

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 3 June 2013

**PRE-TRIAL CHAMBER I**

**Before:** Judge Silvia Fernández de Gurmendi, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Christine Van den Wyngaert

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE  
IN THE CASE OF  
*THE PROSECUTOR V. LAURENT GBAGBO***

**Public**

**Decision adjourning the hearing on the confirmation of charges pursuant to  
article 61(7)(c)(i) of the Rome Statute**

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

**The Office of the Prosecutor**  
Fatou Bensouda, Prosecutor  
Eric Macdonald, Senior Trial Lawyer

**Counsel for the Defence**  
Emmanuel Altit  
Agathe Bahi Baroan

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**  
Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

---

**Registrar & Deputy Registrar**  
Herman von Hebel, Registrar  
Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Pre-Trial Chamber I** (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (the “Statute”).

## I. PROCEDURAL HISTORY

1. On 3 October 2011, Pre-Trial Chamber III, by majority, authorised the commencement of an investigation in the Republic of Côte d'Ivoire (“Côte d'Ivoire”) with respect to crimes within the jurisdiction of the Court committed since 28 November 2010.<sup>1</sup> On 22 February 2012, Pre-Trial Chamber III expanded the authorisation for the investigation to encompass crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010.<sup>2</sup>

2. On 23 November 2011, Pre-Trial Chamber III issued a warrant of arrest for Laurent Gbagbo (“Mr Gbagbo”), having found reasonable grounds to believe that he was criminally responsible as an “indirect co-perpetrator” pursuant to article 25(3)(a) of the Statute for the crimes against humanity of murder, rape and other forms of sexual violence, other inhumane acts and persecution, committed in Côte d'Ivoire during the period between 16 December 2010 and 12 April 2011.<sup>3</sup> The decision on the

---

<sup>1</sup> Pre-Trial Chamber III, 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, and corrigendum, ICC-02/11-14-Corr, filed on 15 November 2011. Judge Fernández de Gurmendi issued a separate and partially dissenting opinion on the decision (Judge Fernandez de Gurmendi's separate and partially dissenting opinion to the 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-02/11-15, and corrigendum, ICC-02/11-15-Corr, with Annex 1, filed on 5 October 2011).

<sup>2</sup> Pre-Trial Chamber III, Decision on the “Prosecution’s provision of further information regarding potentially relevant crimes committed between 2002 and 2010”, 22 February 2012, ICC-02/11-36.

<sup>3</sup> Pre-Trial Chamber III, Warrant of Arrest for Laurent Koudou Gbagbo, 23 November 2011, ICC-02/11-01/11-1.

Prosecutor's application for the warrant of arrest was issued on 30 November 2011.<sup>4</sup> Mr Gbagbo was surrendered to the Court on 30 November 2011.

3. On 5 December 2011, Mr Gbagbo made his initial appearance before the Court. During the hearing, Pre-Trial Chamber III satisfied itself that Mr Gbagbo had been informed of the crimes he was alleged to have committed and of his relevant rights and scheduled the confirmation of charges hearing (the "Hearing") for 18 June 2012.<sup>5</sup>

4. On 15 March 2012, the situation in Côte d'Ivoire was reassigned to Pre-Trial Chamber I.<sup>6</sup>

5. On 12 June 2012, following a Defence request for postponement on the grounds, *inter alia*, that their resources were insufficient to properly prepare for the Hearing,<sup>7</sup> the Single Judge<sup>8</sup> issued a decision postponing the Hearing to 13 August 2012.<sup>9</sup>

6. On 2 August 2012, the Single Judge issued a decision postponing the Hearing pending the resolution of the issue of Mr Gbagbo's fitness to take part in the proceedings.<sup>10</sup>

---

<sup>4</sup> Pre-Trial Chamber III, 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-US-Exp, and public redacted version, ICC-02/11-01/11-9-Red, filed on 20 December 2011.

<sup>5</sup> Pre-Trial Chamber III, Transcript of Hearing, 5 December 2011, ICC-02/11-01/11-T-1-ENG, p. 8.

<sup>6</sup> Presidency, Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations, 15 March 2012, ICC-02/11-01/11-59.

<sup>7</sup> Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012, 5 June 2012, ICC-02/11-01/11-140-Conf, and public redacted version, ICC-02/11-01/11-140-Red.

<sup>8</sup> Pre-Trial Chamber I, Décision portant désignation d'un juge unique, 16 March 2012, ICC-02/11-01/11-61.

<sup>9</sup> Pre-Trial Chamber I, Decision on the "Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012", 12 June 2012, ICC-02/11-01/11-152-Conf, and public redacted version ICC-02/11-01/11-152-Red.

<sup>10</sup> Pre-Trial Chamber I, Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing, 2 August 2012, ICC-02/11-01/11-201, with annex.

7. On 2 November 2012, the Chamber issued the “Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court”, finding that Mr Gbagbo was fit to take part in the proceedings.<sup>11</sup> On 29 November 2012, the Chamber rejected the Defence application for leave to appeal this decision.<sup>12</sup>

8. On 14 December 2012, the Chamber issued the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto”, setting 19 February 2013 as the date for the commencement of the Hearing and establishing, *inter alia*, the time limits for the disclosure and presentation of evidence.<sup>13</sup>

9. On 17 January 2013, the Prosecutor filed the amended document containing the charges (the “Amended DCC”), list of evidence and consolidated Elements Based Chart.<sup>14</sup> In the Amended DCC, the Prosecutor alleges that Mr Gbagbo is criminally responsible for crimes against humanity committed in Côte d'Ivoire between 16 December 2010 and 12 April 2011.<sup>15</sup>

10. On 1 February 2013, the Defence filed the list of evidence that it intended to present at the Hearing.<sup>16</sup>

11. The Hearing was held from 19 until 28 February 2013.<sup>17</sup> The final written submissions of the Prosecutor<sup>18</sup> and the Office of Public Counsel for victims<sup>19</sup> were

---

<sup>11</sup> Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Conf and public redacted version, ICC-02/11-01/11-286-Red.

<sup>12</sup> Pre-Trial Chamber I, Decision on three applications for leave to appeal, 29 November 2012, ICC-02/11-01/11-307.

<sup>13</sup> 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.

<sup>14</sup> Soumission de l'Accusation du Document amendé de notification des charges, de l'Inventaire amendé des éléments de preuve à charge et des Tableaux amendés des éléments constitutifs des crimes, 17 January 2013, ICC-02/11-01/11-357, with confidential annexes 1-3; and public redacted version, ICC-02/11-01/11-357-Anx1-Red.

<sup>15</sup> Amended DCC, paras 92-108.

<sup>16</sup> Communication de l'inventaire des éléments de preuve à décharge de la Défense, 1 February 2013, ICC-02/11-01/11-381, with confidential annex.

<sup>17</sup> Pre-Trial Chamber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG; *id.*, Transcript of Hearing, 20 February 2013, ICC-02/11-01/11-T-15-ENG, and public redacted version

filed on 14 March 2013, and the final written submissions of the Defence were filed on 28 March 2013.<sup>20</sup> The Chamber announced on the last day of the Hearing that the decision would be issued within 60 days after the final written submissions of the Defence.<sup>21</sup>

## II. THE APPLICABLE LAW

12. The Chamber notes articles 21, 61 and 67 of the Statute. Article 61(7) of the Statute provides:

The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
  - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
  - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

---

ICC-02/11-01/11-T-15-Red-ENG; *id.*, Transcript of Hearing, 21 February 2013, ICC-02/11-01/11-T-16-ENG, and public redacted version ICC-02/11-01/11-T-16-Red-ENG; *id.*, Transcript of Hearing, 22 February 2013, ICC-02/11-01/11-T-17-ENG, and public redacted version ICC-02/11-01/11-T-17-Red-ENG; *id.*, Transcript of Hearing, 25 February 2013, ICC-02/11-01/11-T-18-ENG, and public redacted version ICC-02/11-01/11-T-18-Red-ENG; *id.*, Transcript of Hearing, 26 February 2013, ICC-02/11-01/11-T-19-ENG, and public redacted version ICC-02/11-01/11-T-19-Red-ENG; *id.*, Transcript of Hearing, 27 February 2013, ICC-02/11-01/11-T-20-ENG, and public redacted version ICC-02/11-01/11-T-20-Red-ENG; *id.*, Transcript of Hearing, 28 February 2013, ICC-02/11-01/11-T-21-ENG.

<sup>18</sup> Prosecution's submission on issues discussed during the Confirmation Hearing, 14 March 2013, ICC-02/11-01/11-420-Conf, with Annex A, and public redacted version ICC-02/11-01/11-420-Red, filed on 21 March 2013.

<sup>19</sup> Final written submissions of the Common Legal Representative of Victims following the confirmation of charges hearing, 14 March 2013, ICC-02/11-01/11-419.

<sup>20</sup> Soumissions écrites de la défense portant sur un certain nombre de questions discutées lors de l'audience de confirmation des charges, 28 March 2013, ICC-02/11-01/11-429-Conf, with confidential annex, and public redacted version, ICC-02/11-01/11-429-Red, filed on 3 April 2013.

<sup>21</sup> Pre-Trial Chamber I, Transcript of Hearing, 28 February 2013, ICC-02/11-01/11-T-21-ENG, p. 51, lines 5-9.

13. The Chamber notes that Pre-Trial Chamber III previously issued a decision pursuant to article 61(7)(c) of the Statute and agrees with its determination that an adjournment of the Hearing may take place “subsequent to the oral sessions and as long as the Chamber has not made its final determination on the merits and issued a decision whether or not to confirm the charges”.<sup>22</sup> In the same decision, Pre-Trial Chamber III assessed article 61(7)(c)(i) of the Statute as follows:

Under sub-paragraph (i), the Chamber makes an evaluation of the evidence presented and its sufficiency to reach the “substantial grounds to believe” threshold of the chapeau in article 61(7) of the Statute. In its determination, pursuant to article 61(7)(c)(i) of the Statute, the Chamber adjourns the hearing because the evidence presented does not meet the required threshold for confirming the charges as required by article 61(7)(a) of the Statute, and because such evidence is not irrelevant and insufficient to a degree that merits declining to confirm the charges under article 61(7)(b) of the Statute. In this case the Chamber decides that some further evidence is needed. Only after this evidence is provided will the Chamber be in a position to make its final determination on the merits. This process requires analysis and evaluation of the evidence and related documents already before the Chamber in order to justify the request for further evidence.<sup>23</sup>

14. As to the phrase “with respect to a particular charge” in article 61(7)(c)(i) of the Statute, the Chamber considers that this phrase does allow for the Chamber to adjourn the Hearing with respect to one or more charges, including any element within the charge(s) in question. This interpretation also reconciles article 61(7)(c)(i) of the Statute with rule 127 of the Rules of Procedure and Evidence (the “Rules”), which contemplates the possibility of adjourning the Hearing under article 61(7)(c) of the Statute with respect to multiple charges.<sup>24</sup>

### III. ANALYSIS

15. As developed further below, the Chamber considers that the Prosecutor’s evidence, viewed as a whole, although apparently insufficient, does not appear to be so lacking in relevance and probative value that it leaves the Chamber with no

---

<sup>22</sup> Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009, ICC-01/05-01/08-388, para. 37.

<sup>23</sup> *Ibid.*, para. 16.

<sup>24</sup> Rule 127 of the Rules provides, in relevant part and with emphasis added: “[i]f the Pre-Trial Chamber is ready to confirm some charges but adjourns the hearing *on other charges under article 61, paragraph 7 (c) [...]*”.

choice but to decline to confirm the charges under article 61(7)(b) of the Statute. Rather than making a final determination on the merits at this time, the Chamber considers it appropriate in this case to adjourn the Hearing pursuant to article 61(7)(c)(i) of the Statute.

### 1. Evidentiary threshold

16. Pursuant to article 61(7) of the Statute, the Chamber “shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.

17. It is recalled that the drafters of the Statute established progressively higher evidentiary thresholds applicable in the course of the different stages of the proceedings.<sup>25</sup> The evidentiary threshold of “substantial grounds to believe” required for the confirmation of charges is higher than the threshold required for the issuance of a warrant of arrest (“reasonable grounds to believe”)<sup>26</sup> but lower than the threshold required for the conviction of an accused (“beyond reasonable doubt”).<sup>27</sup> With a view to giving concrete meaning to the term “substantial grounds”, Pre-Trial Chamber I emphasized that “[a]fter an exacting scrutiny of all the evidence, the Chamber will determine whether it is *thoroughly satisfied* that the [Prosecutor’s] allegations are *sufficiently strong* to commit [the person] to trial” (emphasis added).<sup>28</sup> Pre-Trial Chamber II understood the term “substantial” to mean “significant”,

---

<sup>25</sup> Pre-Trial Chamber II, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, para. 28; Appeals Chamber, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 3 February 2010, ICC-02/05-01/09-73, para. 30; Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto 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. 40.

<sup>26</sup> Article 58(1) of the Statute.

<sup>27</sup> Article 66(3) of the Statute.

<sup>28</sup> Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 39.



“solid”, “material”, “well built”, “real” rather than “imaginary”.<sup>29</sup> Pre-Trial Chambers have consistently held that to meet the evidentiary burden of “substantial grounds to believe”, the Prosecutor must “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations”.<sup>30</sup>

18. The higher evidentiary threshold at this juncture of the proceedings accords with the gatekeeper function of the Pre-Trial Chamber according to which (i) only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion; (ii) the suspect is protected against wrongful prosecution; (iii) and judicial economy is ensured by distinguishing between cases that should go to trial and those that should not.<sup>31</sup>

---

<sup>29</sup> Pre-Trial Chamber II, *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. 29.

<sup>30</sup> Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 39; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 65; Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 37; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 40; Pre-Trial Chamber II, *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. 29; Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto 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. 40.

<sup>31</sup> Appeals Chamber, *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 (OA 4), para. 39; Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 52; Pre-Trial Chamber II, *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. 28; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 41; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 63; Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tENG, para. 37.

2. *Evidentiary threshold applicable to all “facts and circumstances”*

19. As has been repeatedly held, the proposed charges are composed of the “facts and circumstances”<sup>32</sup> and their legal characterization.<sup>33</sup> It is incumbent on the Prosecutor to clearly define in the document containing the charges all the facts and circumstances and to propose therein their legal characterization.<sup>34</sup> At the present stage of the proceedings, it is the Chamber’s duty to evaluate whether there is sufficient evidence for each of the “facts and circumstances” advanced by the Prosecutor in order to satisfy all of the legal elements of the crime(s) and mode(s) of liability charged. The standard by which the Chamber scrutinizes the evidence 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 suspect.

20. Article 74(2) of the Statute mentions the “facts and circumstances as described in the charges”, which clearly refers to “the charges as confirmed” in the article 61(7)(a) decision. Any other general background information, albeit informative or helpful, will not be central to the charges<sup>35</sup> as it will not “support the legal elements of the crime charged”.<sup>36</sup>

21. For example, the individual incidents alleged by the Prosecutor in support of her allegation that there was an “attack directed against any civilian population” are

---

<sup>32</sup> Article 74(2) of the Statute.

<sup>33</sup> Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 56.

<sup>34</sup> Regulation 52 of the Regulations of the Court dictates that the document containing the charges include a “statement of the facts” and a “legal characterisation of the facts”.

<sup>35</sup> Trial Chamber V, *Prosecutor v. Uhuru Muigai Kenyatta*, Order regarding the content of the charges, 20 November 2012, ICC-01/09-02/11-536, para. 13; Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 152.

<sup>36</sup> Appeals Chamber, *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 Regulations 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, footnote 163.

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”. This is especially so in this case in which the Prosecutor identifies particular incidents that *constitute* the attack against the civilian population. In other words, the incidents are “facts” which “support the [contextual] legal elements of the crime charged”.

22. Taking into consideration that contextual elements form part of the substantive merits of the case,<sup>37</sup> the Chamber sees no reason to apply a more lenient standard in relation to the incidents purportedly constituting the contextual element of an “attack” for the purposes of establishing the existence of crimes against humanity than the standard applied in relation to other alleged facts and circumstances in the case. Accordingly, each incident underlying the contextual elements must be proved to the same threshold that is applicable to all other facts. This is not to say that there is no difference between crimes that underlie a suspect’s individual criminal responsibility and crimes being committed as part of incidents which only establish the relevant context. The crimes which are alleged to prove the suspect’s individual criminal responsibility must be linked to the suspect personally, whereas incidents proving the contextual circumstances do not require such an individualised link. As such, the former set of crimes will inevitably need to be proven in greater detail than the latter. Indeed, in order to be considered relevant as proof of the contextual elements, the information needed may be less specific than what is needed for the crimes charged but is still required to be sufficiently probative and specific so as to support the existence of an “attack” against a civilian population. The information needed must include, for example, details such as the identity of the perpetrators, or at least information as to the group they belonged to, as well as the identity of the

---

<sup>37</sup> Appeals Chamber, *Prosecutor v. Uhuru Muigai Kenyatta*, 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.

victims, or at least information as to their real or perceived political, ethnic, religious or national allegiance(s).

23. When 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. This is all the more so in case none of the incidents, taken on their own, could establish the existence of such an “attack”.

### 3. Chamber’s Approach to Evidence

24. The Chamber notes article 61(5) of the Statute, which provides that “the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial”.

25. Even though article 61(5) of the Statute only requires the Prosecutor to support each charge with “sufficient” evidence at the confirmation hearing, the Chamber must assume that the Prosecutor has presented her strongest possible case based on a largely completed investigation. As the Appeals Chamber highlighted, “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”.<sup>38</sup> This approach ensures continuity in the presentation of the case and safeguards the rights of the Defence, which should not be presented with a wholly different evidentiary case at trial.<sup>39</sup> It also ensures that the commencement of the trial is not unduly delayed and

---

<sup>38</sup> Appeals Chamber, *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 (OA 4), para. 44.

<sup>39</sup> See also Trial Chamber V, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, paras 118-123.

conforms with the right of the Defence to be tried without undue delay pursuant to article 67(1)(c) of the Statute.

26. In relation to the quality of individual items of evidence, the Chamber considers that it would be unhelpful to formulate rigid formal rules, as each exhibit and every witness is unique and must be evaluated on its own merits. Nevertheless, the Chamber does consider it useful to express its general disposition towards certain types of evidence.

27. As a general matter, it is preferable for the Chamber to have as much forensic and other material evidence as possible. Such evidence should be duly authenticated and have clear and unbroken chains of custody. Whenever testimonial evidence is offered, it should, to the extent possible, be based on the first-hand and personal observations of the witness.

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

29. Heavy reliance upon anonymous hearsay, as is often the basis of information contained in reports of nongovernmental organizations ("NGO reports") and press articles, is problematic for the following reasons. Proving allegations solely through anonymous hearsay puts the Defence in a difficult position<sup>40</sup> because it is not able to

---

<sup>40</sup> See, for example, Pre-Trial Chamber I, Transcript of Hearing, 27 February 2013, ICC-02/11-01/11-T-20-Red-ENG, p. 48 lines 17-25 and p. 49, lines 1-17 and p. 60, lines 16-25; *id.*, Transcript of Hearing, 25 February 2013, ICC-02/11-01/11-T-18-Red-ENG, p. 31, lines 1-25.

investigate and challenge the trustworthiness of the source(s) of the information, thereby unduly limiting the right of the Defence under article 61(6)(b) of the Statute to challenge the Prosecutor's evidence, a right to which the Appeals Chamber attached "considerable significance".<sup>41</sup> Further, 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. In 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.<sup>42</sup>

30. In relation to corroboration, it should be noted that it will often be difficult, if not impossible, to determine whether and to what extent anonymous hearsay in documentary evidence corroborates other evidence of the same kind. This is because it will usually be too difficult to determine whether two or more unknown sources are truly independent of each other, and the Chamber is not allowed to speculate in this regard. The Chamber does not exclude the possibility that in exceptional cases it may be apparent from the evidence that two or more anonymous hearsay sources in documentary evidence corroborate each other because they are clearly based on independent sources. However, since even in such cases the Chamber may still not have enough information about the trustworthiness of these sources, it will be extremely cautious in attributing the appropriate level of probative value.

31. The Chamber is mindful of the Prosecutor's right to "rely on documentary or summary evidence and [that she] need not call the witness expected to testify at the trial".<sup>43</sup> However, the fact that during the confirmation process the Prosecutor is

---

<sup>41</sup> Appeals Chamber, *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 (OA 4), para. 40.

<sup>42</sup> The Chamber observes, in this regard, that the problem with anonymous hearsay may not necessarily be resolved by the fact that the Chamber has some generic information about the source. What matters is that enough information about the trustworthiness of the source of the information is available in order to allow the Chamber to attribute the appropriate level of probative value to the information.

<sup>43</sup> Article 61(5) of the Statute.

allowed to present most, if not all, of her evidence in documentary form, does not diminish the intrinsic shortcomings of the type of evidence discussed in the previous paragraphs.

32. The Chamber notes, in this regard, that the presentation of anonymous hearsay evidence that is contained in documentary evidence, such as press articles and NGO reports, must be clearly distinguished from the presentation by the Prosecutor of anonymous or summary witness statements at the confirmation hearing. In relation to the former, unless the Prosecutor conducts further investigations, there is no prospect of more information becoming available about the source of the evidence. However, in relation to the latter, the situation is different because the Chamber knows the identity of the witness and it may also be assumed that the witness will later be called at trial.

33. As stated by the Appeals Chamber, 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 the witness”,<sup>44</sup> and therefore any such evaluation will “necessarily be presumptive”.<sup>45</sup> The Appeals Chamber took pains to warn that Pre-Trial Chambers should “take great care in finding that a witness [whose statement was presented in summary or anonymous form] is or is not credible.”<sup>46</sup>

34. Moreover, in relation to (anonymous) summaries of witness statements, the Chamber must be sensitive to the fact that the Defence will regularly not be in a position to exercise its right to challenge such evidence, in particular its probative

---

<sup>44</sup> Appeals Chamber, *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 (OA 4), para. 48.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

value.<sup>47</sup> In this regard, the Chamber adopts a similar position to the one held by other Pre-Trial Chambers, according to which the Chamber may, in order to counterbalance the disadvantageous position of the Defence, decline to confirm allegations that are supported only by anonymous or summary witness statements.<sup>48</sup>

35. In light of the above considerations, the Chamber notes with serious concern that in this case the Prosecutor relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity. Such pieces of evidence 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. Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, 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.

#### 4. *The Evidentiary Record of the Prosecutor in the Present Case*

36. During the Hearing, the Prosecutor made clear that besides the four charged incidents,<sup>49</sup> she is relying upon further 41 incidents to establish her allegation for the existence of an “attack directed against any civilian population” under article 7 of

---

<sup>47</sup> Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 90.

<sup>48</sup> Pre-Trial Chamber II, *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Confirmation of Charges Pursuant to Articles 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 90; Pre-Trial Chamber II, *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. 50; Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 49; Pre-Trial Chamber I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 41; Pre-Trial Chamber I, *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 52; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, 30 September 2008, ICC-01/04-01/07-717, para. 160.

<sup>49</sup> The Chamber notes the Prosecutor’s contention that the four charged incidents alone, in and of themselves, are sufficient to establish the existence of a widespread or systematic attack, see ICC-02/11-01/11-420-Red, para. 30.



the Statute.<sup>50</sup> Of these 45 incidents, the majority of them are proven solely with anonymous hearsay from NGO Reports, United Nations reports and press articles. As explained above, the Chamber is unable to attribute much probative value to these materials. Moreover, many of these incidents are described in very summary fashion, making 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. The Chamber is also presented with an incomplete picture as to: (i) the structural connections between the so-called “pro-Gbagbo forces” acting across the incidents; and (ii) the presence and activities of the armed forces opposing them. Ultimately, the Chamber is asked by the Prosecutor to draw numerous inferences from actions or conduct of Mr Gbagbo, his inner circle and the “pro-Gbagbo forces”, but the Chamber does not have enough information to determine whether these inferences are sufficiently supported by the evidence in order to meet the required threshold for confirmation.

37. Despite these difficulties in the evidentiary record of the Prosecutor, the Chamber considers that this does not automatically have to lead to the immediate refusal to confirm the charges. Although the Chamber is not prepared to accept allegations proven solely through anonymous hearsay in documentary evidence, the Chamber notes that past jurisprudence, which predates the abovementioned decisions of the Appeals Chamber,<sup>51</sup> 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 or largely complete her investigation, following all relevant incriminating and exonerating lines of investigation in order to establish the truth.

---

<sup>50</sup> See Pre-Trial Chamber I, Transcript of Hearing, 20 February 2013, ICC-02/11-01/11-T-15-Red-ENG, pp. 38-45.

<sup>51</sup> Appeals Chamber, *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 (OA 4), para. 44; Appeals Chamber, *Prosecutor v. Uhuru Muigai Kenyatta*, 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.

The Chamber does not exclude that the Prosecutor might be able to present or collect further evidence and is therefore, out of fairness, prepared to give her a limited amount of additional time to do so. As the Appeals Chamber noted when discussing summary evidence, when the evidence is insufficient the “Pre-Trial Chamber need not reject the charges but may adjourn the hearing and request the Prosecutor to provide further evidence”.<sup>52</sup>

### 5. Rights of the Defence

38. In deciding whether or not to activate article 61(7)(c)(i) of the Statute, the Chamber considered the effect of this decision on the right of Mr Gbagbo “to be tried without undue delay” pursuant to article 67(1)(c) of the Statute. In the present case, the relevant period<sup>53</sup> began to run as soon as Mr Gbagbo was first notified of the warrant of arrest on 29 November 2011 and subsequently surrendered to the Court on 30 November 2011.<sup>54</sup>

39. Whether or not the activation of article 61(7)(c)(i) of the Statute unduly infringes the right of the suspect to be tried without undue delay must be determined on a case-by-case basis, taking into account the particularities of the case and in accordance with internationally recognized human rights.<sup>55</sup>

---

<sup>52</sup> Appeals Chamber, *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 (OA 4), para. 48.

<sup>53</sup> According to the jurisprudence of the European Court of Human Rights (“ECtHR”), the beginning of the relevant period starts at the moment a suspect is notified that he/she is charged with a criminal offence, ECtHR, *Case of Eckle v Germany*, Judgment, 15 July 1982, Series A No. 51, p. 33, para. 73; *id.*, *Case of Metzger v Germany*, Judgment of 31 May 2001, Application no. 37591/97, para. 31; *id.*, *Case of Corigliano v Italy*, Judgment of 10 December 1982, Application no. 8304/78, para. 34. In a similar vein, Inter-American Court of Human Rights (“IACtHR”), *Case of Suarez-Rosero v Ecuador*, Judgment of 12 November 1997, Series C No. 35, para. 70.

<sup>54</sup> ICC-02/011-01/11-12-Conf-Exp, pp. 4-5.

<sup>55</sup> In this regard, the Chamber pays heed to the criteria established by the ECtHR including the complexity of the case and the conduct of the applicant and the relevant authorities. See, for example, ECtHR, *Case of Philis v Greece (No 2)*, Judgment of 27 June 1997, Application no. 19773/92, para. 35; *id.*, *Case of Gast and Popp v Germany*, Judgment of 25 February 2000, Application no. 29357/95, para. 70; *id.*, *Case of Lukenda v Slovenia*, Judgment of 6 October 2005, Application no. 23032/02, para. 74; See also

40. The Chamber is aware of the fact that the pre-trial proceedings in this case have already lasted approximately one and a half years before this Court. In this respect, the Chamber recalls that during that time it was requested by the Defence to examine the question of Mr Gbagbo's fitness to take part in the proceedings which involved, *inter alia*, the appointment of three medical experts and a hearing for this purpose.

41. At the same time, the Chamber is also attentive to the following: first, the seriousness of the charges presented against Mr Gbagbo; second, the complexity of the case which involves a myriad of incidents allegedly committed by a multitude of perpetrators over several months, necessitating a complex investigation; and third, the fact that requesting further evidence under article 61(7)(c)(i) is a procedural avenue which is explicitly provided for in the Statute and which has been recalled by the Appeals Chamber as an appropriate one.<sup>56</sup>

42. In light of the foregoing, the Chamber is of the view that allowing the Prosecutor to provide more evidence or conduct further investigation for a limited period of time will not unduly infringe the right of the Defence to be tried without undue delay.

43. The Chamber also highlights that this procedural avenue does not affect any of the rights of the Defence under article 61(6) of the Statute, since the Defence will be given appropriate time to respond to the new evidence presented by the Prosecutor.

---

Human Rights Committee, General Comment No. 32, 23 August 2007, CCPR/C/GC/32, para. 35; IACtHR, *Case of Genie-Lacayo v Nicaragua*, Judgment of 29 January 1997, Series C No. 30, para. 77; *id.*, *Case of Valle Jaramillo v Colombia*, Judgment of 27 November 2008, Series C No. 192, para. 155.

<sup>56</sup> Appeals Chamber, 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 (OA 4), para. 48

#### IV. CONCLUSIONS OF THE CHAMBER

44. For these reasons, the Chamber, by majority, decides to adjourn this hearing pursuant to article 61(7)(c)(i) of the Statute. Accordingly, the Chamber requests the Prosecutor to consider providing, to the extent possible, further evidence or conducting further investigation with respect to the following issues:

1. The position(s), movements and activities of all armed groups opposed to the “pro-Gbagbo forces” (for example *Commando Invisible* and *Forces Nouvelles*) in Côte d’Ivoire (including particularly in and around Abidjan) between November 2010 and May 2011, including specific information about confrontations between those armed groups and the “pro-Gbagbo forces” between November 2010 and May 2011.
2. The organizational structure of the “pro-Gbagbo forces”, including how the different sub-groups interacted within the overall structure and especially how the “inner circle” coordinated, funded and supplied the means for the activities of the different sub-groups; any changes or evolution in the aforementioned structure and/or operating methods, taking place between November 2010 and May 2011.
3. How, when and by whom the alleged policy/plan to attack the “pro-Ouattara civilian population” was adopted, including specific information about meetings at which this policy/plan was allegedly adopted as well as how the existence and content of this policy/plan was communicated or made known to members of the “pro-Gbagbo forces” once it was adopted.
4. For each of the incidents allegedly constituting the attack against the “pro-Ouattara civilian population”:
  - a. whether the alleged physical perpetrators were acting pursuant to or in furtherance of the alleged policy.
  - b. to which sub-group(s) of the “pro-Gbagbo forces” the several alleged physical perpetrators belonged. If different sub-groups were involved in the same incident, identify to which of these the alleged physical perpetrators belonged and to what extent they are alleged to have cooperated in the perpetration of the crimes.
  - c. information as to the number of victims, the harm they suffered as well as their real or perceived political, ethnic, religious or national allegiance(s).
  - d. information as to the links between the several incidents inside and outside<sup>57</sup> Abidjan.
5. In relation to the alleged compound incidents taking place on 16-19 December 2010 (“RTI incidents”) and 12 April 2011 (“Yopougon incidents”), more specific evidence for each of the sub-incidents, including more detailed evidence for the alleged cases of sexual violence.

---

<sup>57</sup> With regard to events in the West, see Amended DCC, para. 27; with regard to the events in Agboville, see Pre-Trial Chamber I, Transcript of Hearing, 20 February 2013, ICC-02/11-01/11-T-15-Red-ENG, p. 43, lines 1-2.

6. In relation to the alleged incidents taking place on 3 March 2011 (“Women’s march”) and 17 March 2011 (“Shelling of Abobo”), any forensic or other evidence<sup>58</sup> indicating who fired the ammunitions and what their alleged target was.

45. With a view to informing the Defence in detail of the content of the charges,<sup>59</sup> the Chamber considers it appropriate that the Prosecutor submit a new Amended DCC setting out in detail and with precision<sup>60</sup> the facts of the case, including all incidents forming the contextual elements of crimes against humanity. Together with the Amended DCC, the Prosecutor is instructed to submit a new list of evidence setting out the entirety of the evidence on which she intends to rely for the purposes of the confirmation of charges<sup>61</sup> and an updated consolidated Elements Based Chart covering the entirety of the charges.<sup>62</sup> In this context, the Chamber makes reference to its “Decision establishing a disclosure system and a calendar for disclosure”<sup>63</sup> which specifies the details of the system of disclosure, the procedure related to the requests for redactions and protective measures, and the registration procedure. With a view to expediting the proceedings, the Chamber wishes to add that the evidence must be made available to the Chamber the moment it is disclosed between the parties. In this context, the Chamber puts special emphasis on the necessity that the Prosecutor comply with her disclosure obligations without waiting for the deadlines to expire.<sup>64</sup>

46. The Defence will have the right to object to the charges, challenge the new evidence presented by the Prosecutor and present new evidence in response to the further evidence submitted by the Prosecutor.

---

<sup>58</sup> The Chamber is led to believe that there exists at least one UN report in this regard, see Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d’Ivoire, 14 June 2011, CIV-OTP-0002-0598 at 0604, para. 16.

<sup>59</sup> Article 67(1)(a) of the Statute and regulation 52 of the Regulations of the Court.

<sup>60</sup> Special reference is made to regulation 52(b) of the Regulations of the Court.

<sup>61</sup> The Chamber suggests that the Prosecutor highlight the new pieces of evidence so as to make easier their identification in the list of evidence.

<sup>62</sup> The Chamber suggests that the Prosecutor highlight the new pieces of evidence so as to make easier their identification in the Element Based Chart.

<sup>63</sup> Pre-Trial Chamber I, Decision establishing a disclosure system and a calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30 with Annexes I-III.

<sup>64</sup> *Ibid.*, para. 38.

47. Upon receipt of all submissions and evidence of the parties and participants, the Chamber will issue a final decision determining whether there is sufficient evidence to establish substantial grounds to believe that Mr Gbagbo committed each of the crimes charged. The calendar established hereunder is subject to any further decision of the Chamber to resume the hearing on the confirmation of charges at the request of the participants or on its own motion if there is a need to hear further oral submissions or *viva voce* testimony of one or more witnesses.

**FOR THESE REASONS, THE CHAMBER, BY MAJORITY**

- a) **Decides** to adjourn the Hearing;
- b) **Requests** the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges, mindful of the questions in paragraph 44 of the present decision;
- c) **Adopts** the following calendar for disclosure of evidence and submissions. To this end, the Chamber orders the Prosecutor
  - (i) to disclose to the Defence by no later than **Friday, 5 July 2013** all evidence in her possession for which she does not intend to present any requests for redactions to the Chamber;
  - (ii) to submit to the Chamber **as soon as practicable** and no later than **Friday, 5 July 2013** any requests for redactions with regard to the evidence which is in her possession and on which she intends to rely for the purposes of the confirmation of charges;
  - (iii) to agree with the Defence on a location and time to permit the inspection of any material within the meaning of rule 77 of the Rules which is in the Prosecutor's possession starting **as soon as practicable** and by no later than **Friday, 5 July 2013**;

- (iv) to disclose to the Defence by no later than **Tuesday, 15 October 2013** the first batch of evidence she has collected in the course of her further investigation and for which she does not intend to present any requests for redactions to the Chamber;
- (v) to submit to the Chamber **as soon as practicable** and no later than **Tuesday, 15 October 2013** any requests for redactions with regard to the evidence she has collected in the course of her further investigation and on which she intends to rely for the purposes of the confirmation of charges;
- (vi) to agree with the Defence on a location and time to permit the inspection of any material within the meaning of rule 77 of the Rules which is in the Prosecutor's possession starting **as soon as practicable** and by no later than, **Tuesday, 15 October 2013**;
- (vii) to disclose to the Defence any evidence for which authorization for redactions is sought, as soon as practicable and **no later than 5 days** after the notification of the Chamber's decision on said request(s) for redactions;
- (viii) to disclose to the Defence by no later than **Friday, 15 November 2013** the second batch of evidence she collected in the course of her further investigation and for which she does not intend to present any requests for redactions to the Chamber; and
- (ix) to submit by no later than **Friday, 15 November 2013** the Amended DCC, amended list of evidence and updated consolidated Element Based Chart.

With regard to the Defence, the Chamber orders it

- (x) to submit justified proposals for redactions, if any, pursuant to rule 81 of the Rules **as soon as practicable and by no later than Friday, 15 November 2013;**
  - (xi) to agree with the Prosecutor on a location and time to permit the inspection of any material within the meaning of rule 78 of the Rules starting **as soon as practicable** and by no later than **Monday, 9 December 2013;**
  - (xii) to submit its observations on the Prosecutor's evidence and to disclose to the Prosecutor the evidence it intends to present, if any, and to file its amended list of evidence by no later than **Monday, 16 December 2013;**
  - (xiii) to submit to the Prosecutor its requests, if any, for the lifting of redactions to material covered by article 67(2) of the Statute or rule 77 of the Rules **as soon as practicable** following the disclosure of the relevant materials; and
  - (xiv) to submit its requests, if any, for a ruling of the Chamber on any disagreement with the Prosecutor on the lifting of redactions applied to materials covered by article 67(2) of the Statute or rule 77 of the Rules **no later than 5 days** after the Prosecutor's response thereon;
- d) **Orders** the Registry to make available the evidence to the Chamber at the moment it is disclosed between the parties;
  - e) **Decides** that the Prosecutor and the victims may file final written submissions in response to the Defence by no later than **Friday, 24 January 2014;**
  - f) **Decides** that the Defence may submit final written submissions in response to the Prosecutor's and victims' observations by no later than **7 February 2014;**
  - g) **Decides** that the 60-day period required for the issuance of the decision on the confirmation of charges will start running anew as of the date of receipt of the last written submission.



Judge Silvia Fernández de Gurmendi attaches a dissenting opinion to this decision.

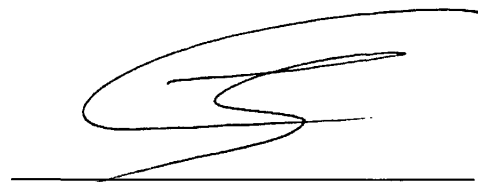
Done in both English and French, the English version being authoritative.

---

**Judge Silvia Fernández de Gurmendi**  
**Presiding Judge**



**Judge Hans-Peter Kaul**



**Judge Christine Van den Wyngaert**

Dated this Monday, 3 June 2013

At The Hague, The Netherlands

## 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”.<sup>1</sup>

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.<sup>2</sup> 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”.<sup>3</sup> As an explanation for this fresh start, the Majority recalls that this more “forgiving jurisprudence” of

---

<sup>1</sup> Decision, para. 17.

<sup>2</sup> Decision, para. 37.

<sup>3</sup> Decision, para. 37.

previous Chambers “predates [two] decisions of the Appeals Chamber”<sup>4</sup> 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”.<sup>5</sup>

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,<sup>6</sup> 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.

---

<sup>4</sup> Decision, para. 37.

<sup>5</sup> Decision, paras 25 and 37.

<sup>6</sup> 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 Mbaruhimana*, “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,<sup>7</sup> 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.<sup>8</sup> 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”.<sup>9</sup> 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.<sup>10</sup>

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*,

---

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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.<sup>11</sup>

13. As noted, on the basis of this statement, my colleagues assume that the Prosecutor must now “present all her evidence”<sup>12</sup> and that she “has presented her strongest possible case based on a largely completely investigation”.<sup>13</sup>

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,<sup>14</sup> the Appeals Chamber merely restated its previous

---

<sup>11</sup> 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).

<sup>12</sup> Decision, para. 37.

<sup>13</sup> Decision, para. 25.

<sup>14</sup> In footnote 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”<sup>15</sup> and that “[t]he Prosecutor’s investigation may be continued beyond the confirmation hearing”.<sup>16</sup> 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”.<sup>17</sup>

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.<sup>18</sup>

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

---

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

<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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”.<sup>19</sup>

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 not to relying 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”.<sup>20</sup> 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 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

---

<sup>19</sup> Decision, para. 25.

<sup>20</sup> 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”.<sup>21</sup>

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]”.<sup>22</sup> The Majority expresses its “general disposition towards certain types of evidence”,<sup>23</sup> 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”;<sup>24</sup> “[w]henver testimonial evidence is offered, it should, to the extent possible, be based on first-hand and personal observations of the witness;<sup>25</sup> “reliance upon [hearsay] evidence should be avoided [...] wherever

---

<sup>21</sup> 1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, para. 232.

<sup>22</sup> Decision, para. 31.

<sup>23</sup> Decision, para. 26.

<sup>24</sup> Decision, para. 27.

<sup>25</sup> Decision, para. 27.

possible”;<sup>26</sup> “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”;<sup>27</sup> “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”.<sup>28</sup> Furthermore, the Majority also explicitly indicates that it “is not prepared to accept allegations proven solely through anonymous hearsay in documentary evidence”.<sup>29</sup>

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

---

<sup>26</sup> Decision, para. 28.

<sup>27</sup> Decision, para. 29.

<sup>28</sup> Decision, para. 35.

<sup>29</sup> 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.<sup>30</sup> Furthermore, the Chambers should not seek to determine whether the evidence is sufficient to sustain a future conviction.<sup>31</sup>

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 thus, *inter alia*, judicial economy.<sup>32</sup> 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

---

<sup>30</sup> 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.

<sup>31</sup> *Id.*

<sup>32</sup> 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,<sup>33</sup> 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.<sup>34</sup>

## 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.<sup>35</sup>

30. As repeatedly observed by other Chambers of the Court,<sup>36</sup> 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).

---

<sup>33</sup> “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.

<sup>34</sup> 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.

<sup>35</sup> Decision, para. 19.

<sup>36</sup> 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,<sup>37</sup> although without determining “how narrowly or how broadly the term ‘facts and circumstances described in the charges’ as a whole should be understood”.<sup>38</sup>

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.<sup>39</sup> This distinction appears

---

<sup>37</sup> 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.

<sup>38</sup> 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.

<sup>39</sup> 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.<sup>40</sup> 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.

---

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).

<sup>40</sup> 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 “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’”.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup>

---

<sup>41</sup> Decision, para. 21.

<sup>42</sup> Decision, para. 45.

<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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".<sup>47</sup> 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.<sup>48</sup> 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".<sup>49</sup>

---

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.

<sup>44</sup> In particular, but not exclusively paras 20-42 of the DCC.

<sup>45</sup> List of Evidence, pp. 23-32.

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

<sup>47</sup> Decision, para. 21.

<sup>48</sup> *Id.*

<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> Evidence relevant to

---

<sup>50</sup> Decision, para. 45.

<sup>51</sup> 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”.<sup>52</sup> 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 in this regard 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.”<sup>53</sup> The Majority specifically requests of the Prosecutor further evidence with respect to the issue, in relation to

---

<sup>52</sup> 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.

<sup>53</sup> Decision, para. 35.

“each of the incidents”, on “whether the alleged physical perpetrators were acting pursuant to or in furtherance of the alleged policy”.<sup>54</sup>

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”.<sup>55</sup>

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*”.<sup>56</sup> 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,<sup>57</sup> 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

---

<sup>54</sup> Decision, para. 43.

<sup>55</sup> 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”.

<sup>56</sup> On the record, ICC Volume I, Issue 11, 2 July 1998; and ICC Volume I, Issue 18 (Part 1), 11 July 1998.

<sup>57</sup> 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.

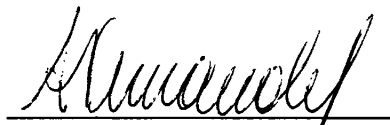
50. In line with the above, I also disagree with the instruction given to the Prosecutor to submit a new “Amended DCC setting out in detail and with precision the facts of the case, including all incidents forming the contextual elements of crimes against humanity”.<sup>58</sup> As already indicated, 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.

---

<sup>58</sup> Decision, para. 45 (footnote omitted).



**Judge Silvia Fernández de Gurmendi**

Dated this 3 June 2013

At The Hague, The Netherlands