Dissenting opinion of Judge Silvia Fernández de Gurmendi

1. I am unable to join my colleagues in their decision to adjourn the confirmation of charges hearing and request the Prosecutor to consider providing further evidence or conducting further investigation.

2. I recognise that the adjournment of the hearing within the meaning of article 61(7)(c)(i) of the Statute is a valid procedural avenue that Pre-Trial Chambers have the duty to consider, in certain circumstances, as part of their mandate to contribute to the establishment of the truth. However, for the reasons developed in this Opinion, I cannot agree with the terms of the adjournment as formulated by my colleagues in the case at hand, as it presupposes an interpretation of the role of the Pre-Trial Chamber and of the applicable procedural and substantive law that I do not share.

3. Firstly, I believe that the Majority's decision that the evidence is insufficient to make a determination on whether to confirm or decline to confirm the charges is based on an expansive interpretation of the applicable evidentiary standard at the confirmation of charges stage that exceeds what is required and indeed allowed by the Statute.

4. Secondly, I disagree with the conclusions of the Majority as to the facts and circumstances that need to be proven to the required evidentiary standard. I believe that the Majority's decision reveals a certain understanding of the applicable law with regard to crimes against humanity which finds, in my view, no support in the Statute. More specifically, I disagree with my colleagues' interpretation of how individual acts or "incidents" relate to the "attack" against the civilian population and the policy requirement under article 7 of the Statute. This interpretation, separately and in combination with the Majority's understanding of the evidentiary

standard, appears to be central to the finding by the Majority that the evidence is insufficient, and that therefore an adjournment is necessary.

5. Thirdly, I disagree with the content of the request to the Prosecutor, both in relation to the list of "issues" or "questions" put forward by my colleagues and to the instruction to submit an amended Document Containing the Charges (DCC). I believe that the list is either not relevant or not appropriate to prove or disprove the charges and I consider the request for an amended DCC to be *ultra vires*, since it exceeds the role and functions assigned by the Statute to the Pre-Trial Chamber.

I. Evidentiary standard

6. The Majority correctly spells out the evidentiary threshold that needs to be applied by the Chamber at the confirmation of charges hearing pursuant to article 61(7) of the Statute. The Majority recalls, *inter alia*, that Pre-Trial Chambers have consistently held that in order to meet this evidentiary burden, the Prosecutor must "offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations".[1]

7. However, while appearing to endorse in principle this consistent jurisprudence, in fact, the Majority explicitly acknowledges that in its assessment of the evidence presented by the Prosecutor, it departs from the existing approach. The Majority recognises that the past jurisprudence "may have appeared more forgiving" in this regard and it is precisely for this reason that "out of fairness" it declares itself "prepared" to provide the Prosecutor with "a limited amount of additional time" to present or collect further evidence.[2] Indeed, according to my colleagues, in light of past jurisprudence, "the Prosecutor in this case may not have deemed it necessary to present all her evidence or largely complete her investigation".[3] As an explanation for this fresh start, the Majority recalls that this more "forgiving jurisprudence" of

[1] Decision, para. 17.
[2] Decision, para. 37.
[3] Decision, para. 37.

previous Chambers "predates [two] decisions of the Appeals Chamber"[4] which, in the Majority's view, modify the previous jurisprudence of Pre-Trial Chambers and have the effect of making it necessary for the Prosecutor to: (i) "present all her evidence"; (ii) "largely complete her investigation"; and (iii) "present[] her strongest possible case".[5]

8. I respectfully disagree with my colleagues. At the outset, I note that their decision to allocate more time to the Prosecutor to adapt to supposedly new rules derived from Appeals Chamber decisions comes rather late in the process. The two decisions relied upon by the Majority were issued by the Appeals Chamber in the case of *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* and in the case of *The Prosecutor v. Callixte Mbarushimana* in May 2012,[6] thus providing ample time to alert the Prosecutor of any expected adjustments before the submission of the DCC and the list of evidence on 17 January 2013.

9. Most importantly, contrary to my colleagues, I do not believe that these two decisions have any bearing on relevant past jurisprudence. I disagree in particular with their interpretation of the decisions of the Appeals Chamber and the assumptions drawn from those decisions. I believe that such interpretation and assumptions have led them to understand the evidentiary standard in a manner which is inconsistent with the object and purpose of the confirmation of charges hearing.

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[4] Decision, para. 37.

[5] Decision, paras 25 and 37.

[6] Appeals Chamber, *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 24 May 2012, ICC-01/09-02/11-425; Appeals Chamber, *The Prosecutor* v. *Callixte Mbaruhismana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514.

10. In the decision in *Muthaura, Kenyatta and Ali,* the Appeals Chamber held that the contextual elements of the crimes charged form part of the substantive merits of the case,[7] and therefore that they must be proven to the threshold of "substantial grounds to believe". I do not see how this decision contradicts previous jurisprudence of this Court. To my knowledge, no Pre-Trial Chamber of this Court has yet failed to apply the "substantial grounds to believe" standard to facts and circumstances underlying the contextual elements of crimes against humanity.[8] In its decision, the Appeals Chamber did not accept a proposed alternative interpretation by which the contextual elements had to be proven to the higher threshold of "certainty".[9] Instead, the Appeals Chamber determined that the Pre-Trial Chamber was indeed correct to apply the standard of "substantial grounds to believe" also to the contextual elements of the crimes.[10]

11. I am in full agreement with the previous jurisprudence of the Pre-Trial Chambers, with the decision of the Appeals Chamber in *Muthaura, Kenyatta and Ali,*

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[7] Appeals Chamber, *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* "Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 24 May 2012, ICC-01/09-02/11-425, paras 33-36.

[8] Pre-Trial Chamber I, *The Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui,* "Decision on the confirmation of charges", 1 October 2008, ICC-01/04-01/07-717; Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo,* "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424; Pre-Trial Chamber I, *The Prosecutor* v. *Callixte Mbarushimana,* "Decision on the confirmation of charges", 16 December 2011, ICC-01/04-01/10-465-Red; Pre-Trial Chamber II, *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-02/11-328-Red; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11-373.

[9] Dissenting Opinion of Judge Hans-Peter Kaul annexed to ‚Pre-Trial Chamber II, *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-02/11-328-Red paras 9 and 33.

[10] Appeals Chamber, *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali,* "Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 24 May 2012, ICC-01/09-02/11-425, para. 33.

and indeed, with my colleagues, on the proposition that contextual elements must be proven as part of the merits of the case to the requisite threshold of substantial grounds to believe. In this regard, as developed in Section II below, my disagreement with the Majority relates to an entirely different yet fundamental matter, namely to its understanding of how these contextual elements are established in fact and in law.

12. Similarly, I do not believe that there is any departure from past jurisprudence that results from the judgment in the *Mbarushimana* case, in which the Appeals Chamber stated:

> As previously indicated by the Appeals Chamber, 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.[11]

13. As noted, on the basis of this statement, my colleagues assume that the Prosecutor must now "present all her evidence"[12] and that she "has presented her strongest possible case based on a largely completed investigation".[13]

14. I have subscribed to this statement as an *ad hoc* member of the Appeals Chamber for the appeal in the *Mbarushimana* case. However, I believe that the Majority misrepresents this judgment, which, in my view, does not signal any departure from the existing jurisprudence. As explicitly indicated in the very statement upon which my colleagues place so much emphasis, and in the accompanying footnote,[14] the Appeals Chamber merely restated its previous

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[11] Appeals Chamber, *The Prosecutor* v. *Callixte Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 44 (footnotes omitted).

[12] Decision, para. 37.

[13] Decision, para. 25.

[14] In foonote 89 that accompanies the statement concerned, the Appeals Chamber made reference to a previous decision it had issued in the Lubanga case. In the footnote itself, the Appeals Chamber summarised the relevant part of that decision holding that the Appeals Chamber "acknowledg[ed] that the Prosecutor may continue his investigation beyond the confirmation hearing, but stat[ed] that

jurisprudence from the case of *The Prosecutor* v. *Thomas Lubanga Dyilo*. 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", expressly determined that "this is not a requirement of the Statute" [15] and that "[t]he Prosecutor's investigation may be continued beyond the confirmation hearing".[16] I also observe that in its judgment in the *Lubanga* case the Appeals Chamber recognised that "the threshold for the confirmation of charges [...] is lower than for conviction [...] and may be satisfied before the end of the investigation".[17]

15. Regardless of the *desirability* of the ideal that investigations be largely completed before confirmation of charges, I find it problematic that a policy objective has been turned by the Majority into a legal requirement, something that cannot be done without amendments to the legal framework.

16. I am therefore unable to accept my colleagues' conclusion that in light of an alleged obligation to largely complete the investigation, it must be assumed that the Prosecutor has presented all her evidence or her strongest possible case.[18]

17. Furthermore, in light of the statutory provisions, I believe this conclusion is not even a corollary that flows necessarily from the first premise, even if it happened to be true. Indeed, even when the Prosecutor has completed an investigation, there is

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'ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing'".

[15] Appeals Chamber, *The Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568, para. 54.

[16] Appeals Chamber, *The Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568, para. 2.

[17] Appeals Chamber, *The Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568, para. 56.

[18] Decision, paras 25 and 37..

no legal requirement for her to submit to the Chamber all her evidence or to present to the Chamber "her strongest possible case".[19]

18. There may be a number of good reasons for the Prosecutor not to rely on certain evidence, even where it is of particular importance. There may be reasons relevant to the protection of safety, physical and psychological well-being of victims, witnesses or other persons at risk on account of the activities of the Court, that, depending on the circumstances of the case, may warrant redactions of substantive parts of the statements, non-disclosure of the identities of witnesses or of sources of certain information appearing in documentary evidence or non-reliance on items of evidence because of particularly intrusive protective measures considered disproportionate until trial is certain.

19. Decisions to withhold certain pieces of evidence or to present them in summary form, for whatever reason, would be in line with article 61(5) of the Statute. Indeed, in the *Mbarushimana* decision, the Appeals Chamber reaffirmed that, in light of this provision, the Prosecutor "need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe".[20] According to article 61(5) of the Statute, "the Prosecutor shall support each charge with *sufficient* evidence to establish *substantial grounds to believe* that the person committed each of the crimes charged (emphasis added)". The same provision also clarifies that for the purposes of the confirmation of charges hearing "the Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial".

20. The *travaux preparatoires* 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

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[19] Decision, para. 25.

[20] Appeals Chamber, *The Prosecutor* v. *Callixte Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514, para. 47.

would entail unnecessary delays "if the evidence collected in the case was excessive".[21]

21. It is therefore clear that 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. Nothing in the legal system of the Court prevents the Prosecutor from relying at trial on evidence that has not been relied upon for the purposes of the confirmation of charges hearing. Accordingly, it is not for the Chamber to speculate on whether it has received all the evidence or the "strongest possible" evidence, but solely to assess whether it has sufficient evidence to determine substantial grounds to believe that the person has committed the crimes charged.

22. In relation to the type of evidence that may be required at the pre-trial phase, the Majority declares itself "mindful of the Prosecutor's right to 'rely on documentary or summary evidence and [that she] need not call the witness [*sic*] expected to testify at the trial", but continues that "the fact that during the confirmation process the Prosecutor is allowed to present most, if not all, of her evidence in documentary form, does not diminish the intrinsic shortcomings of [certain types of evidence]".[22] The Majority expresses its "general disposition towards certain types of evidence",[23] announcing its preference for certain types of evidence. It states, *inter alia*,: "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";[24] "[w]henever testimonial evidence is offered, it should, to the extent possible, be based on first-hand and personal observations of the witness;[25] "reliance upon [hearsay] evidence should be avoided [...] wherever

[21] 1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, para. 232.
[22] Decision, para. 31.
[23] Decision, para. 26.
[24] Decision, para. 27.
[25] Decision, para. 27.

possible";[26] "it is highly problematic when the Chamber itself does not know the source of the information and is deprived of vital information about the source of the evidence [because] [i]n such cases the Chamber is unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information";[27] "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(1)(a) of the Statute [...] and they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges".[28] Furthermore, the Majority also explicitly indicates that it "is not prepared to accept allegations proven solely through anonymous hearsay in documentary evidence".[29]

23. It is not necessary for the purpose of this Opinion, to address in detail such assertions of the Majority, the shortcomings of which may only be assessed fully when applied to concrete pieces of evidence. It suffices to indicate at this stage that I am not persuaded by the general approach of my colleagues. I believe such an approach undermines both the flexibility in the assessment of evidence that needs to prevail through all phases of the proceedings, as well as the possibility for the Prosecutor to rely solely on documentary and summary evidence.

24. Indeed, the drafters of the Statute have deliberately opted for a flexible approach to evidence and avoided elaboration of specific evidentiary rules. Except for the limited exclusion of certain types of evidence under article 69(7) of the Statute, all types of evidence are admissible within the legal framework of the Court, including direct, indirect and circumstantial evidence. The respective probative value will depend on the concrete circumstances that surround each item of evidence. Indeed, rule 63(2) of the Rules grants the Chamber the authority to assess

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[26] Decision, para. 28.
[27] Decision, para. 29.
[28] Decision, para. 35.
[29] Decision, para. 37.

freely, *i.e.* without formal evidentiary rules, all evidence submitted, and rule 63(4) of the Rules prevents the Chamber from imposing a legal requirement of corroboration.

25. As said, the approach of my colleagues is particularly problematic at the confirmation hearing, both in light of article 61(5) of the Statute, which clearly states that the Prosecutor may rely exclusively on documentary and summary evidence, and, more generally, in light of the limited purpose of the confirmation hearing. I believe that at no point should pre-trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect, as was previously held.[30] Furthermore, the Chambers should not seek to determine whether the evidence is sufficient to sustain a future conviction.[31]

26. As rightly recalled by my colleagues, the evidentiary threshold of "substantial grounds to believe" needs to be understood in light of the gatekeeper function of the Pre-Trial Chamber, which serves to distinguish between cases that should go to trial and those that should not, thus ensuring, *inter alia*, judicial economy.[32] I believe that Pre-Trial Chambers need to exercise this gatekeeping function with utmost prudence, taking into account the limited purpose of the confirmation hearing. An expansive interpretation of their role is not only unsupported by law. It affects the entire architecture of the procedural system of the Court and may, as a consequence, encroach upon the functions of trial Judges, generate duplications, and end up frustrating the judicial efficiency that Pre-Trial Chambers are called to ensure.

27. In this regard, I am troubled by the assumptions upon which my colleagues believe the mandate of Pre-Trial Chambers must be fulfilled, as well as by their approach to the evidence, as described above. In my view, they are likely to be understood as an implicit incentive for the Prosecutor to submit as much evidence as

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[30] Pre-Trial Chamber I, *The Prosecutor* v. *Bahar Idriss Abu Garda*, "Decision on the Confirmation of Charges", 8 February 2010, ICC-02/05-02/09-243-Red, para 40.
[31] *Id.*
[32] Decision, para. 18.

possible, including live witnesses, in order to secure confirmation, this in turn compelling the Defence to do the same.

28. Such an incentive runs counter to efforts deployed so far by Pre-Trial Chambers to discourage live evidence, including in the case at hand,[33] and may result in an extension of the already too lengthy pre-trial proceedings by generating, *inter alia*, more complex processes of disclosure, redactions and protective measures, to the detriment of the right of the suspect to be tried without undue delay. In sum, the approach of my colleagues may end up reintroducing through the back door the "mini-trial" or "trial before the trial" that the drafters and other Chambers of this Court wished so much to avoid.[34]

II. The facts and circumstances that need to be proven

29. As observed above, the Majority considers, and I fully agree, that the requisite evidentiary threshold needs to be applied equally to all "facts and circumstances" described in the charges, whether they pertain to the individual crimes charged, the criminal responsibility of the suspect or the contextual elements.[35]

30. As repeatedly observed by other Chambers of the Court,[36] in the framework of the Statute and the Rules, the "charges" are composed of facts and circumstances which are described therein (factual element) and their legal characterisation (legal element).

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[33] "Decision on the date of the confirmation of charges hearing and proceedings leading thereto", 14 December 2012, ICC-02/11-01/11-325, para. 34.

[34] See Pre-Trial Chamber I, *The Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the confirmation of charges", 1 October 2008, ICC-01/04-01/07-717 para. 64; Pre-Trial Chamber I, *The Prosecutor* v. *Bahar Idriss Abu Garda*, "Decision on the Confirmation of Charges", 8 February 2010, ICC-02/05-02/09-243-Red, para. 39.

[35] Decision, para. 19.

[36] See *e.g.* Pre-Trial Chamber II, *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-02/11-328-Red, para. 56; Trial Chamber I, *The Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute", 14 March 2012, ICC-01/04-01/06-2842, para. 2.

31. According to article 61(7) of the Statute, the Chamber must "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". Article 74 of the Statute provides that the decision of the Trial Chamber on the guilt or innocence of the accused "shall not exceed the facts and circumstances described in the charges".

32. What the Pre-Trial Chamber is therefore required to analyse, in accordance with article 61(7) of the Statute, is whether the available evidence, taken as a whole, sufficiently demonstrates that the facts and circumstances described in the charges are proven to the requisite threshold.

33. It is unquestionable that "facts and circumstances described in the charges" do not refer to *all* facts that are contained in the narrative of the DCC or discussed in some way at the confirmation of charges hearing. This has been confirmed by the Appeals Chamber, which has stated that the facts and circumstances described in the charges must be distinguished from the evidence put forward by the Prosecutor, as well as from background or other information contained in the DCC,[37] although without determining "how narrowly or how broadly the term 'facts and circumstances described in the charges' as a whole should be understood".[38]

34. Facts and circumstances described in the charges must in particular be distinguished from the facts which are not described in the charges, but from which the facts and circumstances of the charges can be inferred.[39] This distinction appears

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[37] Appeals Chamber, *The Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", 8 December 2009, ICC-01/04-01/06-2205, footnote 163.

[38] Appeals Chamber, *The Prosecutor* v. *Germain Katanga*, "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons'", 27 March 2013, ICC-01/04-01/07-3363, para. 50.

[39] I observe that these other facts that are not the material facts of the charges have previously been defined by the other Pre-Trial Chambers as "subsidiary facts". See Pre-Trial Chamber I, *The Prosecutor* v. *Abdhallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Corrigendum of the 'Decision on

of significance especially in terms of the applicable standard of proof, as well as in relation to a clear determination of the factual parameters of the case. A clear line, based on the individual charges as presented by the Prosecutor, must indeed be drawn between the facts and circumstances which are "described in the charges" and the facts and circumstances that are *not* "described in the charges", as only the former must be proven to the requisite threshold of substantial grounds to believe.

35. In practice, knowing where to draw the line has not been easy and the controversy has continued even after the issuance of confirmation of charges decisions. Taking stock of past problems, the Chamber sought to clarify the matter in the case at hand by requesting the Prosecutor to present a DCC in which the facts and circumstances of the charges would be clearly distinguished from other factual allegations.[40] The Prosecutor complied with this instruction of the Chamber and provided charges in which all the pleaded factual allegations were set out in sections H and I of the DCC, separate from other submissions, including a number of facts upon which the Prosecutor relies in order to prove one or more of those factual allegations that are described in the charges. It was on the basis of these charges as described by the Prosecutor that the Defence eventually presented its list of evidence and that the confirmation of charges hearing took place, without objections from the Chamber.

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the Confirmation of Charges'", 7 March 2011, ICC-02/05-03/09-121-Red-Corr, paras 36 to 38; Pre-Trial Chamber II, *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-02/11-328-Red, paras 56 to 60. For the relevance of the concrete distinction between material and subsidiary facts see also Trial Chamber V, *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Order regarding the content of the charges", 20 November 2012, ICC-01/09-02/11-536. I also observe at this juncture that facts of a subsidiary nature will usually emerge from "circumstantial evidence" which has indeed been defined as "evidence surrounding an event from which a fact at issue may be reasonably inferred" and which "may become a critical ingredient", given that "crimes are committed very often when witnesses are not present, and [...] in criminal trials, especially in cases like the ones before this Tribunal, the possibility of establishing the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is problematic or unavailable" (ICTY, Prosecutor v. Radoslav Brđanin, Case No. IT-99-356-T, "Trial Judgment", 1 September 2004, para. 35).

[40] Pre-Trial Chamber I, "Decision on the date of the confirmation of charges hearing and proceedings leading thereto", 14 December 2012, ICC-02/11-01/11-325, para. 34.

36. The Majority now claims 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'".[41] In addition, the Majority even requires these facts to be included among the facts of circumstances of the charges in a new amended DCC to be presented by the Prosecutor.[42]

37. I respectfully disagree with my colleagues. I am of the view that by introducing the notion of "incidents" and applying to it the relevant evidentiary standard the Majority misinterprets article 7 of the Statute.

38. Article 7(1) of the Statute requires that crimes against humanity be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Pursuant to article 7(2) of the Statute two cumulative requirements need to be met to establish an "attack against the civilian population": (i) there must be a *course of conduct* involving a multiple commission of acts against the civilian population; and (ii) the course of conduct must be carried out pursuant to or in furtherance of a State or organizational *policy* to commit such attack. Such an attack must then qualify as either widespread or systematic, while the individual acts charged must be committed "as part" of the attack, and the suspect must act with knowledge thereof. Since these are the contextual elements of crimes against humanity, the Chamber is mandated to make findings, pursuant to article 61(7) of the Statute, on the factual allegations underpinning them.[43]

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[41] Decision, para. 21.

[42] Decision, para. 45.

[43] Within the meaning of the distinction among "conduct", "consequences" and "circumstances" made in article 30 of the Statute, the facts underlying the contextual elements of the crimes charged are more appropriately qualified as "circumstances" of which the perpetrator must be aware, as also explicitly clarified by article 7(1)(a) of the Statute which indeed requires that the perpetrator had "knowledge" of the attack directed against the civilian population. In the same vein, the contextual elements of the crimes are dubbed "contextual *circumstances* (emphasis added)" at paragraph 7 of the

39. These contextual elements are currently laid out at paragraphs 97 and 105 of the DCC, while the Prosecutor referred in other sections of that document, as well as at the hearing, to a number of other facts, in order to prove one or more of the material facts described in the charges, including the contextual elements of the crimes charged.[44] Crucially, the Prosecutor narrates at paragraphs 23 to 29 of the DCC a series of events involving acts of killing, raping, injuring and deprivation of physical liberty. The Prosecutor's List of Evidence contains specific references to those items of evidence that support the allegations concerning these events.[45] At the hearing, the Prosecutor made a presentation describing 45 "incidents", including those four during which the specific crimes imputed to Mr Gbagbo are alleged to have occurred.[46]

40. The Majority considers that these 45 "incidents", which as such do not even appear in the DCC, now *constitute* the "attack against the civilian population".[47] As already indicated, the Majority considers that they must be included within the facts of the case that are charged and proven to the required evidentiary threshold.[48] I beg to disagree. The Prosecutor needs to prove the existence of an "attack" as this is the contextual element of crimes against humanity. She also needs to prove, to the requisite threshold, the underlying crimes that are attributed to Mr Gbagbo, which were allegedly committed during four out of those 45 "incidents".[49]

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general introduction of the Elements of Crimes. In relation to the contextual elements of war crimes, the Elements of Crimes likewise require "awareness of the factual *circumstances* that established the existence of an armed conflict" (Elements of Crimes, article 8, Introduction). Other "factual circumstances" required for a number of crimes within the jurisdiction of the Court are equally listed in the provisions of the Elements of Crimes enumerating the constitutive elements of those crimes.

[44] In particular, but not exclusively paras 20-42 of the DCC.

[45] List of Evidence, pp. 23-32.

[46] ICC-02/11-01/11-T-15-Red-ENG, p. 36, line 10 to p. 45, line 17.

[47] Decision, para. 21.

[48] *Id.*

[49] Namely "during and after a pro-Ouattara march on the [*Radio Télévision Ivoirienne*]" between 16 and 19 December 2010, at a "pro-Ouattara women's demonstration in Abobo" on 3 March 2011, "in or near Abobo market by shelling a densely populated area" on 17 March 2011 and in Yopougon on 12 April 2011. See paras 93-95 and 101-103 of the DCC.

41. The remaining "incidents" are neither contextual elements nor underlying acts within the meaning of article 7(1)(a) of the Statute. They are not facts underlying the elements of crimes against humanity but, in my view, they merely serve to prove, together with *all* available evidence, the attack and/or its widespread or systematic nature.

42. The term "incident" has no specific legal meaning either, although it may be of certain practical value in the analysis of the evidence and the construction of a narrative of relevant facts as it appears to refer to an event within certain temporal and territorial parameters. Since the construction of "incidents" is an exercise of interpretation of the evidence, it is inherently arbitrary and broader or narrower "incidents" may be construed from the same evidence.

43. The term "incident" in this sense cannot thus be equated with the statutory notion of "acts referred to in paragraph 1 against any civilian population" and nowhere in article 7(2) of the Statute is it required that an attack against a civilian population comprise either a specific or "a sufficient number of incidents". Indeed, the words "course of conduct" in article 7(2)(a) of the Statute make clear that an "attack" is not a mechanical aggregate of a certain number of "incidents".

44. Therefore, the Prosecutor is not required to allege each such "incident" as part of the facts and circumstances of the charges as required by the Majority.[50] Rather, the Prosecutor must allege and the Chamber must determine to the requisite threshold on the basis of all relevant evidence, whether there is an "attack", meaning a *course of conduct* involving a multiple commission of acts.[51] Evidence relevant to

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[50] Decision, para. 45.

[51] Along the same line that what is required to establish the relevant "course of conduct" is the commission of those acts referred to in article 7(1) of the Statute, Pre-Trial Chamber II previously held that "[t]he commission of the acts referred to in article 7(1) of the Statute constitute the 'attack' itself and, besides the commission of the *acts*, no additional requirement for the existence of an 'attack' should be proven (emphasis added)" (Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, para. 75).

prove the attack may not be necessarily and solely related to separate "incidents". On the contrary, other relevant evidence which may equally support the allegation of an attack under article 7(2)(a) of the Statute could include evidence with respect to the general situation in the area under consideration or evidence relating to a certain level of planning and coordination of the attack.

45. Chambers of this Court have never understood the "attack" as comprising a number of "incidents" that need to be proven separately. They have correctly appreciated the need that all relevant acts be considered together with all other available evidence in order to substantiate *as a whole* the existence of an attack or course of conduct, which they have described as a "campaign or operation carried out against the civilian population".[52] Today's decision of the Majority departs from this understanding with no explanation.

46. It appears from its Decision that the Majority also intends to establish whether each separate "incident" is a constitutive part of the attack by determining whether it occurred pursuant to or in furtherance of the "policy" required in article 7(2)(a) of the Statute. In this regard, my colleagues declare that the weaknesses in the evidence "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) of the Statute."[53] The Majority specifically requests of the Prosecutor further evidence with respect to the issue, in relation to "each of the incidents", on

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[52] Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, para. 75. Pre-Trial Chamber II, *Situation in the Republic of Kenya*, "Corrigendum to the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr, 1 April 2010, para. 80. Pre-Trial Chamber III, *Situation in the Republic of Côte d'Ivoire*, "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", 3 October 2011, ICC-02/11-14-Corr, para. 31; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 23 January 2012, ICC-01/09-01/11-373, para. 164.

[53] Decision, para. 35.

"whether the alleged physical perpetrators were acting pursuant to or in furtherance of the alleged policy".[54]

47. I am afraid I am again in disagreement with my colleagues. In addition to arguments already given in relation to the notion of "incident", it is clear under article 7(2)(a) of the Statute that it is the "attack" that needs to be committed pursuant to or in furtherance to the policy, not individual "acts" and certainly not the legally inexistent "incidents".[55]

48. I note that the matter was indeed discussed during the negotiations of the Statute where the current formulation "policy to commit such attack" eventually ended up replacing an earlier formulation of a "policy to commit *those acts*".[56] It might be argued that acts underlying the attack, once the attack is established, are also an expression of the policy. However, it would be a legal and methodological mistake to seek to assess the policy requirement in relation to separate acts, or "incidents", instead of considering it with respect to the attack as a whole. While the policy might be discerned from the pattern of events on the ground,[57] it might be impossible to establish a link between acts considered in isolation and the policy. A piecemeal approach to facts and evidence is simply not helpful to assess systemic forms of criminality.

III. Content of the Majority's request to the Prosecutor

49. Taking into account the legal requirements under article 7 of the Statute and the limited object and purpose of the confirmation hearing, I consider that the

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[54] Decision, para. 43.

[55] I also make reference in this respect to the Elements of Crimes which further clarify that "'policy to commit such attack' requires that the State or organization actively promote or encourage such *an attack* against a civilian population (emphasis added)", rather than each individual act or "incident".

[56] On the record, ICC Volume I, Issue 11, 2 July 1998; and ICC Volume I, Issue 18 (Part 1), 11 July 1998.

[57] Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 15 June 2009, ICC-01/05-01/08-424, para. 81; Pre-Trial Chamber III, *The Prosecutor v. Laurent Koudou Gbagbo*, "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo", 30 November 2011, ICC-02/11-01/11-9-Red, para. 37.

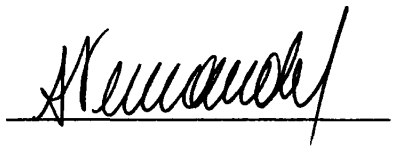
additional evidence that is being requested is either not appropriate or not relevant to prove the charges as formulated by the Prosecutor.

50. In line with the above, I also disagree with the instruction given to the Prosecutor to submit a new "Amended DCC setting out in detail and with precision the facts of the case, including all incidents forming the contextual elements of crimes against humanity".[58] As already indicated, I do not agree that these "incidents" constitute the contextual elements of the crimes charged. Most importantly, I do not believe that the Chamber has the power to shape the factual allegations of the charges or to request the Prosecutor to reframe the charges in order to adapt them to its understanding of the case.

51. In my view, the instruction of the Majority amounts to a request for the Prosecutor to amend the charges, something that the Chamber may only do to a limited extent under article 61(7)(c)(ii) of the Statute. Pursuant to this provision, the Chamber may indeed request the Prosecutor to consider amending the charges but only in relation to the legal characterisation of the facts. It does not allow the Chamber to involve itself in the Prosecutor's selection of which facts to charge. In sum, it is for the Prosecutor and not for the Chamber to select her case and its factual parameters. The Pre-Trial Chamber is not an investigative chamber and does not have the mandate to direct the investigations of the Prosecutor.

52. In conclusion, for the reasons given, I dissent from today's decision of my colleagues to adjourn the confirmation of charges hearing in the present case under article 61(7)(c)(i) of the Statute.

[58] Decision, para. 45 (footnote omitted).



Judge Silvia Fernández de Gurmendi

Dated this 3 June 2013

At The Hague, The Netherlands