overview of the Second Ground of Appeal*

54. The Decision correctly spells out the relevant evidentiary threshold pursuant to Article 61(7), consistent with prior jurisprudence,¹¹⁷ but then departs from that jurisprudence when interpreting the law on the standard of proof and applying it to the evidence presented in this case. As a result, the Majority erred in the interpretation and application of the standard of proof under Article 61(7) (“Core Error”). The Decision relies on a number of erroneous findings and assumptions, which go to proof of the error under this Second Ground of Appeal. In

¹¹³ Darryl Robinson, AJIL Symposium: A Plea to Judges – Don’t Make the Policy Element Impossible, 23 July 2013, at <http://opiniojuris.org/2013/07/22/ajil-symposium-a-plea-to-judges-dont-make-the-policy-element-impossible/>.

¹¹⁴ Decision, paras.21-22.

¹¹⁵ Decision, para.36.

¹¹⁶ Decision, para.44(4).

¹¹⁷ Decision, para.17.

particular, the Decision requires that in order for the Prosecutor to meet the evidentiary threshold under Article 61(7) she “largely complete her investigation” (“First Sub-Error”);¹¹⁸ and that she “present *all* her evidence”¹¹⁹ and “her strongest possible case” (“Second Sub-Error”).¹²⁰ In addition, the Majority ruled that “past jurisprudence, which predates [...] decisions of the Appeals Chamber, may have appeared more forgiving” in the application of the standard of proof,¹²¹ which indicates the Majority’s erroneous belief that recent jurisprudence of the Appeals Chamber has modified the interpretation of the standard of proof under Article 61(7) and requires a more stringent - or at least a “less forgiving” approach - in its application (“Third Sub-Error”).¹²² Finally, the Decision provides for a detailed explanation of the Majority’s “general disposition towards certain types of evidence”, which is inappropriate at the confirmation stage (“Fourth Sub-Error”).¹²³

55. These erroneous findings and assumption are qualified as sub-errors, but they do not constitute separate grounds of appeal. There is therefore no need to establish a link between each of these sub-errors and the Issue under appeal.
56. The Prosecution contends that each of these sub-errors directly result in the Core Error under the Prosecutions Second Ground of Appeal. The Majority resorted to rules and procedures that only apply to trial and thereby effectively elevated the evidentiary threshold for the confirmation of charges. In fact, the approach taken by the Majority is inconsistent with the following established principles: (i) that the evidentiary threshold for confirmation of charges is different and lower than that for conviction; (ii) that confirmation proceedings have a limited scope and purpose and in particular are not a trial before the trial or “mini trial”; and (iii)

¹¹⁸ Decision, paras.25, 37.

¹¹⁹ Decision, paras.37 (emphasis added).

¹²⁰ Decision, para.25.

¹²¹ Decision, para.37.

¹²² See Dissenting Opinion, para.7.

¹²³ Decision, para.26; see also paras.27-34.

that the Pre-Trial Chamber's powers are limited – it exercises a “gatekeeper function”, but does not rule on the guilt or innocence of an accused.

(ii) First Sub-Error: The Majority erred by holding that the Prosecutor must largely complete her investigation to meet the threshold under Article 61(7).

57. The Majority quotes the Appeals Chamber's finding in the *Mbarushimana* case that “the investigation should largely be completed at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber”.¹²⁴ The Majority interprets this finding to make it “*necessary* [for the Prosecutor to] largely complete her investigation, following all relevant incriminating and exonerating lines of investigation in order to establish the truth”.¹²⁵ It also found that for the purposes of the confirmation of charges proceedings “the Chamber must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation”,¹²⁶ and it requires to “be presented [with] the fruits of *a full* and proper investigation”.¹²⁷

58. The Majority's interpretation of the *Mbarushimana* Decision is based on a selective reading of that decision and it is consequently incorrect. As evidenced by footnote 89 of the *Mbarushimana* Decision, the Appeals Chamber merely restated its previous jurisprudence from the *Lubanga* case.¹²⁸ In that case, the Appeals Chamber, while stating that “*ideally*, it would be *desirable* for the investigation to be complete by the time of the confirmation hearing”, it determined that “*this is not a requirement* of the Statute”.¹²⁹ To the contrary, the Appeals Chamber ruled that “the Pre-Trial Chamber [in that case] erred in

¹²⁴ Decision, para.25, quoting ICC-01/04-01/10-514, para.44 (“*Mbarushimana* Decision”).

¹²⁵ Decision, para.37 (emphasis added). The Majority articulates this finding by stating that “past jurisprudence, which predates the [*Mbarushimana* Decision] may have appeared more forgiving in this regard. Therefore, the Prosecutor in this case may not have deemed it necessary to [...] largely complete her investigation [...]”.

¹²⁶ Decision, para.25.

¹²⁷ Decision, para.35 (emphasis added).

¹²⁸ ICC-01/04-01/06-568 OA3 (“*Lubanga* Decision”).

¹²⁹ *Lubanga* Decision, para.54 (emphasis added).

finding that the Prosecutor's investigation [...] must be brought to an end before the confirmation hearing, barring exceptional circumstances that might justify later isolated acts of investigation".¹³⁰ The Appeals Chamber further expressly found that "[t]he Prosecutor's investigation may be continued beyond the confirmation hearing"¹³¹ and that "the threshold for the confirmation of charges [...] is lower than for conviction [...] and may be satisfied before the end of the investigation".¹³²

59. The Majority erred by effectively turning the desirability that investigation be largely completed before confirmation of charges – a policy objective that the Prosecution has previously acknowledged¹³³ – into a legally binding limitation to Prosecution's post-confirmation investigations.¹³⁴
60. The Prosecution further submits that under the Statute it not only has the *authority* to continue its investigation after the confirmation of charges stage, but a *duty* to do so up to and during trial always taking into account considerations of fairness to the accused. The Appeals Chamber ruled that "[t]he [Prosecutor's] duty to establish the truth [pursuant to article 54(1)(a)] is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth."¹³⁵ The fact that the Prosecution has not completed its investigation at the confirmation of charges stage cannot, in itself, have a bearing on the interpretation and application of the standard of proof under Article 61(7), as it is the case in this Decision.

¹³⁰ *Lubanga* Decision, para.49.

¹³¹ *Lubanga* Decision, para.2.

¹³² *Lubanga* Decision, para.56.

¹³³ *Lubanga* Decision, para.54.

¹³⁴ Dissenting Opinion, para.15; see also ICC-01/09-02/11-728-Anx3-Corr2-Red, paras.86-100.

¹³⁵ *Lubanga* Decision, para.52.

(iii) Second Sub-Error: The Majority erred by finding that the Prosecutor must present all her evidence and her strongest possible case at the confirmation of charges stage in order to meet the standard of proof under Article 61(7)

61. The Majority found that in order to meet the evidentiary threshold for confirmation of charges, “the Chamber must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation”.¹³⁶ It also found that it is “necessary [for the Prosecutor] to present all her evidence [...]”.¹³⁷ These findings are wrong in law and disregard the specific evidentiary features that are applicable at the confirmation stage and which must be taken into account when interpreting and applying the “substantial grounds to believe” test.
62. As stated by the Dissenting Judge, “both the quantum and the quality of the evidence received by the Pre-Trial Chamber may differ from the evidence that will be presented at trial”.¹³⁸ According to Article 61(5), “the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”. It is left to the Prosecution to determine how best to satisfy this standard of proof. Article 61(3)(a) states that within a reasonable time prior to the confirmation of charges hearing, the suspect must “[b]e informed of the evidence on which the Prosecutor *intends* to rely at the hearing”.¹³⁹ Similarly, Rule 121(3) refers to “the evidence which [the Prosecutor] *intends* to present at the hearing”.¹⁴⁰ Accordingly, the Statute and the Rules allow the Prosecution to choose what evidence to use. In particular, there is no duty on the Prosecution to use all or the best evidence available at the confirmation hearing. The Appeals Chamber affirmed this

¹³⁶ Decision, para.25.

¹³⁷ Decision, para.37. The Majority articulates this finding by stating that “past jurisprudence, which predates the [*Mbarushimana* Decision] may have appeared more forgiving in this regard. Therefore, the Prosecutor in this case may not have deemed it necessary to present all her evidence [...]”.

¹³⁸ Dissenting Opinion, para.21.

¹³⁹ (Emphasis added).

¹⁴⁰ (Emphasis added).

principle when ruling that “[the] limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor [...] need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe.”¹⁴¹

63. The error in the Majority’s finding is further demonstrated by the fact that the Statute draws clear distinctions between the types of evidence upon which the Prosecution may rely for the purposes of confirmation of charges and for trial. Article 61(5) provides that for the confirmation of charges hearing, “[t]he Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial”. Article 69(2), in contrast, states that as a general rule, “[t]he testimony of a witness at trial shall be given in person”.¹⁴² In addition, Article 68(5) states that “[w]here the disclosure of evidence or information [...] may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, *for the purposes of any proceedings conducted prior to the commencement of the trial*, withhold such evidence or information and instead submit a summary thereof.”¹⁴³
64. The Appeals Chamber has noted the qualitative differences between *viva voce* testimony of witnesses and summaries of such evidence submitted in documentary form. It found that “the Prosecutor’s reliance on documentary or summary evidence *in lieu* of in-person testimony will limit the Pre-Trial Chamber’s ability to evaluate the credibility of witnesses”¹⁴⁴ and “may also mean that the Pre-Trial Chamber will not be presented with all details of the evidence in the possession of the Prosecutor.”¹⁴⁵ This confirms that the Prosecution need not present its “best evidence” at that confirmation of charges stage.

¹⁴¹ *Mbarushimana* Decision, para.47.

¹⁴² See also ICC-01/05-01/08-1386 OA5 OA6, para.80. ICC-01/09-01/11-153, para.8.

¹⁴³ Emphasis added.

¹⁴⁴ *Mbarushimana* Decision, paras.48, 45; ICC-01/05-01/08-1386, OA5 OA6, para.76.

¹⁴⁵ *Mbarushimana* Decision, para.48.

65. Finally, as stated by the Dissenting Judge, “[t]he *travaux préparatoires* actually demonstrate that access by the Chamber to the entire file of the Prosecutor was not only not required but also not preferred as this would entail unnecessary delays ‘if the evidence collected in the case was excessive’”.¹⁴⁶

(iv) Third Sub-Error: The Majority erred by findings that recent jurisprudence has modified the interpretation of the standard of proof under Article 61(7)

66. As indicated above, the Majority ruled that “past jurisprudence, which predates [...] decisions of the Appeals Chamber, may have appeared more forgiving” in the application of the standard of proof.¹⁴⁷ This indicates the Majority’s belief that recent jurisprudence of the Appeals Chamber has modified the interpretation of the standard of proof under Article 61(7) and requires a more stringent, or at least a “less forgiving” approach in its application.¹⁴⁸ This finding is incorrect.

67. The Decision specifically refers to the *Mbarushimana* Decision and to a decision rendered by the Appeals Chamber in the case against *Muthaura and Kenyatta*.¹⁴⁹ The Majority misinterprets the relevant portions of these decisions, which do not modify the interpretation and application of the standard of proof under Article 61(7) compared to that adopted by unspecified “past jurisprudence”.

68. As demonstrated above, the relevant portions of the *Mbarushimana* Decision do not change the applicable law. They simply re-state the findings made by the Appeals Chamber in the *Lubanga* Decision.¹⁵⁰ The latter decision was issued on 13

¹⁴⁶ Dissenting Opinion, para.20, relying on 1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, para.232. The Prosecution notes that this statement refers to the submission of information to the body reviewing “the indictment” prior to arrest, it is nevertheless relevant in this context, because the draft statute at that time did not foresee a separate intermediary step of confirmation of charges before trial.

¹⁴⁷ Decision, para.37.

¹⁴⁸ See Dissenting Opinion, para.7.

¹⁴⁹ Decision, para.37, fn.51, referring to *Mbarushimana* Decision, para.44 and ICC-01/09-02/11-425 (“*Muthaura* Decision”), paras.33-36.

¹⁵⁰ See paras.57-59 above.

October 2006, prior to the first confirmation of charges decision before this Court, which was issued on 29 January 2007.¹⁵¹

69. In turn, the relevant portions of the *Muthaura* Decision provide that the contextual elements of the crimes charged “relate to the substantive merits” of the case and must be established to the threshold of “substantial grounds to believe”.¹⁵² This does not constitute any change in interpretation and application of the standard of proof under Article 61(7),¹⁵³ nor has any Pre-Trial Chamber ever taken a different approach when issuing a decision on confirmation of charges.¹⁵⁴

(v) *Fourth Sub-Error: The Majority erred in its “general disposition towards certain types of evidence” for the confirmation of charges stage*

70. The Majority expresses its “general disposition towards certain types of evidence”,¹⁵⁵ announcing its preference for some types of evidence over others. It states, *inter alia* that: “it is preferable [...] to have as much forensic and other material evidence as possible [...] duly authenticated and hav[ing] clear and unbroken chains of custody”;¹⁵⁶ “[w]henver testimonial evidence is offered, it should, to the extent possible, be based on first-hand and personal observations of the witness”;¹⁵⁷ “reliance upon [hearsay] evidence should be avoided [...] wherever possible”;¹⁵⁸ “NGO reports and press articles [...] cannot in any way be presented as the fruits of a full and proper investigation by the Prosecutor in accordance with article 54(l)(a) of the Statute [...] and they do not usually constitute a valid substitute for the type of evidence that is required to meet the

¹⁵¹ ICC-01/04-01/06-803-tEN.

¹⁵² *Muthaura* Decision, paras.33-36.

¹⁵³ Dissenting Opinion, paras.8-11.

¹⁵⁴ ICC-01/09-01/11-373, paras.174, 180, 208; ICC-01/09-02/11-382-Red, paras.227-229; ICC-01/04-01/06-803-tEN, paras.236-237; ICC-01/04-01/07-717, paras.403-417; ICC-01/05-01/08-424, para.28, read in conjunction with paras.91, 94, 99, 101, 108, 110, 117; ICC-02/05-03/09-121-Corr-Red, para.51.

¹⁵⁵ Decision, para.26.

¹⁵⁶ Decision, para.27.

¹⁵⁷ Decision, para.27.

¹⁵⁸ Decision, para.28.

evidentiary threshold for the confirmation of charges".¹⁵⁹ Furthermore, the Majority also explicitly indicates that it "is not prepared to accept allegations proven solely through anonymous hearsay in documentary evidence".¹⁶⁰

71. Article 61(5) and 68(5) allow the Prosecution to rely on documentary or summary evidence *in lieu* of in-person testimony.¹⁶¹ 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. There is no need for it to be provided "first-hand" by the witness talking about his or her "personal observations".¹⁶² The Chamber's evidentiary requirements disregard the special features provided for by the Statute for evidence to be presented at the confirmation hearing and effectively render them meaningless.
72. The Prosecution submits that the above findings also violate the flexible approach to evidence adopted by the drafters of the Rome Statute in Article 69(4). Accordingly, all types of evidence are potentially admissible¹⁶³ and can be given due weight at the decision-making process.¹⁶⁴ Moreover, to attribute, as a general rule, little or no evidentiary value to certain types of evidence, such as hearsay evidence or NGO reports, violates the principle of free assessment of evidence under Rule 63(2). This principle means that the Chamber is not bound by any rules or guidelines that prescribe what weight to give to certain types of evidence or what conditions must apply for a fact to be established.¹⁶⁵ The weight to be given to certain pieces of evidence cannot be determined in the abstract. It

¹⁵⁹ Decision, para.35.

¹⁶⁰ Decision, para.37.

¹⁶¹ See paras.62-63 below. See also Dissenting Opinion, para.25.

¹⁶² Decision, para.27.

¹⁶³ The only exceptions are constituted by Article 69(7) and Rule 71.

¹⁶⁴ Piragoff, "Evidence", in Lee, R.S. (Editor), "The International Criminal Court - Elements of Crimes and Rules of Procedure" (Transnational Publishers, Ardsley, New York, 2001) ("Piragoff"), pp.349, 351.

¹⁶⁵ Supreme Court of Germany, BGH VRS 33, 431; BGH NJW 1982, 2882; Jean Pradel, "Droit Pénal Comparé" Editions Dalloz (2008), *La règle de la liberté de la preuve*, p.265; Piragoff, p.352.

will depend on the circumstances that surround each piece of evidence that must be assessed in the context of the record as a whole.¹⁶⁶

73. In addition, the Majority's general approach to certain types of evidence is inconsistent with the jurisprudence of the Appeals Chamber that mandates restraint in the evaluation of evidence at the confirmation stage, because of the limited purpose of the confirmation hearing. The Appeals Chamber found that "the Pre-Trial Chamber's ability to evaluate the evidence is [not] unlimited [and] its function in evaluating the evidence is [not] identical to that of the Trial Chamber".¹⁶⁷ It also found that "the Pre-Trial Chamber's determinations [of the credibility of witnesses] will necessarily be presumptive, and it should take great care in finding that a witness is or is not credible".¹⁶⁸
74. Finally, the evidentiary ruling of the Majority is also inconsistent with the previous finding of the Chamber in this same case when it indicated to the parties that it "expects that oral testimony at the hearing, if any, will be narrowly relied on and only to the extent that it cannot be properly substituted by documentary evidence or a written statement".¹⁶⁹ Contrary to this indication, the Majority now suddenly mandates the Prosecution to avoid "reliance upon [hearsay] evidence [...] wherever possible", which would effectively exclude the use of Article 61(5) witness summaries prepared by the Prosecution.¹⁷⁰

(vi) Core Error under the Second Ground of Appeal: The Four Sub-Errors directly result in the erroneous interpretation and application of the standard of proof under Article 61(7)

75. The standard of proof under Article 61(7) requires the Prosecution to provide "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". This threshold has consistently been

¹⁶⁶ Dissenting Opinion, para.24.

¹⁶⁷ *Mbarushimana* Decision, para.47.

¹⁶⁸ *Mbarushimana* Decision, para.48.

¹⁶⁹ ICC-02/11-01/11-325, para.34, reiterating its prior ruling in this case: ICC-02/11-01/11-107, para.11.

¹⁷⁰ Decision, para.28.

interpreted to requiring the Prosecution to “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”.¹⁷¹ The Appeals Chamber expressly stated that “the threshold for the confirmation of charges (‘substantial grounds’, article 61(7) of the Statute) is lower than for conviction (‘beyond reasonable doubt’, article 66 (3) of the Statute)”.¹⁷²

76. By making the First and Second Sub-Errors described above, 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 at the end of trial. It is at that latter stage that the Prosecution, will present all its evidence, including its strongest evidence that it has collected during its investigations that are largely concluded. The erroneous findings under the First and Second Sub-Errors therefore blur the distinction in practice between the standards of proof under Articles 61(7) and 66(3).
77. The Third Sub-Error also results in the erroneous interpretation and application of the standard of proof under Article 61(7). The Chamber’s erroneous belief that recent jurisprudence of the Appeals Chamber has modified the interpretation of the standard of proof under Article 61(7) effectively resulted in elevating the “substantial grounds to believe” test. The Chamber departed from the “more forgiving” approach taken by Pre-Trial Chambers previously and adopted a more stringent, or at least a “less forgiving” approach in the application of the standard of proof under Article 61(7).¹⁷³
78. The Fourth Sub-Error has the same effect. The Chamber expressly departed from the approach to evidence previously taken at the confirmation stage.¹⁷⁴ Some types of evidence, such as NGO or UN reports, have previously been taken into consideration to establish certain facts at the confirmation stage, either on their

¹⁷¹ ICC-01/04-01/06-803-tENG, paras.38-39; ICC-01/04-01/07-717, para.65; ICC-01/05-01/08-424, para.29.

¹⁷² *Lubanga* Decision, para.56.

¹⁷³ Decision, para.37; Dissenting Opinion, para.7.

¹⁷⁴ Decision, para.37.

own or together with other evidence.¹⁷⁵ According to the Decision, they are *ab initio* not given any weight. This means that the Majority does not accept that the some types of evidence, including NGO or UN reports and “hearsay evidence” (such as summaries of witness statements) can constitute “concrete and tangible proof demonstrating a clear line of reasoning underpinning [the Prosecution’s] specific allegations”.¹⁷⁶ This effectively results in an elevated threshold of proof under Article 61(7).

79. In addition, the four Sub-Errors set out above violate the established principle that confirmation proceedings have a limited scope and purpose and in particular are not a trial before the trial or a “mini trial”.¹⁷⁷ The Majority’s ruling means that in order for the Prosecution to meet the evidentiary threshold for the confirmation of charges (as interpreted by the Decision), it must present all and its best evidence (including *viva voce* testimony of witnesses) after completing its investigation. Bearing in mind that the Pre-Trial Chamber will then apply the Majority’s stringent rules to assess the evidence presented by the Prosecution, this approach will, in practice, lead to confirmation hearings that are difficult to distinguish from trials.

80. Finally, the four Sub-Errors result in the Pre-Trial Chamber usurping the functions and powers of a Trial Chamber. According to the established jurisprudence, the Pre-Trial Chamber’s powers are limited. It exercises a “gatekeeper function”, but does not rule on the guilt or innocence of an

¹⁷⁵ See for instance ICC-01/09-02/11-382-Red, para.160, para.160; ICC-01/09-01/11-373, paras.177-178 (fns.254-256, 258); ICC-01/04-01/06-803-tEN, paras.197, 221 (fns.294-295), 235-237; ICC-01/04-01/07-717, paras.409 (fn.535), 410, 414-415.

¹⁷⁶ The overly restrictive approach to a very important category of evidence, which the majority erroneously reduces to anonymous hearsay, is more general and goes beyond the issue of the confined nature of the confirmation hearing. Contemporaneous records of IGOs and NGOs from the field, if reliable, can be highly probative evidence that the Prosecution will also seek to use at trial.

¹⁷⁷ ICC-02/11-01/11-325, para.22; *Mbarushimana Decision*, para.39; ICC-01/04-01/07-2259 OA10, para.40; ICC-01/09-01/11-221, para.9; ICC-01/09-02/11-321, para.8; ICC-01/04-01/07-717, para.64; ICC-02/05-03/09-121-Corr-Red, para.31; ICC-01/04-01/06-803-tENG, para.37; ICC-02/05-02/09-243-Red, para.39; ICC-01/04-01/07-428-Corr, paras.5-6.

accused.¹⁷⁸ The Majority nevertheless requires the Prosecutor to present sufficient evidence “*in order to establish the truth*”.¹⁷⁹ It is not the function of the Pre-Trial Chamber to establish the truth. While under the Statute there are different standards of proof applicable at different stages of the proceedings, there are no different levels of truth. Truth is established by the Trial Chamber when deciding whether it is “convinced of the guilt of the accused beyond reasonable doubt”.¹⁸⁰ By assuming a truth-finding function, the Pre-Trial Chamber effectively elevates the substantial grounds to believe test and applies a standard of proof that comes close to that applied at trial.

(vii) The errors under the Second Ground of Appeal materially impact on the Decision

81. The Majority stated that because prior decisions under Article 61(7) “may have appeared more forgiving” in the application of the standard of proof, “the Prosecutor in this case may not have deemed it necessary to present all her evidence or largely complete her investigation, following all relevant incriminating and exonerating lines of investigation to establish the truth”.¹⁸¹ As a result, the Majority found that there are “difficulties in the evidentiary records of the Prosecutor”.¹⁸² However, notwithstanding these difficulties the Majority found that it was “out of fairness, prepared to give [the Prosecutor] a limited amount of additional time [...] to present or collect further evidence”,¹⁸³ and accordingly adjourned the confirmation of charges hearing pursuant to Article 61(7)(c)(i).¹⁸⁴ This demonstrates that all four Sub-Errors as well as the Core Error under the Second Ground of Appeal materially impact on the Decision.

¹⁷⁸ ICC-01/04-01/06-774 OA6, para.47; ICC-01/04-01/07-475 OA, para.68; ICC-02/05-02/09-243-Red, para.40; see also Decision, para.18.

¹⁷⁹ Decision, para.37 (emphasis added).

¹⁸⁰ Article 66(3).

¹⁸¹ Decision, para.37.

¹⁸² Decision, para.37.

¹⁸³ Decision, para.37.

¹⁸⁴ Decision, para.44.

CONCLUSION

82. For the reasons set out above, the Prosecution requests the Appeals Chamber to:

- a. Grant the appeal and overturn the erroneous findings contained in the Decision;
- b. State the correct legal standards with respect to the issues raised under the Errors and Sub-Errors referred to in this Appeal; and
- c. Order the Pre-Trial Chamber to apply those correct legal standards when deciding pursuant to Article 61(7) “whether there is sufficient evidence to establish substantial grounds to believe that [Mr Gbagbo] committed each of the crimes charged”.



Fatou Bensouda, Prosecutor

Dated this 12st day of August 2013

At The Hague, The Netherlands