

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-02/11-01/11 OA 5**

**Date: 16 December 2013**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE**

**IN THE CASE OF THE PROSECUTOR v. LAURENT KOUDOU GBAGBO**

**Public Document**

**Judgment**

**on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of  
3 June 2013 entitled "Decision adjourning the hearing on the confirmation of  
charges pursuant to article 61(7)(c)(i) of the Rome Statute"**

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Mr Fabricio Guariglia

**Counsel for Mr Laurent Koudou Gbagbo**  
Mr Emmanuel Altit  
Ms Agathe Bahi Baroan

**Legal Representatives of Victims**  
Ms Paolina Massidda  
Ms Sarah Pellet

**Amici Curiae**  
Mr Darryl Robinson  
Ms Margaret deGuzman  
Mr Charles Jalloh  
Mr Robert Cryer

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” of 3 June 2013 (ICC-02/11-01/11-432),

After deliberation,

Unanimously,

*Delivers the following*

## JUDGMENT

The “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” is confirmed. The appeal is dismissed.

### REASONS

#### I. PROCEDURAL BACKGROUND

##### A. Proceedings before the Pre-Trial Chamber

1. On 17 January 2013, the Prosecutor filed the document containing the charges (hereinafter: “DCC”), charging Mr Laurent Koudou Gbagbo (hereinafter: “Mr Gbagbo”) with crimes against humanity, namely, murder or attempted murder under article 7 (1) (a) of the Statute, rape under article 7 (1) (g) of the Statute, inhumane acts under article 7 (1) (k) of the Statute, and persecution under article 7 (1) (h) of the Statute.<sup>1</sup> In the DCC, the Prosecutor described four incidents during which the acts relevant to the crimes charged allegedly occurred<sup>2</sup> (hereinafter: “Charged Incidents”). In the section entitled “Facts relevant to the chapeau elements of article 7”, in a subsection entitled “Attack against a civilian population”, the Prosecutor described a

<sup>1</sup> “Annex 1: Amended Document Containing the Charges”; “Annex 2: Amended list of incriminating evidence” (hereinafter: “List of Evidence”), English translation registered on 30 May 2013, ICC-02/11-01/11-357-Conf-Anx1-tENG, pp. 46, 47. *See also* “Document amendé de notification des charges”, ICC-02/11-01/11-421-Conf-Anx1 (hereinafter: “Footnoted DCC”), dated 17 January 2013 and registered on 15 March 2013, p. 85.

<sup>2</sup> DCC, paras 43-56.

series of attacks, including the four Charged Incidents, as well as a number of other incidents set out in paragraphs 23 to 29 of the DCC<sup>3</sup> (hereinafter: “41 Incidents”).

2. The confirmation of charges hearing was held between 19 and 28 February 2013<sup>4</sup> and the parties and participating victims were authorised to file written submissions.<sup>5</sup> On 14 March 2013, the Prosecutor and the participating victims filed their final written submissions.<sup>6</sup> On 28 March 2013, Mr Gbagbo filed his final written submissions.<sup>7</sup>

3. On 3 June 2013, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) issued, by majority, Judge Silvia Fernández de Gurmendi dissenting, the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”<sup>8</sup> (hereinafter: “Impugned Decision”). Due to a number of difficulties with the evidence presented by the Prosecutor, the Pre-Trial Chamber concluded that it did not have enough information to determine whether the inferences that the Prosecutor asked it to draw were “sufficiently supported by the evidence in order to meet the required threshold for confirmation”.<sup>9</sup> As a result, the Pre-Trial Chamber adjourned the confirmation hearing pursuant to article 61 (7) (c) (i) of the Statute and requested the Prosecutor to “consider providing, to the extent possible, further evidence or conducting further investigation” with respect to a number of

<sup>3</sup> DCC, para. 20.

<sup>4</sup> Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG (ET WT); Transcript of Hearing, 20 February 2013, ICC-02/11-01/11-T-15-Red-ENG (WT); Transcript of Hearing, 21 February 2013, ICC-02/11-01/11-T-16-Red-ENG (WT); Transcript of Hearing, 22 February 2013, ICC-02/11-01/11-T-17-Red-ENG (WT); Transcript of Hearing, 25 February 2013, ICC-02/11-01/11-T-18-Red-ENG (WT); Transcript of Hearing, 26 February 2013, ICC-02/11-01/11-T-19-Red-ENG (WT); Transcript of Hearing, 27 February 2013, ICC-02/11-01/11-T-20-Red-ENG (WT); Transcript of Hearing, 28 February 2013, ICC-02/11-01/11-T-21-ENG (ET WT). *See also* “Decision on the date of the confirmation of charges hearing and proceedings leading thereto”, dated 14 December 2012 and registered on 17 December 2012, ICC-02/11-01/11-325 (hereinafter: “Decision of 14 December 2012”), para. 23, p. 14.

<sup>5</sup> “Decision on the schedule for the confirmation of charges hearing”, dated 12 February 2013 and registered on 13 February 2013, ICC-02/11-01/11-397, para. 10; Transcript of Hearing, 28 February 2013, ICC-02/11-01/11-T-21-ENG (ET WT), p. 50, line 21, to p. 51, line 1.

<sup>6</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 ICC-02/11-01/11-420-Red, 21 March 2013; “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>7</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 ICC-02/11-01/11-429-Red, 3 April 2013.

<sup>8</sup> ICC-02/11-01/11-432.

<sup>9</sup> Impugned Decision, para. 36.

specified issues, relating to the factual allegations underlying the contextual elements of crimes against humanity and the four Charged Incidents.<sup>10</sup>

4. On 10 June 2013, the Prosecutor requested leave to appeal the Impugned Decision<sup>11</sup> (hereinafter: “Application for Leave to Appeal”) in respect of three issues. The common legal representative of the victims and Mr Gbagbo filed their responses to the Application for Leave to Appeal on 17 June 2013 and 24 June 2013, respectively.<sup>12</sup>

5. On 31 July 2013, the Pre-Trial Chamber, by majority, Judge Silvia Fernández de Gurmendi dissenting, issued the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”<sup>13</sup> (hereinafter: “Decision Granting Leave to Appeal”), granting the Prosecutor leave to appeal only in respect of one of the issues raised in the Application for Leave to Appeal.<sup>14</sup> The Pre-Trial Chamber reformulated the issue presented by the Prosecutor in the following terms:

Whether the Pre-Trial Chamber erred in holding that, when the Prosecutor alleges that an “attack against any civilian population” consists of multiple smaller incidents, none of which alone rises to the level of the minimum requirements of article 7 of the Statute and which allegedly took place at different times and places, a sufficient number of these incidents must be proved to the requisite standard, meaning that each of these incidents must be supported with sufficient evidence before the Chamber can take them into consideration to determine whether those incidents, taken together, indicate that there are substantial grounds to believe that an ‘attack’ took place.<sup>15</sup>

<sup>10</sup> Impugned Decision, para. 44.

<sup>11</sup> “Prosecution’s application for leave to appeal the ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, ICC-02/11-01/11-435.

<sup>12</sup> “Response of the Common Legal Representative to the ‘Prosecution’s application for leave to appeal the ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, ICC-02/11-01/11-437; “Réponse de la défense à la demande présentée par le Procureur d’autorisation d’interjeter appel de la décision portant ajournement de l’audience de confirmation des charges conformément à l’article 61-7-c-i du Statut (ICC-02/11-01/11-435) et observations de la défense à la « réponse » du Représentant légal des victimes à la demande d’interjeter appel du Procureur (ICC-02/11-01/11-437)”, ICC-02/11-01/11-438.

<sup>13</sup> ICC-02/11-01/11-464.

<sup>14</sup> Decision Granting Leave to Appeal, para. 33. *See also* Decision Granting Leave to Appeal, p. 33.

<sup>15</sup> Decision Granting Leave to Appeal, para. 36.

## B. Proceedings before the Appeals Chamber

6. On 12 August 2013, having been granted an extension of the page limit under regulation 37 of the Regulations of the Court,<sup>16</sup> the Prosecutor filed the “Prosecution’s appeal against the ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”<sup>17</sup> (hereinafter: “Document in Support of the Appeal”).

7. On 20 September 2013, having been granted an extension of the time limit under regulation 35 of the Regulations of the Court,<sup>18</sup> Mr Gbagbo filed his response to the Document in Support of the Appeal (hereinafter: “Response to the Document in Support of the Appeal”).<sup>19</sup>

8. On 27 September 2013, having been granted authorisation to present “their views and concerns with respect to their personal interests in the issue raised on appeal pursuant to article 68 (3) of the Statute”,<sup>20</sup> 199 participating victims (hereinafter: “Victims”) filed the “Observations of the Common Legal Representative on the ‘Prosecution’s appeal against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”<sup>21</sup> (hereinafter: “Victims’ Observations”). Mr Gbagbo responded to the Victims’ Observations on 2 October 2013<sup>22</sup> (hereinafter: “Mr Gbagbo’s Response to the Victims’ Observations”).

9. On 10 October 2013, Mr Darryl Robinson, Ms Margaret deGuzman, Mr Charles Jalloh and Mr Robert Cryer (hereinafter: “*Amici Curiae*”), having been granted leave

<sup>16</sup> “Decision on the ‘Prosecution’s Request for an Extension of the Page Limit for the Prosecution’s Appeal against the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’””, 7 August 2013, ICC-02/11-01/11-471 (OA 5).

<sup>17</sup> ICC-02/11-01/11-474 (OA 5).

<sup>18</sup> “Decision on Mr Gbagbo’s request for translation and an extension of time for the filing of a response to the document in support of the appeal”, 22 August 2013, ICC-02/11-01/11-489 (OA 5).

<sup>19</sup> “Defence response to ‘Prosecution’s appeal against the “Decision adjourning the hearing on the confirmation of charges” (ICC-02/11-01/11-474)’”, English translation registered on 29 October 2013, ICC-02/11-01/11-509-tENG.

<sup>20</sup> “Decision on the participation of victims in the Prosecutor’s appeal against the ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 29 August 2013, ICC-02/11-01/11-492 (OA 5), para. 1.

<sup>21</sup> ICC-02/11-01/11-513 (OA 5).

<sup>22</sup> “Defence Response to the Observations submitted by the legal Representative of Victims on the Prosecutor’s Appeal against Pre-Trial Chamber I’s *Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute*(ICC-02/11-01/11-432)”, English translation registered on 5 November 2013, ICC-02/11-01/11-518-tENG (OA 5).

to present observations pursuant to rule 103 of the Rules of Procedure and Evidence,<sup>23</sup> filed their observations on the Document in Support of the Appeal<sup>24</sup> (hereinafter: “*Amici Curiae* Observations”). On 18 October 2013, Mr Gbagbo and the Prosecutor filed their respective responses to the *Amici Curiae* Observations.<sup>25</sup>

## II. PRELIMINARY ISSUES

### A. Victims’ Observations

10. Mr Gbagbo argues that the Victims’ Observations do not respect the requirements of regulations 36 and 37 of the Regulations of the Court and exceed the authorised page limit.<sup>26</sup> As the Victims did not seek an extension of the page limit under regulations 36 and 37 of the Regulations of the Court, Mr Gbagbo requests that the Victims’ Observations be declared inadmissible.<sup>27</sup>

11. In the alternative, Mr Gbagbo submits that the Victims’ Observations exceed the terms established by the Statute and the Appeals Chamber for the intervention of victims, and that the Victims “act as an auxiliary Prosecutor, resulting in an imbalance, detrimental to the Defence and calling into question the fairness of the proceedings”.<sup>28</sup> Mr Gbagbo argues that the Victims’ Observations do not present their views and concerns with respect to their personal interests in the present appeal, but are instead “abstract considerations on the applicable law”.<sup>29</sup> Accordingly, Mr Gbagbo requests the Appeals Chamber not to take the Victims’ Observations into consideration.<sup>30</sup>

12. Regulation 36 (3) of the Regulations of the Court stipulates that an average page shall not exceed 300 words. The 20 pages of the Victims’ Observations contain approximately 7,487 words, amounting to an average word count of 374 words per

<sup>23</sup> “Decision on the ‘Request for Leave to Submit *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, 1 October 2013, ICC-02/11-01/11-516 (OA 5).

<sup>24</sup> “*Amicus Curiae* Observations of Professors Robinson, deGuzman, Jalloh and Cryer”, dated 9 October 2013 and registered on 10 October 2013, ICC-02/11-01/11-534 (OA 5).

<sup>25</sup> “Réponse de la défense aux « *Amicus Curiae* Observations of Professors Robinson, deGuzman, Jalloh and Cryer » (ICC-02/11-01/11-534)”, ICC-02/11-01/11-540 (OA 5); “Prosecution’s Response to *Amicus Curiae* Observations of Professors Robinson, deGuzman, Jalloh and Cryer”, ICC-02/11-01/11-541 (OA 5).

<sup>26</sup> Mr Gbagbo’s Response to the Victims’ Observations, paras 3-6.

<sup>27</sup> Mr Gbagbo’s Response to the Victims’ Observations, paras 2, 7-8, 55.

<sup>28</sup> Mr Gbagbo’s Response to the Victims’ Observations, paras 2, 9. *See also* Mr Gbagbo’s Response to the Victims’ Observations, paras 13-21.

<sup>29</sup> Mr Gbagbo’s Response to the Victims’ Observations, paras 10-12, 21.

<sup>30</sup> Mr Gbagbo’s Response to the Victims’ Observations, paras 2, 55.

page. Therefore, the Victims have failed to comply with the requirements of regulation 36 of the Regulations of the Court and have effectively exceeded the page limit for filings set out in regulation 37 of the Regulations of the Court.

13. The Appeals Chamber reminds all participants of the importance of complying with the requirements set out in regulations 36 and 37 of the Regulations of the Court and that failure to do so may result in their filings being dismissed *in limine*. In this instance, the Appeals Chamber notes that the Victims' Observations focus exclusively on the legal requirements for an 'attack' under article 7 of the Statute in relation to the first ground of appeal,<sup>31</sup> as well as on the second ground of appeal.<sup>32</sup> For reasons that will be explained below, these aspects of the Prosecutor's appeal will not be addressed by the Appeals Chamber. As the Victims' Observations will not be taken into account for the purposes of the present appeal, the Appeals Chamber does not consider it necessary to entertain Mr Gbagbo's above-mentioned requests further.

#### **B. *Amici Curiae* Observations**

14. The Appeals Chamber notes that the *Amici Curiae* Observations address the legal requirements for an 'attack' under article 7 of the Statute in relation to the first ground of appeal. In the circumstances of the present case and for reasons that will be explained below, this aspect of the Prosecutor's appeal will not be addressed by the Appeals Chamber. Therefore, the *Amici Curiae* Observations will also not be considered for the purposes of the present appeal.

### **III. MERITS**

15. The Prosecutor presents the following two grounds of appeal:

The Majority erred in requiring that in this case a sufficient number of [i]ncidents underlying the contextual elements, including the 41 Incidents, must be established to the standard of proof enshrined in [a]rticle 61(7) and by applying that standard of proof to the subsidiary facts and evidence that relate to the 41 Incidents ("First Ground of Appeal"); and

[...] The Majority erred in its interpretation and application of the standard of proof under [a]rticle 61(7) of the Statute ("Second Ground of Appeal").<sup>33</sup>

<sup>31</sup> See Victims' Observations, paras 8-24.

<sup>32</sup> See Victims' Observations, paras 25-43.

<sup>33</sup> Document in Support of the Appeal, para. 6.

## A. First Ground of Appeal

16. Under the First Ground of Appeal, the Prosecutor raises three broad arguments, namely (i) that “the ‘facts and circumstances’ contained in the DCC that need to be established and that are relevant to the existence of the ‘attack’ do not refer to any ‘incidents’ other than the four Charged Incidents”;<sup>34</sup> (ii) that “the standard of proof under [a]rticle 61(7) exclusively applies to the elements of the crimes (including the contextual elements) and to findings of fact that are essential to establish these elements” and that, in this case, “the subsidiary facts relevant to the 41 Incidents are not essential to establishing the ‘attack’”;<sup>35</sup> and (iii) that the Pre-Trial Chamber misapplied and misinterpreted the term “attack” under article 7 (2) (a) of the Statute, in finding that it encompassed “a certain number of ‘incidents’, rather than a ‘course of conduct involving a multiple commission of acts’”.<sup>36</sup>

17. The Appeals Chamber finds that the first and second set of arguments presented by the Prosecutor substantially overlap; therefore, these arguments will be considered together under the section on the scope of the factual allegations underlying the contextual elements of crimes against humanity. The Appeals Chamber will then address the Prosecutor’s arguments relating to the Pre-Trial Chamber’s interpretation of an “attack” under article 7 of the Statute. First, however, the relevant part of the Impugned Decision is summarised.

### 1. *Relevant part of the Impugned Decision*

18. In the Impugned Decision, the Pre-Trial Chamber found that 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”.<sup>37</sup> By way of example, the Pre-Trial Chamber indicated that the “individual incidents alleged by the Prosecutor in support of her allegation that there was an ‘attack directed against any civilian population’ are part of the facts and circumstances for the purposes of article 74(2) of the Statute and therefore must be proved to the requisite threshold of ‘substantial grounds to believe’”.<sup>38</sup> The Pre-Trial Chamber accepted that the information

<sup>34</sup> Document in Support of the Appeal, paras 22-29.

<sup>35</sup> Document in Support of the Appeal, paras 22, 30-44.

<sup>36</sup> Document in Support of the Appeal, paras 22, 45-52.

<sup>37</sup> Impugned Decision, para. 19.

<sup>38</sup> Impugned Decision, para. 21.

necessary to prove the contextual elements may be “less specific than what is needed for the crimes charged” but found that it “is still required to be sufficiently probative and specific so as to support the existence of an ‘attack’ against a civilian population”.<sup>39</sup>

19. The Pre-Trial Chamber concluded that:

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”.<sup>40</sup>

20. The Pre-Trial Chamber noted that during the confirmation hearing the Prosecutor contended that the four Charged Incidents alone, in and of themselves, were sufficient to establish the existence of a widespread or systematic attack, but made clear that besides these four incidents, she was relying on the 41 Incidents to establish her allegation of the existence of an “attack directed against any civilian population” under article 7 of the Statute.<sup>41</sup>

21. The Pre-Trial Chamber observed further that:

[...] 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.<sup>42</sup>

22. In the Pre-Trial Chamber’s assessment, the evidence tendered by the Prosecutor for the purposes of the confirmation of charges hearing appeared insufficient, but did “not appear to be so lacking in relevance and probative value that it [left] the Chamber no choice but to decline to confirm the charges under article 61(7)(b) of the Statute”.<sup>43</sup> Accordingly, the Pre-Trial Chamber decided to adjourn the confirmation of charges hearing pursuant to article 61 (7) (c) (i) of the Statute and request the

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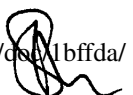
<sup>39</sup> Impugned Decision, para. 22.

<sup>40</sup> Impugned Decision, para. 23.

<sup>41</sup> Impugned Decision, para. 36. *See also* Impugned Decision, fn. 49.

<sup>42</sup> Impugned Decision, para. 36.

<sup>43</sup> Impugned Decision, para. 15. *See also* Impugned Decision, para. 37.



Prosecutor to “consider providing, to the extent possible, further evidence or conducting further investigation” with respect to a number of specified issues.<sup>44</sup>

2. *Scope of the factual allegations underlying the contextual elements of crimes against humanity in this case*

(a) **Submissions of the parties**

(i) *Prosecutor’s submissions*

23. Referring to jurisprudence of the Appeals Chamber, the Prosecutor contends that the “‘facts and circumstances described in the charges’ do not refer to all facts that are contained in the narrative of the DCC”.<sup>45</sup> In this regard, she submits that the Appeals Chamber found that the factual allegations that support the legal elements of the crimes charged must be distinguished from the evidence presented by the Prosecutor or other information contained in the DCC that does not support the legal elements of the crimes charged.<sup>46</sup> She adds that Pre-Trial Chamber I in the case of the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* followed the Appeals Chamber’s ruling and established a distinction between the “‘facts and circumstances described in the charges’ and ‘other facts which are not mentioned in the charges but which are subsidiary or otherwise related to them, in particular since proof of the material facts may be inferred from them’”.<sup>47</sup>

24. The Prosecutor argues that the Pre-Trial Chamber in the present case endorsed this approach when it instructed her to identify the material facts underlying the alleged charges against Mr Gbagbo and to distinguish them from the subsidiary facts.<sup>48</sup> The Prosecutor states that the Pre-Trial Chamber indicated that “subsidiary facts may be analysed by the Pre-Trial Chamber insofar as relevant to determine the existence of material facts, but are not themselves part of the charges and are not

<sup>44</sup> Impugned Decision, para. 44.

<sup>45</sup> Document in Support of the Appeal, para. 24, referring to *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 (OA 15 OA 16), fn. 163.

<sup>46</sup> Document in Support of the Appeal, para. 24.

<sup>47</sup> Document in Support of the Appeal, para. 25, referring to “Corrigendum of the ‘Decision on the Confirmation of Charges’”, dated 7 March 2011 and registered on 8 March 2011, ICC-02/05-03/09-121-Corr-Red, paras 36-37.

<sup>48</sup> Document in Support of the Appeal, para. 26, referring to the Decision of 14 December 2012, paras 27-28. *See also* Document in Support of the Appeal, paras 17, 23.

subject to confirmation by the Pre-Trial Chamber under article 61(7) of the Statute”.<sup>49</sup> The Prosecutor submits that, in accordance with the Pre-Trial Chamber’s instructions, she set out the “facts and circumstances” underlying the contextual elements of crimes against humanity in paragraphs 97 and 105 of the DCC, which incorporated by reference the facts relevant to the four Charged Incidents, but not the 41 Incidents, which were considered to be “subsidiary”.<sup>50</sup>

25. The Prosecutor stresses that the DCC sufficiently sets out the factual basis required under regulation 52 (b) of the Regulations of the Court as paragraphs 97 and 105 of the DCC identify “the perpetrators of the attack, the civilian population that was targeted by the attack and the policy in furtherance of which the crimes were committed”, while details of the four Charged Incidents provide additional factual information regarding the attack including “the number of victims and the type of victimization, the time and place of the alleged acts, as well as the *modus operandi* and intent of the perpetrators”.<sup>51</sup> The Prosecutor contends that “the ‘facts and circumstances’ contained in the DCC that need to be established and that are relevant to the existence of the ‘attack’ do not refer to any ‘incidents’ other than the four Charged Incidents”.<sup>52</sup>

26. The Prosecutor further contends that the “standard of proof under [a]rticle 61(7) exclusively applies to the elements of the crimes (including the contextual elements) and to findings of fact that are essential to establish these elements”.<sup>53</sup> The Prosecutor endorses the Pre-Trial Chamber’s statement that the “evidentiary threshold under [a]rticle 61(7) applies to all ‘facts and circumstances’ of the case and that accordingly it ‘is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the suspect’”.<sup>54</sup> By reference to the jurisprudence of the Court, the *ad hoc* Tribunals and national jurisdictions, the Prosecutor adds that she must prove “*facts which are*

<sup>49</sup> Document in Support of the Appeal, para. 23, referring to Decision of 14 December 2012, para. 27.

<sup>50</sup> Document in Support of the Appeal, paras 17, 26, 28, referring to Decision of 14 December 2012, paras 27-28. *See also* Document in Support of the Appeal, para. 39.

<sup>51</sup> Document in Support of the Appeal, para. 40, referring to DCC, paras 93-96, 101-104. *See also* Document in Support of the Appeal, para. 27.

<sup>52</sup> Document in Support of the Appeal, para. 22.

<sup>53</sup> Document in Support of the Appeal, paras 22, 30.

<sup>54</sup> Document in Support of the Appeal, para. 19.

*indispensable for entering a conviction*” to the requisite threshold.<sup>55</sup> According to the Prosecutor, “such ‘indispensable facts’ are those that provide ‘sufficient [...] factual basis’ to explain how the abstract legal concepts of the elements of the crime apply to the concrete case charged by the Prosecution”.<sup>56</sup> She stresses that it does not apply to “individual pieces of evidence or to every single factual assessment made by a Chamber during the process leading to confirmation of charges or to conviction”.<sup>57</sup>

27. In addition, the Prosecutor avers that the standard of proof under article 61 (7) of the Statute is correctly applied when the Pre-Trial Chamber “cumulatively look[s] at all the evidence that the Prosecut[or] provided in support of the material facts related to the attack and determine[s] whether it is sufficient to establish substantial grounds to believe in relation to the material facts referred to [... in] the DCC”.<sup>58</sup> The Prosecutor submits that once this determination has been carried out, it is for the Pre-Trial Chamber to “determine whether the relevant facts that have been proven to the required threshold are sufficient to establish the legal element of the attack”.<sup>59</sup>

28. Finally, the Prosecutor contends that the Pre-Trial Chamber erred in finding that “*each incident underlying the contextual elements* must be proved to the same threshold that is applicable to all of the facts” or that “[w]hen alleging the existence of an ‘attack directed against any civilian population’ by way of describing a series of incidents, the Prosecutor must *establish to the requisite threshold that a sufficient number of incidents* relevant to the establishment of the alleged ‘attack’ took place”.<sup>60</sup> The Prosecutor submits that the Pre-Trial Chamber “understood this evidentiary requirement to apply to each of the 45 [i]ncidents, namely to the facts relevant to the four Charged Incidents as well as to the evidence relating to the other 41 Incidents adduced as mere support of the evidence that relates to the Charged Incidents”.<sup>61</sup> The Prosecutor avers that, in so doing, the Pre-Trial Chamber “effectively conflated the notions of material facts, and subsidiary facts and evidence” and as a result erred in

<sup>55</sup> Document in Support of the Appeal, paras 32-37.

<sup>56</sup> Document in Support of the Appeal, para. 32.

<sup>57</sup> Document in Support of the Appeal, para. 31.

<sup>58</sup> Document in Support of the Appeal, para. 41, referring to DCC, paras 93-95, 97, 101-103, 105.

<sup>59</sup> Document in Support of the Appeal, para. 41. *See also* Document in Support of the Appeal, paras 42-43.

<sup>60</sup> Document in Support of the Appeal, para. 19.

<sup>61</sup> Document in Support of the Appeal, para. 20.

applying the standard of proof to the subsidiary facts instead of applying the standard of proof only to the material facts.<sup>62</sup>

(ii) *Mr Gbagbo's submissions*

29. Mr Gbagbo argues that the Prosecutor wrongly alleges that the standard of proof under article 61 (7) of the Statute should apply only to the four Charged Incidents but not to the 41 Incidents.<sup>63</sup> Mr Gbagbo submits that, contrary to the Prosecutor's assumption, the Pre-Trial Chamber did not require the Prosecutor to show all the facts alleged in the DCC to the standard of proof applicable for the confirmation of charges.<sup>64</sup> Rather, Mr Gbagbo argues, it found that the Prosecutor "must be required to provide sufficient evidence in respect of the acts underpinning a widespread or systematic attack against the civilian population" in order to prove the contextual elements of crimes against humanity.<sup>65</sup>

30. Mr Gbagbo alleges further that the Prosecutor confuses the concepts of "material facts" and "essential facts".<sup>66</sup> According to Mr Gbagbo, by creating this confusion, the Prosecutor usurps the Pre-Trial Chamber's role by assessing the evidence herself, designating which facts are essential to establishing the existence of the attack and asserting that she has provided a sufficient factual basis to bring the person to trial.<sup>67</sup> Mr Gbagbo stresses that the Impugned Decision clearly indicates that it was "essential" for the Prosecutor to "provide proof of a sufficient number of the incidents among the ones it presented to the Chamber to establish the existence of a widespread or systematic attack".<sup>68</sup> Mr Gbagbo avers that the fact that the Prosecutor disagrees with this statement is irrelevant to the present proceedings.<sup>69</sup> Mr Gbagbo points out that this appeal concerns an adjournment decision, not a confirmation decision and that an "attempt to secure a decision of the Appeals Chamber on a matter which is still pending before the Pre-Trial Chamber amounts to an abuse of process".<sup>70</sup>

<sup>62</sup> Document in Support of the Appeal, para. 23.

<sup>63</sup> Response to the Document in Support of the Appeal, paras 48-59.

<sup>64</sup> Response to the Document in Support of the Appeal, para. 51.

<sup>65</sup> Response to the Document in Support of the Appeal, para. 51.

<sup>66</sup> Response to the Document in Support of the Appeal, paras 57-59.

<sup>67</sup> Response to the Document in Support of the Appeal, para. 58.

<sup>68</sup> Response to the Document in Support of the Appeal, para. 59.

<sup>69</sup> Response to the Document in Support of the Appeal, para. 59.

<sup>70</sup> Response to the Document in Support of the Appeal, para. 59.

31. With respect to the issue of the material and subsidiary facts, Mr Gbagbo stresses that this issue should not be addressed by the Appeals Chamber as it exceeds the scope of the present appeal and is the subject of an oral motion pending before the Pre-Trial Chamber.<sup>71</sup> In the event that the Appeals Chamber should consider this issue, Mr Gbagbo submits that, contrary to the Prosecutor's contention, the DCC does not clearly distinguish between the "material facts" and the "subsidiary facts".<sup>72</sup>

32. Furthermore, Mr Gbagbo alleges that by introducing a semantic confusion between the concept of "fact" and "evidence" and "an unclear distinction between 'material facts', 'subsidiary facts' and 'essential facts'" in the Document in Support of the Appeal,<sup>73</sup> the Prosecutor is attempting to avoid having to prove the existence of 41 of the 45 incidents on which she relied in the DCC and at the confirmation hearing.<sup>74</sup> He claims that the Prosecutor cannot state that she "did not 'plead facts that relate to the 41 [I]ncidents' and then in the same breath go on to say that the same 41 [I]ncidents could constitute 'evidence' of the attack".<sup>75</sup> Mr Gbagbo stresses that "absent persuasive evidence, it is quite simply impossible to prove that the 41 incidents took place, and therefore they cannot be invoked as 'evidence' of anything".<sup>76</sup>

33. In Mr Gbagbo's view, the question is not whether the four Charged Incidents are included in the charges as the Prosecutor contends, but whether the 41 Incidents are also included in the charges in order to establish the contextual elements set out in article 7 of the Statute.<sup>77</sup> In that regard, Mr Gbagbo avers that the Prosecutor is trying to argue a different case from that which was elaborated in the DCC and presented at the confirmation hearing.<sup>78</sup>

34. Mr Gbagbo argues that, contrary to the Prosecutor's contention, the DCC lists "the 45 attacks" in support of the establishment of the contextual elements of crimes against humanity without distinguishing between the four Charged Incidents and the

<sup>71</sup> Response to the Document in Support of the Appeal, paras 23, 40, referring to Mr Gbagbo's oral motion presented on 19 February 2013 during the hearing on the confirmations of charges, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-FRA (ET WT), pp. 19, 47.

<sup>72</sup> Response to the Document in Support of the Appeal, para. 42.

<sup>73</sup> Response to the Document in Support of the Appeal, para. 68.

<sup>74</sup> Response to the Document in Support of the Appeal, paras 67-73.

<sup>75</sup> Response to the Document in Support of the Appeal, para. 72.

<sup>76</sup> Response to the Document in Support of the Appeal, para. 72.

<sup>77</sup> Response to the Document in Support of the Appeal, paras 44-45.

<sup>78</sup> Response to the Document in Support of the Appeal, paras 34-39.

other 41 Incidents.<sup>79</sup> Mr Gbagbo avers that what the Prosecutor terms the “‘descriptive’ segment” of the DCC is headed “Facts relevant to the Chapeau elements of article 7”, a legal qualification, which shows that “in the mind of its author, it is not a ‘descriptive’ segment”.<sup>80</sup> According to Mr Gbagbo, in the DCC and at the confirmation hearing, the Prosecutor relied on all 45 incidents to establish the existence of a widespread or systematic attack against a civilian population.<sup>81</sup> Mr Gbagbo contends that it was only at the end of the confirmation hearing and in her written submissions, that the Prosecutor modified her strategy by stating that only four of the 45 incidents she described were sufficient to constitute an attack within the meaning of article 7 (2) of the Statute.<sup>82</sup>

35. Mr Gbagbo avers, therefore, that the 45 incidents constitute ‘material’ facts as they form part of the “legal elements of the crime charged”.<sup>83</sup> He alleges that by presenting all these incidents, the Prosecutor is in fact attempting to “make up for the weakness in [her] evidence on each incident; [trying] to make up for quality with quantity”.<sup>84</sup> Mr Gbagbo argues that because the Prosecutor “failed to show any proof of the alleged attacks”, she is now arguing that she distinguished between the ‘material’ and ‘subsidiary’ facts from the outset, a premise which “does not stand up to scrutiny”.<sup>85</sup>

#### **(b) Determination by the Appeals Chamber**

36. Recalling article 67 (1) (a) of the Statute, an accused has the right to be informed in detail of the nature, cause and content of the charges against him. Article 61 (3) of the Statute provides that the person shall be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial within a reasonable time before the hearing. Rule 121 (3) of the Rules of Procedure and Evidence obliges the Prosecutor to provide a detailed description of the charges to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing. Regulation 52 of the Regulations of the Court specifies

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<sup>79</sup> Response to the Document in Support of the Appeal, para. 46, referring to the Footnoted DCC, paras 10-42, 59, 85, fns. 427-436, 438-439, 462-463.

<sup>80</sup> Response to the Document in Support of the Appeal, para. 36.

<sup>81</sup> Response to the Document in Support of the Appeal, paras 34, 37, 47.

<sup>82</sup> Response to the Document in Support of the Appeal, para. 34.

<sup>83</sup> Response to the Document in Support of the Appeal, para. 47.

<sup>84</sup> Response to the Document in Support of the Appeal, para. 38.

<sup>85</sup> Response to the Document in Support of the Appeal, paras 38-39.

that the document containing the charges shall include, *inter alia*, a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial and a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

37. The Appeals Chamber notes that these provisions do not distinguish between “material facts” and “subsidiary facts”. In the context of analysing regulation 55 of the Regulations of the Court in the case of the *Prosecutor v. Germain Katanga*, the Appeals Chamber has clarified the following:

The Appeals Chamber is not persuaded by Mr Katanga’s argument that, necessarily, only “material facts”, but not “subsidiary or collateral facts” may be the subject of a change in the legal characterisation. There is no indication of any such limitation in the text of article 74 (2) of the Statute or regulation 55 (1) of the Regulations of the Court. Rather, those provisions stipulate that any change cannot exceed the “facts and circumstances”. To the extent that Mr Katanga relies on the *Lubanga OA 15 OA 16 Judgment*, where the Appeals Chamber indicated at footnote 163 that “facts” must be distinguished from the evidence put forward by the Prosecutor, as well as from background or other information contained in the document containing the charges or the decision confirming the charges, the Appeals Chamber notes that it did not determine in that judgment how narrowly or how broadly the term “facts and circumstances described in the charges” as a whole should be understood. The Appeals Chamber will not, in the abstract, address this matter any further [footnote omitted].<sup>86</sup>

38. The Appeals Chamber further notes that the Prosecutor does not dispute that the facts and circumstances underpinning the contextual elements of crimes against humanity must be proven to the standard of substantial grounds to believe, which is essentially the issue for which leave to appeal was granted.<sup>87</sup> Indeed, as set out above, the Prosecutor quotes with approval the Pre-Trial Chamber’s statement that the “evidentiary threshold under [a]rticle 61(7) applies to all ‘facts and circumstances’ of the case” and that it “is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal

<sup>86</sup> “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 (OA 13), para. 50.

<sup>87</sup> Decision Granting Leave to Appeal, paras 36-37.

responsibility of the suspect”.<sup>88</sup> The Prosecutor subsequently confirms that “[a]s a matter of law, the standard of proof under [a]rticle 61(7) exclusively applies to the elements of the crimes (including the contextual elements) and to findings of fact that are essential to establish these elements”.<sup>89</sup>

39. The Prosecutor asserts on appeal that the Pre-Trial Chamber erred in its understanding of the charges presented for the purposes of the confirmation of charges hearing. Specifically, the Prosecutor argues that the “facts and circumstances” underlying the contextual elements of crimes against humanity set out in paragraphs 97 and 105 of the DCC incorporate by reference the factual allegations underlying the four Charged Incidents.<sup>90</sup>

40. The Prosecutor does not specify whether the alleged error would constitute an error of law, an error of fact or a procedural error. Nevertheless, regardless of its qualification, the Appeals Chamber is of the view, for the reasons explained below, that in her arguments on appeal the Prosecutor does not accurately reflect the charges that were presented in the DCC for the purposes of the confirmation of charges hearing and that the Prosecutor has, as a result, failed to demonstrate any error on the part of the Pre-Trial Chamber under this aspect of the First Ground of Appeal.

41. In this context, the Appeals Chamber notes that in paragraphs 97 and 105 of the DCC, the Prosecutor stated that “[t]he crimes set forth in paragraphs 93-95 [or 101-103] above [i.e. the four Charged Incidents] were committed as part of a widespread and systematic attack directed by pro-GBAGBO forces against civilians perceived to support OUATTARA”.

42. In the view of the Appeals Chamber, this wording partly rehearses the legal requirements for an “attack” within the meaning of article 7 of the Statute. However, apart from specifying the political affiliations of the alleged perpetrators and victims, the paragraphs in question do not contain any *factual* allegation relative to the attack against the civilian population. As such, it cannot be said that the statement in relation to the attack in paragraphs 97 and 105 in itself provided a “sufficient [...] factual basis to bring the person [...] to trial” within the meaning of regulation 52 (b) of the

<sup>88</sup> Document in Support of the Appeal, para. 19.

<sup>89</sup> Document in Support of the Appeal, para. 30.

<sup>90</sup> Document in Support of the Appeal, paras 17, 28.

Regulations of the Court or to inform the suspect in detail of the nature, cause and content of the charges against him within the meaning of article 67 (1) (a) of the Statute.

43. Furthermore, the Appeals Chamber considers that the wording of paragraphs 97 and 105 of the DCC does not necessarily lead to the understanding that the four Charged Incidents – and these incidents alone – were intended to establish the existence of a widespread and systematic attack. As noted above,<sup>91</sup> paragraphs 97 and 105 of the DCC allege that the crimes underlying the four Charged Incidents were committed as *part of* the attack, not that they actually *constituted* the attack. Indeed, the wording of paragraphs 97 and 105 mirrors the definition of a crime against humanity as set out in article 7 (1) of the Statute which is defined as any of the enumerated acts “when committed *as part of* a widespread or systematic attack directed against any civilian population” (emphasis added).

44. The Appeals Chamber, therefore, concludes that the factual allegations by reference to which the Prosecutor intended to prove the attack against the civilian population were those set out in section E of the DCC, under the sub-section entitled “Attack against a civilian population”.<sup>92</sup> In that section, the incidents are set out in a chronological narrative that include the four Charged Incidents, without making a distinction between them and the other 41 Incidents in terms of their relevance to establishing the “attack”.<sup>93</sup> The fact that the Prosecutor did not differentiate between these incidents is confirmed by the introduction to this section of the DCC which reads as follows: “[b]etween 27 November 2010 and 8 May 2011, pro-GBAGBO forces committed attacks against civilians perceived to support OUATTARA [...]. These attacks include the four incidents analysed in depth in this document, as well as the others set out in this section”.<sup>94</sup>

45. In her Document in Support of the Appeal, the Prosecutor, argues that the four Charged Incidents and the 41 Incidents have a different nature and purpose.<sup>95</sup> In particular, she indicates that the “facts and circumstances” underlying the *chapeau*

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<sup>91</sup> See *supra*, para. 41.

<sup>92</sup> See DCC, p. 10.

<sup>93</sup> See DCC, paras 21-29.

<sup>94</sup> DCC, para. 20.

<sup>95</sup> See Document in Support of the Appeal, paras 3, 17, 23, 29, 39.

elements are those relating to the four Charged Incidents, while the facts relevant to the 41 Incidents are variously referred to as “subsidiary facts and evidence [...] from which proof as to the material facts may be inferred”<sup>96</sup> or a description of “the evidence from which proof of the material facts may be inferred”.<sup>97</sup> Elsewhere, the Prosecutor indicates that, in order to establish the “material facts relevant to the attack”, she relied primarily on evidence relating to the Charged Incidents, but also on other evidence relating to the 41 Incidents.<sup>98</sup> The Prosecutor adds that the evidence relating to the 41 Incidents was presented only “to support evidence from the Charged Incidents that goes to proof of the attacker’s pattern of conduct as well as the pattern of victimization”.<sup>99</sup>

46. The Appeals Chamber is not persuaded by these arguments. The Appeals Chamber notes that the factual allegations in question describe a series of separate events. Therefore, it is not immediately obvious that there is any distinction between the four Charged Incidents and the 41 Incidents in terms of their relevance to establishing an attack against a civilian population. The Appeals Chamber considers that the Prosecutor did not present any contextual information or any other factual allegations that would provide a basis for making such a distinction, or serve to explain the alleged link between the 41 Incidents and the four Charged Incidents.

47. Finally, in the Appeals Chamber’s reading of the Impugned Decision, the Pre-Trial Chamber did not actually require that each of the 45 incidents be proven to the requisite standard. In fact, the Pre-Trial Chamber specified that “[w]hen alleging the existence of an ‘attack against any civilian population’ by way of describing a series of incidents, the Prosecutor must establish to the requisite threshold that a *sufficient number of incidents* relevant to the establishment of the alleged ‘attack’ took place. This is all the more so in case none of the incidents, taken on their own, could establish the existence of such an ‘attack’” (emphasis added).<sup>100</sup> The Appeals Chamber considers that it is for the Prosecutor to plead the facts relevant to establishing the legal elements and for the Pre-Trial Chamber to determine whether those facts, if proven to the requisite threshold, establish the legal elements of the

<sup>96</sup> Document in Support of the Appeal, paras 17, 23.

<sup>97</sup> Document in Support of the Appeal, para. 39.

<sup>98</sup> Document in Support of the Appeal, para. 18.

<sup>99</sup> Document in Support of the Appeal, paras 18, 29.

<sup>100</sup> Impugned Decision, para. 23.

attack. The question of how many of the incidents pleaded by the Prosecutor would suffice to prove an “attack” in the present case is a matter for the Pre-Trial Chamber to determine. It is not a question that can be determined in the abstract.

48. In view of the foregoing, the Appeals Chamber finds that the Pre-Trial Chamber did not err in treating the Prosecutor’s factual allegations as encompassing the 41 Incidents in addition to the four Charged Incidents.

3. *Pre-Trial Chamber’s interpretation of an “attack” under article 7 of the Statute*

(a) **Submissions of the parties**

(i) *Prosecutor’s submissions*

49. The Prosecutor submits that the Pre-Trial Chamber’s error regarding the application of the threshold under article 61 (7) of the Statute to each of the incidents derives from its “misinterpretation and misapplication” of the notion of attack under article 7 (2) (a) of the Statute.<sup>101</sup> With regard to the alleged error as to the notion of attack under article 7 (2) (a) of the Statute, the Prosecutor contends that:

The Majority found that “[w]hen alleging the existence of an ‘attack against any civilian population’ by way of describing a series of incidents, the Prosecutor must establish to the requisite threshold that a sufficient number of incidents relevant to the establishment of the alleged ‘attack’ took place”. According to the Majority, this is particularly the case were [*sic*] “none of the incidents, taken on their own, could establish the existence of such an attack”.<sup>102</sup> [Footnotes omitted.]

50. On the basis of these findings, the Prosecutor infers that the “Majority therefore considers that the notion of ‘attack’ encompasses a certain number of ‘incidents’, rather than a ‘course of conduct involving a multiple commission of acts and that in this case the [i]ncidents “constitute the attack””.<sup>103</sup>

51. The Prosecutor further argues that the Pre-Trial Chamber erred in ordering the Prosecutor to present evidence that “the alleged physical perpetrators were acting pursuant to or in furtherance of the alleged policy” in relation to each incident and insofar as it expected “to be able to infer from each individual [i]ncident that the

<sup>101</sup> Document in Support of the Appeal, para. 45.

<sup>102</sup> Document in Support of the Appeal, para. 45.

<sup>103</sup> Document in Support of the Appeal, para. 45.

perpetrators acted pursuant to or in furtherance of the alleged policy”.<sup>104</sup> The Prosecutor emphasises that it must be established that “the ‘attack’ was committed pursuant to or in furtherance to [*sic*] the policy, not individual ‘acts’ or the legally non-existent ‘incidents’”.<sup>105</sup> The Prosecutor submits that this argument, and more generally her First Ground of Appeal, are directly related to the issue in relation to which leave to appeal was granted, in particular because the Prosecutor wishes to demonstrate that “an ‘attack’ is not a mechanical aggregate of ‘incidents’”.<sup>106</sup>

*(ii) Mr Gbagbo’s submissions*

52. With regard to the argument that the Pre-Trial Chamber erred in its interpretation of an “attack” for the purposes of the contextual elements of crimes against humanity, Mr Gbagbo submits that the Prosecutor misconstrues the nature of the Impugned Decision.<sup>107</sup> He argues that the Impugned Decision was directed at adjourning the confirmation of charges hearing, which implies that the Pre-Trial Chamber was not bound to determine the legal elements of crimes against humanity: such determination will be done only in the final decision on the confirmation of charges.<sup>108</sup> Mr Gbagbo adds that, contrary to the Prosecutor’s arguments, the Pre-Trial Chamber made no finding on the legal definition of an attack but “merely found that the Prosecut[or] [herself] was advancing a number of incidents and [...] drew a clear and logical conclusion that for those incidents to be taken into account, the Prosecut[or] must provide proof that they took place and describe their nature”.<sup>109</sup>

**(b) Determination by the Appeals Chamber**

53. The Appeals Chamber notes that the legal requirements necessary to establish an ‘attack’ within the meaning of article 7 of the Statute were not articulated in the Impugned Decision. The statements of the Pre-Trial Chamber highlighted by the Prosecutor reflect the factual allegations of the Prosecutor in the present case and do not establish any requirements as a matter of law. In this regard, the Appeals Chamber notes that the Prosecutor relied on a series of incidents in order to establish that an attack within the meaning of article 7 of the Statute occurred,<sup>110</sup> and, with regard to

<sup>104</sup> Document in Support of the Appeal, para. 52.

<sup>105</sup> Document in Support of the Appeal, para. 52.

<sup>106</sup> Document in Support of the Appeal, para. 14.

<sup>107</sup> Response to the Document in Support of the Appeal, paras 60-61.

<sup>108</sup> Response to the Document in Support of the Appeal, para. 61.

<sup>109</sup> Response to the Document in Support of the Appeal, para. 66.

<sup>110</sup> DCC, para. 20.

the policy element under article 7 (2) (a) of the Statute, the Prosecutor specified that “the attacks referred to in [the DCC] were carried out against civilians in furtherance of the [p]olicy to attack perceived OUATTARA supporters in order to maintain GBAGBO in power at all costs”.<sup>111</sup>

54. In these circumstances, any determination by the Appeals Chamber of the merits of this issue would be made in the abstract and would be premature in the absence of any findings or interpretation by the Pre-Trial Chamber. Therefore, as the Appeals Chamber is not an advisory body,<sup>112</sup> it will not consider this argument under the First Ground of Appeal any further.

## **B. Second Ground of Appeal**

### *1. Submissions of the Parties*

#### **(a) Prosecutor’s submissions**

55. The Prosecutor submits that her Second Ground of Appeal is related to the issue for which leave to appeal was granted and should be considered as properly raised before the Appeals Chamber.<sup>113</sup> The Prosecutor contends that the notion of “issue” does not equate to a “ground of appeal” or an “error” that an appellant may raise in an appeal.<sup>114</sup> She avers that the “correctness of a decision is irrelevant to an issue, while a ground of appeal revolves around an identified error in the decision”.<sup>115</sup> The Prosecutor argues that, rather than defining the “grounds of appeal or the errors”, an issue certified for appeal merely “defines the scope within which an appellant can raise grounds of appeal, in the sense that there [is] a nexus between the issue certified for appeal and the grounds of appeal or errors raised on appeal”.<sup>116</sup> She stresses that a question not “expressly referred to in the issue certified for appeal” was previously accepted as properly raised before the Appeals Chamber because it was considered to be “implicitly contained” in the issue in relation to which leave to appeal had been

<sup>111</sup> DCC, para. 22.

<sup>112</sup> See, e.g., *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 38. See also *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. 68.

<sup>113</sup> Document in Support of the Appeal, paras 9-11, 15-16.

<sup>114</sup> Document in Support of the Appeal, para. 9.

<sup>115</sup> Document in Support of the Appeal, para. 9.

<sup>116</sup> Document in Support of the Appeal, para. 10.

granted.<sup>117</sup> She supports this by reference to jurisprudence from this Court, the *ad hoc* Tribunals and from a national jurisdiction.<sup>118</sup>

56. The Prosecutor further contends that “[b]y reformulating the [issue in relation to which leave to appeal was granted], the Majority has effectively combined the constitutive elements of the issue for which it rejected leave to appeal with the constitutive elements of the issue certified for appeal”.<sup>119</sup> The Prosecutor argues that this is demonstrated most clearly by the fact that the issue certified for appeal “qualifies the meaning of the ‘requisite standard’, thereby including the notion of the interpretation and application of the ‘requisite standard’ of proof into the scope of the certified [i]ssue”.<sup>120</sup> She adds that the Appeals Chamber’s determination as to “whether certain facts need to be established” is premised on a determination as to the “meaning of the ‘requisite standard’ to which they must be established”.<sup>121</sup> In that context, the Prosecutor maintains that the issue raised under the Second Ground of Appeal is “directly related” to, “implicitly contained” in and “inextricably linked” to the issue certified for appeal and therefore is properly raised in the present appeal.<sup>122</sup>

**(b) Mr Gbagbo’s submissions**

57. Mr Gbagbo submits that the Prosecutor attempts to reintroduce an entire issue in relation to which the Pre-Trial Chamber refused to grant leave to appeal on the ground that the issue was not formulated with sufficient clarity and did not arise from the Impugned Decision.<sup>123</sup> Mr Gbagbo argues that the Prosecutor misrepresents the Impugned Decision and invents a legal framework to suit her position.<sup>124</sup>

58. Mr Gbagbo avers that there is no legal basis for the principle that the Prosecutor seeks to establish, namely that “for a ground of appeal to be admissible, it suffices to establish a nexus with the certified ‘issue’”,<sup>125</sup> noting that the only source cited by the Prosecutor is a decision of a Pre-Trial Chamber that was concerned only with the

<sup>117</sup> Document in Support of the Appeal, para. 10.

<sup>118</sup> Document in Support of the Appeal, paras 10-11.

<sup>119</sup> Document in Support of the Appeal, para. 15.

<sup>120</sup> Document in Support of the Appeal, para. 15.

<sup>121</sup> Document in Support of the Appeal, para. 16.

<sup>122</sup> Document in Support of the Appeal, para. 16.

<sup>123</sup> Response to the Document in Support of the Appeal, paras 25-26.

<sup>124</sup> Response to the Document in Support of the Appeal, para. 27.

<sup>125</sup> Response to the Document in Support of the Appeal, para. 28.

requirements necessary to obtain leave to appeal.<sup>126</sup> Mr Gbagbo further contends that the Prosecutor only refers to one decision of the Appeals Chamber issued in the case of the *Prosecutor v. Thomas Lubanga Dyilo* and emphasises that this decision was of an exceptional nature and was taken in a completely different context given that, in that case, the Defence raised a question without having ever sought leave to appeal that point.<sup>127</sup> Mr Gbagbo argues that this shows that it is only when leave to appeal a particular issue was not sought that the Appeals Chamber may consider whether there is a link between the issue for which leave to appeal was granted and the ground of appeal raised by the appellant.<sup>128</sup> He cites jurisprudence of the Appeals Chamber, which, in his view, shows that the appeal cannot go beyond the issue in relation to which leave to appeal was granted.<sup>129</sup>

59. Finally, Mr Gbagbo submits that, even if the Prosecutor's arguments were accepted, she has not demonstrated the existence of a link between the issue in respect of which leave was granted and the Second Ground of Appeal.<sup>130</sup> He indicates that the two questions are distinct, as demonstrated even by the structure of the Document in Support of the Appeal, where the First Ground of Appeal is developed independently of the Second Ground of Appeal.<sup>131</sup>

## 2. *Determination by the Appeals Chamber*

60. Under her Second Ground of Appeal, the Prosecutor alleges that the Pre-Trial Chamber erred in its interpretation and application of the standard of proof under article 61 (7) of the Statute.<sup>132</sup> In particular, she submits that the following four sub-errors were made by the Pre-Trial Chamber: (i) requiring the Prosecutor, in order to meet the evidentiary threshold under article 61 (7) of the Statute, to "largely complete her investigation" (first sub-error);<sup>133</sup> (ii) to "'present *all* her evidence' and 'her strongest possible case'" (second sub-error);<sup>134</sup> (iii) ruling that the "recent jurisprudence of the Appeals Chamber has modified the interpretation of the standard of proof under [a]rticle 67(1) and requires a more stringent [...] approach [...] in its

<sup>126</sup> Response to the Document in Support of the Appeal, para. 28.

<sup>127</sup> Response to the Document in Support of the Appeal, para. 29.

<sup>128</sup> Response to the Document in Support of the Appeal, para. 30.

<sup>129</sup> Response to the Document in Support of the Appeal, para. 31.

<sup>130</sup> Response to the Document in Support of the Appeal, para. 32.

<sup>131</sup> Response to the Document in Support of the Appeal, para. 32.

<sup>132</sup> Document in Support of the Appeal, paras 6, 75-80.

<sup>133</sup> Document in Support of the Appeal, paras 54, 57-60.

<sup>134</sup> Document in Support of the Appeal, paras 54, 61-65.



application” (third sub-error);<sup>135</sup> and stating inappropriately at the confirmation of the charges stage its “general disposition towards certain types of evidence” (fourth sub-error).<sup>136</sup>

61. The Appeals Chamber notes that the Second Ground of Appeal mirrors the first issue in respect of which the Prosecutor requested leave to appeal: “[w]hether the [Impugned] Decision correctly interpreted and applied the evidentiary standard under [a]rticle 61(7)”.<sup>137</sup> In relation to that issue, the Pre-Trial Chamber found that it was not “formulated with sufficient clarity and [did] not arise from the [Impugned Decision]”.<sup>138</sup> The Pre-Trial Chamber declined to grant leave to appeal this issue, finding that the Prosecutor had not identified any legal or factual error in its reasoning regarding the evidentiary threshold and instead “selectively pick[ed] elements from the Chamber’s reasoning in other sections of the [Impugned] Decision, which do not deal with the evidentiary standard”.<sup>139</sup> It further noted that the Prosecutor’s challenges appeared to result from a “misreading of the [Impugned Decision] and a failure to distinguish the question of how to define the standard of proof from the question of how the Prosecutor can be expected to meet this standard”.<sup>140</sup>

62. The Appeals Chamber has previously found that:

Article 82 (1) (d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue.<sup>141</sup>

63. This indicates that it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent. Indeed, the Appeals

<sup>135</sup> Document in Support of the Appeal, paras 54, 66-69.

<sup>136</sup> Document in Support of the Appeal, paras 54, 70-74.

<sup>137</sup> Application for Leave to Appeal, para. 3 (i).

<sup>138</sup> Decision Granting Leave to Appeal, para. 19. *See also* Decision Granting Leave to Appeal, para. 26.

<sup>139</sup> Decision Granting Leave to Appeal, paras 20-22.

<sup>140</sup> Decision Granting Leave to Appeal, para. 22.

<sup>141</sup> *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 20.

Chamber has previously declined to consider arguments of an appellant that go beyond the issue in relation to which leave to appeal has been granted.<sup>142</sup>

64. In the present case, leave to appeal was specifically refused in relation to whether the Pre-Trial Chamber erred in respect of the applicable evidentiary threshold and this question is not intrinsically linked with the issue for which leave to appeal was granted. The Second Ground of Appeal revolves around the evidentiary threshold for the confirmation of charges. In contrast, the issue on appeal relates to the interpretation of the charges in the case at hand and the question of whether and which of the incidents alleged by the Prosecutor must be proved to the relevant standard. Therefore, the Prosecutor's Second Ground of Appeal goes beyond the scope of the present appeal.

65. Furthermore, the Appeals Chamber notes with agreement that the Pre-Trial Chamber rejected leave to appeal because the alleged errors under the Second Ground of Appeal did not arise from the Impugned Decision. The Appeals Chamber recalls

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<sup>142</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the WVU'", 8 October 2010, ICC-01/04-01/06-2582 (OA 18), para. 45; *Prosecutor v. Joseph Kony et al.*, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II", 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05 (OA 2), para. 32. See also International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY"), *Prosecutor v. Jadranko Prlić et al.*, "Decision on the Interlocutory Appeal against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses", 26 February 2009, IT-04-74-AR73.14, para. 17. The cases where the Appeals Chamber considered arguments that went beyond the scope of the issue in relation to which leave to appeal had been granted were those where the arguments were regarded as "intrinsically linked" to the issue on appeal. See *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 (OA 15 OA 16), paras 19-20; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", 21 October 2008, ICC-01/04-01/06-1486 (OA 13), paras 14, 17; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008", 11 July 2008, ICC-01/04-01/06-1433 (OA 11), paras 11-20; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'", 27 May 2008, ICC-01/04-01/07-521 (OA 5), para. 37. See also ICTY, *Prosecutor v. Vojislav Šešelj*, "Decision on Appeal against the Trial Chamber's Decision (No.2) on Assignment of Counsel", 8 December 2006, IT-03-67-AR73.4, para. 20.


that it is not an advisory body<sup>143</sup> and consequently will not determine these issues in the abstract.

66. In these circumstances, the Appeals Chamber will not consider the arguments raised under the Second Ground of Appeal any further.

#### IV. APPROPRIATE RELIEF

67. Pursuant to Rule 158 of the Rules of Procedure and Evidence, the Appeals Chamber may confirm, reverse or amend the decision appealed under article 82 (2) of the Statute. As the Appeals Chamber has dismissed all the arguments of the Prosecutor for the reasons as set out above, it is appropriate to confirm the Impugned Decision and to dismiss the appeal.

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



**Judge Sanji Mmasenono Monageng**  
**Presiding Judge**

Dated this 16th day of December 2013

At The Hague, The Netherlands

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<sup>143</sup> See *supra*, para. 54.