Dissenting opinion of Judge Silvia Fernández de Gurmendi

1. I am unable to join the Majority in its "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (the "Decision").

2. My colleagues have decided to grant the Prosecutor's application only in relation to one of the issues, as reformulated by them, and to reject the remainder of the Prosecutor's Application as well as the entire Defence Application, on the basis that the parties have not identified appealable issues arising out of the Adjournment Decision.[1]

3. I disagree with the reasons provided by the Majority, the reformulation of the Second Issue presented by the Prosecutor, as well as with the rejection of the remaining parts of the Applications. I believe the Decision is not based on an objective application of article 82(1)(d) of the Statute but rather on a selective reading and misrepresentation of the submissions of the parties and participants, as well as of the impugned "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (the "Adjournment Decision" or the "impugned Decision").[2] For the reasons developed below and contrary to the Majority, I believe that both parties have indeed identified "issues" which arise from the Adjournment Decision and meet the other requirements of article 82(1)(d) of the Statute.

I. Interlocutory appeals under article 82(1)(d) of the Statute

4. In accordance with article 82(1)(d) of the Statute, a party may appeal "a decision that involves an issue that would significantly affect the fair and

[1] Decision, paras 26, 36, 52 and 70.
[2] ICC-02/11-01/11-432.

expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." As recalled by the Majority, an "issue" is an identifiable subject or topic the resolution of which is essential for the determination of matters arising in the judicial cause under examination.[3] The issue must emanate from the relevant decision itself and cannot represent a hypothetical concern or an abstract legal question.[4] The Majority also recalled that the requirements of this statutory provision are cumulative, such that a failure to demonstrate the fulfilment of one of the requirements relieves the Chamber from analysing the others.[5] Except for the Second Issue raised by the Prosecutor, the Majority considers that no other issues arising from the Adjournment Decision have been properly identified by the parties and, as a result, does not proceed to analyse the other conditions set forth in article 82(1)(d) of the Statute.

5. At the outset, I wish to emphasise that the provisions of article 82(1)(d) of the Statute define the requirements to which not only the parties but also the Chambers must adhere. In light of the nature of these requirements, it can be said that the Chambers are accorded a large margin of appreciation, but they have not been entrusted with an unfettered discretion to decide whether or not to grant an appeal. A decision under article 82(1)(d) of the Statute is not a policy decision but a legal one that needs to be taken on the basis of an impartial and objective assessment of whether the issues raised meet the requirements of the Statute.

6. Therefore, and taking into account that the Chamber concerned will be dealing with a challenge to its own product, it is essential that it makes, and is seen to be making, an impartial and objective assessment of whether the issues proposed for appeal by the parties meet the criteria set forth in the Statute In particular, the determination of an "issue" within the meaning of article 82(1)(d) of the Statute

[3] Decision, para. 8.
[4] *Id.*
[5] *Ibid.*, para. 9.

appears to require a rather simple and straightforward assessment by the Chamber of whether the question identified by the party arises from what is actually said in the impugned decision, and not from what the judges explain afterwards that they intended to say. Indeed, the certification of an appeal is merely procedural and should not be used by the Chamber to restate its position, clarify the impugned decision or supplement the legal reasoning contained therein. Unfortunately, in my view, this is precisely what has been done by my colleagues in the Decision at hand.

7. In particular, the Majority repeatedly argues that the impugned Decision is misstated or misunderstood and reaches conclusions on the basis of its own alternative interpretation, even when that interpretation goes against a plain reading of the text and contradicts the divergent interpretations of the parties and participants. It might well be that nobody understood the Adjournment Decision, except for the Judges that issued it. However, if that is the case, it is questionable whether such a decision can provide useful guidance in the proceedings to come. The uncertainty generated by the divergent interpretations of the text can only be resolved at this stage by an authoritative and immediate resolution by the Appeals Chamber of the issues identified by the parties in their Applications. The efforts of my colleagues to clarify what they themselves meant in the Adjournment Decision fail to dispel the concerns expressed by the parties, and serve only to compound the uncertainty over what is expected of them in these proceedings.

8. Clarifications provided by a Chamber *ex post* are not a valid legal substitute for what has already been decided by the Chamber. The Appeals Chamber has disapproved of the issuance of clarifications by a Trial Chamber and has stated generally that clarifications subsequently issued by Chambers to previous decisions are "of questionable legality and are undesirable, because they affect the finality of

judicial decisions".[6] What was considered reprehensible at the trial phase is certainly also inappropriate at the pre-trial phase.

II. Prosecutor's Application

A. First Issue: "Whether the Decision correctly interpreted and applied the evidentiary standard under Article 61(7)"

9. I cannot accept the arguments put forward by the Majority and its conclusion that the First Issue presented by the Prosecutor is not formulated with sufficient clarity and does not arise from the Adjournment Decision.[7]

10. The Majority argues that the relevant paragraphs for the determination of the applicable evidentiary threshold are only paragraphs 17 and 18 of the Adjournment Decision, to be found under the heading "Evidentiary threshold".[8] The Majority observes that these two paragraphs are not challenged by the Prosecutor, who does not identify any factual or legal error in them and focuses instead on other sections of the Decision, "which do not deal with the evidentiary standard" but with matters pertaining to the question of "how the Prosecutor can be expected to meet this standard".[9] According to the Majority, these are two separate questions, which the Prosecutor fails to distinguish. Furthermore, my colleagues state that the Prosecutor does not explain how the matters she raises are related to the evidentiary standard.[10] Finally, the Majority claims that "[i]n fact, the points raised by the Prosecutor all seem to stem from a misreading of the Adjournment Decision".[11]

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[6] Appeals Chamber, "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, para. 92.
[7] Decision, para. 19.
[8] *Ibid.*, para. 20.
[9] *Ibid.*, para. 22.
[10] *Ibid.*, para. 22.
[11] *Ibid.*, para. 22.

11. I regret to say that I am puzzled by the first line of reasoning by which my colleagues separate the law from its application, and then conclude that their interpretation of the law is correct because the relevant paragraphs contained in a particular section of the Adjournment Decision have not been challenged. Since judges are required precisely to interpret the law and apply it to the facts under consideration, it is rather odd that my colleagues fail to see the link between the theoretical enunciation of the evidentiary standard and the quantum and quality of evidence they have indicated they expect to receive from the Prosecutor in order to apply that standard. There is an obvious and inextricable link between the two, since the evidentiary standard set forth by the Statute should constitute the terms of reference that inform what is expected from the Prosecutor. The issue at hand is not whether the Majority has correctly spelled out the terms of reference in some section of the Adjournment Decision but whether what it has indicated it expects to receive is compatible with such terms of reference. That is the issue put to the Chamber, and it does, in my view, arise from the Adjournment Decision.

12. Indeed, in her Application, the Prosecutor recognises that the Adjournment Decision "correctly spells out the relevant evidentiary threshold"[12] – but then goes on to argue that the Adjournment Decision "departs from [prior] jurisprudence when interpreting the law on the standard of proof and applying it to the facts of the case".[13] This assertion of the Prosecutor is not made in abstract or hypothetical terms but on the basis of specific arguments, which are mostly ignored by the Majority. My colleagues' findings that "[n]o argument is put forward as to how the Adjournment Decision is supposed to have modified the interpretation of the evidentiary threshold" and that "no factual or legal error has been identified by the Prosecutor"[14] are in my view inaccurate. The Prosecutor's submissions at paragraphs 5 and 6 of

[12] Prosecutor's Application, para. 4.
[13] *Id.*
[14] Decision, para. 21.

her Application are sufficiently clear and precise for the purpose of an application for leave to appeal.

13. The Prosecutor is indeed clear as to what she sees as a departure from the evidentiary standard in accordance with existing jurisprudence:

> In particular, the Decision requires that at the confirmation of charges stage the Prosecutor: (i) "largely complete her investigation"; (ii) "present all her evidence"; and (iii) "present[...] her strongest possible case". In addition, the Decision provides a detailed explanation of the Majority's "general disposition towards certain types of evidence."[15]

14. The Prosecutor explains further that the First Issue essentially relates to the question of whether the specific findings made in the Adjournment Decision (and rehearsed at paragraphs 4 and 5 of her Application) "can be reconciled with the following established principles: (i) that the evidentiary threshold is different and lower than that for conviction; (ii) that confirmation proceedings have a limited scope and purpose and in particular are not a trial before the trial or a 'mini trial': (iii) that the Pre-Trial Chamber's powers are limited – it exercises a 'gatekeeper function', but does not rule on the guilt or innocence of an accused; and (iv) that under Article 61(5), the Prosecution is allowed to rely on documentary or summary evidence and need not call the witnesses expected to testify at trial".[16]

15. My colleagues do not properly address these submissions. As already indicated, they fail to recognise the link between the description of the law and its purported application by the Chamber and limit themselves to stating that the Prosecutor does not explain how the findings challenged by the Prosecutor are related to the evidentiary standard.[17]

16. In a second line of reasoning, the Majority also states that all points raised by the Prosecutor stem from a misreading of the Adjournment Decision, which the Majority then proceeds to "clarify".

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[15] Prosecutor's Application, para. 4 (footnotes omitted).
[16] *Ibid.*, para. 5.
[17] Decision, para. 22.

17. As already indicated, such clarifications are not a permissible substitute for what is indeed said in a decision. Furthermore, the clarification offered by my colleagues cannot be sustained in light of the plain text of the Adjournment Decision. According to the Majority, when it stated at paragraph 25 of the Adjournment Decision that "the Chamber must *assume* that the Prosecutor has presented her strongest possible case based on a largely completed investigation",[18] it "merely indicated that, if it considered that the evidence presented at confirmation did not meet the evidentiary standard of article 61(7) of the Statute, it would not be able to confirm the charges on the basis of assumptions that the Prosecutor might have additional/better evidence in her possession or might be able to collect such evidence post-confirmation".[19] The Majority concludes that, "[i]n other words, the Adjournment Decision does not make it a legal requirement for the Prosecutor to have completed her investigation or to present all her evidence at confirmation".[20]

18. I welcome the fact that my colleagues now appear to join me in recognising that the completion of the investigation prior to confirmation of charges is not a legal requirement under the Statute.[21] This represents a significant departure from positions previously held by them not only in the Adjournment Decision, but also in other cases before this Court.[22]

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[18] Adjournment Decision, para. 25 (emphasis added by my colleagues).
[19] Decision., para. 24.
[20] *Id.*
[21] Dissenting Opinion to Adjournment Decision, para. 14.
[22] This previous position is held by Judge Van Den Wyngaert in the *Kenyatta* case in Trial Chamber V, *The Prosecutor v. Uhuru Muigai Kenyatta*, "Decision on defence application pursuant to Article 64(4) and related requests", ICC-01/09-02/11-728, 26 April 2013, paras 117-128 (See also the "Concurring Separate Opinion by Judge Eboe Osuji" attached to the same decision). In the same vein, Judge Kaul has previously adopted a similar position and expressly held that "it is not only desirable, but necessary that the investigation is complete, if at all possible, at the time of the [confirmation] [h]earing, unless the Prosecutor justifies further investigations after confirmation with compelling reasons" (Dissenting Opinion by Judge Hans-Peter Kaul 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-01/09-02/11-382-Red, para. 57).

19. Unfortunately, no matter how sound this new position might be, the explanation that is now provided cannot be reconciled with a straightforward reading of the Adjournment Decision. In fact, on the basis of such an explanation, several assertions in the Adjournment Decision would become meaningless, including the entirety of paragraph 25, which would serve no other apparent purpose than to reiterate that the Prosecutor needs to present sufficient evidence to meet the relevant standard, something that could have been more efficiently done by simply referring to the Statute.

20. In fact, with the clarification, that paragraph is open to additional questions. If the Chamber does not believe that there is a legal requirement for the Prosecutor to complete her investigation or present all her evidence, what is then the legal basis for it to consider that "*[e]ven 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"?[23] If there is no obligation on the Prosecutor in this regard, I do not see how the Chamber must or can assume that the Prosecutor has proceeded in such a manner. From article 61(5) of the Statute, the Chamber could actually draw the contrary assumption; that the Prosecutor has *not* presented all or her strongest evidence since she is explicitly allowed to present only what is sufficient to meet the pre-trial evidentiary standard and to rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial. This assumption would also be consistent with the past practice of Pre-Trial Chambers, including our practice in the present case,[24] which has been to discourage the Prosecutor from presenting live evidence, no matter how strong that evidence might be.

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[23] Decision, para. 25 (emphasis added).

[24] "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.

21. Most importantly, with this explanation by the Majority, one of the main justifications for the adjournment of the confirmation of charges hearing disappears, since the adjournment was largely premised on the recognition that the Prosecutor may have proceeded on the basis of previous less stringent jurisprudence. This is clearly stated at paragraph 37 of the Adjournment Decision where "the Chamber notes that past jurisprudence, which predates [two] decisions of the Appeals Chamber may have appeared more forgiving in this regard" and that "[t]herefore, the Prosecutor, in this case, may not have deemed it necessary to present all her evidence or largely complete her investigation". The Majority was "therefore, out of fairness, prepared to give her a limited amount of additional time to do so."[25] As the Prosecutor puts it, the decision to adjourn the hearing, far from being frivolous on this point, stems from "the Majority's belief that recent jurisprudence by the Appeals Chamber has modified the interpretation of the standard of proof under Article 61(7) and requires a more stringent or at least a 'less forgiving' approach in its application".[26] As developed below, the Defence appears to share the understanding that the Majority decided to adjourn the hearing rather than to decline to confirm the charges based on such belief.[27]

22. In light of the above, I cannot accept the clarification offered by my colleagues. The clarification is *per se* inadmissible in the context of the procedure under article 82(1)(d) of the Statute. In addition, it cannot be sustained by a plain, straightforward reading of the Adjournment Decision.

23. In addition, I do not believe that the explanation provided, even if it were to be accepted, solves all the problems identified in the context of the First Issue.

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[25] Adjournment Decision, para. 37.
[26] Prosecutor's Application, para. 6.
[27] See below, para. 66.

24. This is in particular the case with the Majority's approach to evidence, which is developed at length in the Adjournment Decision.[28] Without any reasoning, the Majority completely ignores the Prosecutor's submissions in relation to the "detailed explanation of the Majority's 'general disposition towards certain types of evidence'".[29] These are specific matters of concern which are unrelated to the interpretation of the "assumptions" made in the Adjournment Decision and should have been considered by the Majority. The Prosecutor specifically argues that the expression of the "general disposition" of the Chamber towards particular kinds of evidence has a bearing on the application of the evidentiary standard at the confirmation of charges stage. In particular, the Prosecutor contends that the Majority's general indication that some categories of evidence are preferred over others raises the question of how this finding can be reconciled with article 61(5) of the Statute, under which the Prosecutor is allowed, at the confirmation of charges hearing, to rely on documentary or summary evidence and need not call the witnesses expected to testify at trial.[30] Whether or not these elements can be reconciled is an issue that clearly arises from the Decision, and which meets the criteria of article 82(1)(d) of the Statute.

25. I note that in relation to its contested approach to evidence, the Majority only refers to a different part of the Prosecutor's Application to claim that "the Prosecutor completely misstates the Adjournment Decision when she argues that it forces her to present all her best evidence and that she must therefore call many live witnesses".[31] However, it appears that it is the Majority who misrepresents the submission of the Prosecutor and rebuts it prematurely. Indeed, the Prosecutor does not argue that forcing her to call live witnesses is in itself an "issue" arising out of the Adjournment

[28] Adjournment Decision, paras 26-35.
[29] Prosecutor's Application, para. 4.
[30] *Ibid.*, para. 5.
[31] Decision, para. 25.

Decision but advances this argument in support of her allegations that the First and Second Issue affect the fair and expeditious conduct of the proceedings.[32]

26. In sum, I disagree with the Majority because I would have found that the First Issue arises out of the Adjournment Decision. In addition, I hold the view that the other requirements of article 82(1)(d) of the Statute are met.

27. In my view, the correct interpretation and application of the evidentiary standard in the present case has a crucial impact on both the fairness and expeditiousness of the proceedings as it clearly impacts on the amount and quality of the evidence to be provided and the length of the proceedings that will be needed for its disclosure, consideration and assessment.

28. Finally, I am of the view that an immediate resolution of the First Issue would materially advance the proceedings as the settling of the matter by the Appeals Chamber would rid the proceedings in the case of possible mistakes.[33] This would prevent any encroachment on the rights of the parties or unnecessary delays in the proceedings, and would ensure that future proceedings in the case follow the right course.

29. Accordingly, I would have granted the Prosecutor leave to appeal with respect to the First Issue.

B. Second Issue: "Whether in this case each 'incident underlying the contextual elements' must be established to the standard of proof enshrined in Article 61(7)"

30. The Second Issue presented by the Prosecutor primarily relates to paragraphs 19 to 23 of the Adjournment Decision on the "Evidentiary threshold applicable to all 'facts and circumstances'". In the Adjournment Decision, the Majority stated that

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[32] Prosecutor's Application, paras 17-18.

[33] See Appeals Chamber, "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. 14.

"the *individual* incidents alleged by the Prosecutor to support 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) and therefore must be proved to the requisite threshold of 'substantial grounds to believe'".[34] The Majority further stated that "*each incident* underlying the contextual element must be proved to the same threshold that is applicable to all other facts".[35] Against this backdrop, the Majority requested the Prosecutor to consider providing further evidence or conducting further investigation on a series of matters "*[f]or each of the incidents* allegedly constituting the attack against the 'pro-Ouattara civilian population'".[36]

31. Under the Second Issue, the Prosecutor challenges precisely these findings, alleging that, contrary to the Majority's view, the "incidents" are "evidence offered to establish the existence of an attack and not material facts for the purpose of the charges".[37] In the Prosecutor's submission, the Second Issue, which "revolves around the definition of the scope of 'facts and circumstances described in the charges' that must be established to the requisite evidentiary threshold, and in particular the proper distinction between 'facts' and 'evidence'",[38] ultimately requires consideration of the following questions: (i) "[w]hether each of the incidents must be established to the threshold of 'substantial grounds to believe'";[39] (ii) "whether the standard of proof under Article 61(7) exclusively applies to establishing the elements of the crimes (including the contextual elements and the mode of liability), and therefore to findings of facts that are indispensable to confirm the charges, and if so whether the 41 incidents can be properly included among these indispensable facts";[40] and (iii) "whether the term 'incident' can be equated with the statutory

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[34] Adjournment Decision, para. 21 (emphasis added).
[35] *Ibid.*, para. 22 (emphasis added).
[36] *Ibid.*, para. 44(4) (emphasis added).
[37] Prosecutor's Application, para. 11.
[38] *Ibid.*, para. 9.
[39] *Ibid.*, para. 10.
[40] *Ibid.*, para. 11.

notion of 'act' referred to in Articles 7(1) and 7(2), and whether this has an impact on the applicable standard of proof of those incidents".[41]

32. The Prosecutor submits that on appeal she will argue that "the facts pertaining to the 41 incidents are not material facts for the purposes of the charges" and will "demonstrate that all the evidence related to these incidents must be viewed cumulatively and in the context of the entire record in order to determine whether there are substantial grounds to believe that there was an attack, as alleged by the Prosecution, without the need to enter findings on whether each of them has been established".[42]

33. In my view, the Second Issue is satisfactorily identified, accurately reflects the position expressed in the Adjournment Decision and constitutes "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".[43] I am therefore of the view that the Second Issue arises out of the Adjournment Decision.

34. In the current Decision, the Majority cites the relevant part of the Adjournment Decision and recognises that "[t]he Prosecutor challenges the Chamber's finding that the incidents are part of the 'facts and circumstances' of the case and that the incidents must be established to the requisite threshold applicable at this stage".[44] However, instead of proceeding to the natural conclusion that the Second Issue as formulated arises from the Adjournment Decision, my colleagues, "with a view to receiving meaningful guidance by the Appeals Chamber",[45] decide to reformulate the issue as follows:

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[41] *Ibid.*, para. 12.
[42] *Ibid.*, para. 11.
[43] Appeals Chamber, "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. 9.
[44] Decision, para. 35.
[45] *Ibid.*, para. 36.

> 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.[46]

35. I cannot agree to such reformulation, which departs from what is requested in the submissions of the Prosecutor without proper reasoning or justification. Once again, the Majority considers that its Adjournment Decision has not been understood. In this regard, it states that "the way in which the Prosecutor has framed the issue misstates the Adjournment Decision, as the decision does not state that *each* of the 41 alleged incidents must be proved to the requisite standard but only that a *sufficient number* of those incidents must be so proved".[47]

36. However, it stems from the above-cited passages of the Adjournment Decision,[48] that it is indeed the Majority's view that the incidents must be individually proved to the substantial grounds to believe threshold. It bears no relation to this specific point that the Adjournment Decision further explained that in order to prove the existence of an "attack", the subsequent step is to determine whether a "sufficient number of incidents" has been established to the requisite threshold.[49] This is not the crux of the Second Issue, which does not refer to the "number" of incidents that need to be proved in order to establish an attack, but to whether those incidents need to be *individually* proved to the threshold of substantial grounds to believe before being taken into account for the determination of whether the attack has been satisfactorily established. These are two different aspects, and the Prosecutor's submissions in relation to the Second Issue are not mistaken in this regard.

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[46] *Id.*
[47] *Id.* (emphasis in the original).
[48] See above para. 31.
[49] Decision, para. 23.

37. In any event, the concern of the Majority could have been easily addressed by a slight amendment to the Second Issue to make it clear that in this context, "each" meant *individual* incidents and not *all* incidents. However, the Majority chooses instead to reject the Prosecutor's Second Issue in its entirety and to replace it with a reformulation of its own, which misrepresents the issue arising from the Adjournment Decision, as presented by the Prosecutor and elaborated in her Application. Although this was certainly not the intention, the reformulation gives, in fact, the impression that it is aimed not at the resolution of a problem but at obtaining the endorsement of a position.

38. Indeed, it is taken for granted that the attack consists of "incidents", since the first sentence of the reformulation reads as follows: "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 [...]".[50]

39. A core aspect of the issue – whether the "incidents" are constitutive parts of the attack – is thus transformed into an accepted starting premise. Moreover, in the same sentence, an interpretation of the Majority is transformed into an allegation by the Prosecutor, contrary to her own submission. The Prosecutor does not allege "that an 'attack against any civilian population' *consists* of multiple smaller incidents", but argues precisely the opposite by saying that "the facts pertaining to the 41 incidents were *evidence* offered to establish the existence of an attack and not material facts for the purposes of the charges".[51]

40. It is to be noted that the Majority made contrary assertions both in the Adjournment Decision and the current Decision. In the Adjournment Decision, it stated that "in this case [...] the Prosecutor identifies particular incidents that

[50] Decision, Second Issue as reformulated, para. 36.
[51] Prosecutor's Application, para. 11 (emphasis added).

constitute the attack against the civilian population".[52] This is repeated at paragraph 34 of the current Decision, where the Majority indicates that its approach with regard to the examination of the contextual elements of crimes against humanity "has been adopted in response to the Prosecutor's *allegation* that a series of incidents *constitute* the attack".[53] However, no reference to specific written or oral submissions of the Prosecutor is provided in support of these assertions that the attack in this case is alleged to be constituted by an aggregation or series of individual incidents. The Prosecutor has indeed referred to incidents but, as stated above, she has not advanced that they constitute the attack or that they are "facts and circumstances described in the charges". These are not the Prosecutor's allegations but the Majority's *interpretation* thereof. At paragraph 34 of the current Decision, the Majority argues in support of its reformulation that "[t]hese incidents were part of the DCC and mentioned one by one during the confirmation hearing".[54] As further elaboration of its position, the Majority refers back to paragraphs 21 and 22 of the Adjournment Decision, which are inserted in full in the same paragraph.

41. It is thus clear that the initial premise of the reformulation in fact reflects the interpretation by the Majority of how the incidents referred to by the Prosecutor relate to the attack and to the facts and circumstances of the charges for the purpose of article 74(2) of the Statute. This interpretation is precisely what is being contested under the Second Issue presented by the Prosecutor. Whether or not the attack in this case "consists" of discrete "multiple smaller incidents" is not a settled issue. On the contrary, it is one of the central questions of the Second Issue, which meets the requirements under 82(1)(d) of the Statute, and that needs to be answered by the Appeals Chamber, not by the same Chamber that issued the impugned Decision.

42. The remainder of the reformulation by the Majority is equally unacceptable to me as it blurs the matters that need to be addressed by the Appeals Chamber. After

[52] Adjournment Decision, para. 21 (emphasis in the original).
[53] Decision, para. 34 (emphasis added).
[54] *Ibid.*

transforming the core of the Second Issue into its premise, the Majority's reformulation goes on to ask "whether [...] each of these incidents must be supported with sufficient evidence before the Chamber can take them into consideration to determine whether those incidents, taken altogether, indicate that there are substantial grounds to believe that an 'attack' took place".[55]

43. The Majority simply ignores the questions that in the Prosecutor's submission constitute the actual subjects of the Second Issue,[56] and her arguments in this regard are not even addressed. The Majority takes no position on whether or not leave to appeal may be granted with respect to the issue proposed by the Prosecutor as encompassing those key questions. Rather, in the explanatory paragraph of the issue as reformulated, the Majority merely states that "the answer to this question does not depend on whether the incidents are considered as being part of the 'facts and circumstances of the charges' or whether they are categorised as 'subsidiary facts'"[57] and that "[t]he real question is whether the Chamber can expect the Prosecutor to back up her allegations with sufficient evidence, or whether it is permissible for her to make factual allegations without sufficient evidence and still propose them as a basis for drawing inferences about the charges".[58]

44. With due respect to my colleagues, that is not the "real" question under the Prosecutor's Second Issue that arises from the Adjournment Decision. No explanation is provided by the Majority as to why the "real" question under the Second Issue should not relate to the relevance of the "incidents" within the context of the charges brought against Mr Gbagbo. The Second Issue presented by the Prosecutor concerns precisely the categorisation of the "incidents" as part of the "facts and circumstances of the charges". This is the issue that arises from what the

[55] Decision, Second Issue as reformulated, para. 36.
[56] See above, para. 32.
[57] Decision, para. 37.
[58] *Ibid.*

Majority expressly stated in the Adjournment Decision,[59] and it is precisely the object of the Second Issue in the submission of the Prosecutor.[60] The specific question is indeed whether, in the present case, the "incidents" are or are not "facts and circumstances of the charges" which, as such, must be proved to the standard of substantial grounds to believe. Therefore, contrary to the view of the Majority, I believe that the resolution of the Second Issue depends exactly on whether the "incidents" are considered to be part of the facts and circumstances of the charges or should be categorised as subsidiary facts. What is "sufficient" evidence for one category might not be enough for the other. In fact, such a distinction must be made in order for the question to hold any tangible meaning, since it is a generally accepted principle that alleged facts must be substantiated. As a result, the guidance required from the Appeals Chamber necessarily relates to how and to what extent different categories of facts need to be proved.

45. It is regrettable that although my colleagues intended "to receiv[e] meaningful guidance by the Appeals Chamber",[61] they have in fact put forward an unjustified reformulation that blurs the Second Issue and questions that, in the Prosecutor's submission, revolve around this issue.[62] These questions are still discernible and it remains possible to address them on appeal, but the task of the Appeals Chamber could have been facilitated by accepting a neutral, simple and straightforward formulation of the Second Issue, as proposed by the Prosecutor.

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[59] Adjournment Decision, para. 21 ("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 of the charges for the purposes of article 74(2) of the Statute and therefore must be proved to the requisite threshold of 'substantial grounds to believe'").

[60] Prosecutor's Application, para. 9 ("[t]he Second Issue [...] revolves around the definition of the scope of the 'facts and circumstances described in the charges' that must be established to the requisite evidentiary threshold, and in particular the proper distinction between 'facts and evidence'") and para. 10 ("[w]ith a view to establishing the existence of th[e] attack, the Prosecution then referred in a different section of the DCC to 'subsidiary facts' and evidence relating to '41 incidents'. Whether each of these incidents must be established to the threshold of 'substantial grounds to believe' is the subject of the Second Issue").

[61] Decision, para. 36.

[62] See above para. 32.

46. I am also persuaded that the Second Issue, as presented by the Prosecutor, significantly affects the fairness of the proceedings. Indeed, the determination of the legal criteria for assessing the evidence presented in order to establish the contextual elements of the crimes charged significantly impacts on the scope of the Prosecutor's further investigation in the present case, and, more generally, on what is required of the Prosecutor in terms of evidence in order to support her allegations. This is particularly so considering that the Second Issue is not limited to a matter of interpretation and application of the evidentiary threshold, but, more fundamentally, involves the very question of *what* is to be proved by the Prosecutor in order to obtain confirmation of charges. Indeed, as submitted by the Prosecutor,[63] the significant and concrete impact of whether the "incidents" must be individually proved to the standard of substantial grounds to believe is further evidenced by the list of the matters (in relation to "each incident"), identified at paragraph 44 of the Adjournment Decision, for which the Prosecutor is requested to consider providing further evidence or conducting further investigation.[64]

47. By the same token, the Second Issue, which ultimately concerns the status and the relevance of the "incidents" within the scope of the facts of the case, equally affects the fairness *vis-à-vis* the Defence, given that its strategy may also depend on whether or not the "incidents" are to be considered as "facts and circumstances of the charges". In my view, the Second Issue therefore affects the fair conduct and the integrity of the present proceedings.

48. I further believe that the Second Issue affects the expeditious conduct of the proceedings, given that the manner in which the contextual elements of the crimes must be assessed in the present case directly impacts on the amount and type of evidence that the Prosecutor will need to collect, as well as on the length of time that will be required for the disclosure, discussion and assessment of such evidence.

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[63] Prosecutor's Application, para. 8.
[64] Adjournment Decision, para. 44.

49. Finally, it is my opinion that an immediate resolution of the Second Issue by the Appeals Chamber will materially advance the proceedings, as it will assist in the determination of the legal criteria for establishing the contextual elements of the crimes charged, the elucidation of which will be of benefit both to the parties and to the Chamber for the determination of its final decision under article 61(7) of the Statute. An immediate intervention of the Appeals Chamber on the matter will thus permit the proceedings to advance and will cure at this stage any possible error made by the Chamber in the Adjournment Decision in relation to the Second Issue.

50. Accordingly, I would have granted leave to appeal with respect to the Second Issue as presented by the Prosecutor.

C. Third Issue: "Whether the Pre-Trial Chamber has the power to order the Prosecution to amend the Document Containing the Charges (...) by including additional facts"

51. I also disagree with my colleagues on their disposal of the Prosecutor's Third Issue. Once again, the Majority rejects leave to appeal, relying on the argument that the issue "does not arise from the Adjournment Decision but rests on a misinterpretation of the Chamber's ruling".[65] I am unable to accept the clarification that is provided and the conclusion that is reached. I very much regret that my colleagues refuse to seek the guidance of the Appeals Chamber on an important constitutional matter, which arises from the Adjournment Decision and meets the requirements of article 82(1)(d) of the Statute.

52. The Majority claims that "the Chamber did not *order* the Prosecutor to *amend* the DCC by including *additional facts*" but merely "*requested* the Prosecutor to *consider* providing further evidence or conducting further investigations with respect to all charges".[66] Emphasising the non-binding nature of such requests, the Majority

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[65] Decision, para. 48.

[66] *Ibid.*, para. 50 (emphasis in the original).

recalls that the Prosecutor is free to make use of this option or not, as she is free to decide not to conduct further investigation or "decline the Chamber's invitation to consider presenting further evidence.[67] The Majority explains further that "[t]he submission of a new amended DCC prior to the hearing is ordered in order to ensure that the Defence is informed fully and in detail of the content of the charges" and that "[t]his instruction relates to the form of the charges and not to their content."[68] In light of the above, my colleagues appear to suggest that they have not ordered a substantive amendment but rather a clearer and more detailed document containing the charges.

53. I believe these arguments fail to appreciate the essence of the Third Issue. This issue does not relate to the powers of the Chamber to request the Prosecutor to consider providing further evidence or conducting further investigation but to the specific content of the order that is issued to the Prosecutor. Contrary to the explanations of the Majority, the DCC that has been ordered cannot be considered to be a mere formal corollary of the request of the Chamber to consider providing further evidence or conducting further investigation, in accordance with article 61(7)(c)(i) of the Statute. Indeed, even if the Prosecutor chooses not to rely on any additional evidence, she is still bound by the terms of the Adjournment Decision to present 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*"[69]. The Amended DCC was not ordered on the basis of evidentiary lacunas that might be solved with further evidence, but, in the words of the Majority, "[w]ith a view to informing the Defence in detail of the content of the charges",[70] regardless of whether these charges will be substantiated by further evidence.

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[67] *Id.*

[68] *Ibid,* para. 51.

[69] Adjournment Decision, para. 45. (emphasis added).

[70] *Ibid.*, para 45.

54. In this respect it must be recalled that the instruction given by the Chamber with regard to the Amended DCC is not an option for the Prosecutor but has been issued in clear binding terms in accordance with paragraph 45 and operative subsection (c)(ix) of the Adjournment Decision, as is acknowledged by the Majority.[71] As stated above, and contrary to the explanation of the Majority, the Third Issue relates to the content of this order, and not to the powers to request further investigation and evidence. The content of such an order involves the issue of the competence of the Chamber to shape the factual allegations of the case and reframe the charges. The Prosecutor states in this regard that "the Third Issue concerns the question of whether a Pre-Trial Chamber has the power under the Statute to shape the factual allegations of the charges or to request the Prosecutor to reframe the charges in order to adapt them to the Chamber's understanding of the case.[72] The Majority's explanation that its instruction only "relates to the form of the charges and not to their content" cannot be sustained.[73] Both the text and context of the instruction make it clear that the order to submit a new DCC is a corollary of the finding of the Chamber that the "incidents forming the contextual elements of the crimes against humanity" are part of the facts and circumstances of the charges.[74]

55. My colleagues have made abundantly clear that they consider that the "incidents" referred to by the Prosecutor are constitutive parts of the attack and form part of "the facts of circumstances described in the charges" for the purpose of article 74(2) of the Statute. They are, of course, entitled to this interpretation. However, they need to recognise that whether or not these incidents are "facts and circumstances described in the charges" is a major point of contention arising from the Decision and underlying the Second Issue.

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[71] The Majority indeed states that "[t]he submission of a new amended DCC is *ordered* in order to ensure [the rights of the Defence]": Decision, para. 51 (emphasis added).
[72] Prosecutor's Application, para. 23.
[73] Decision, para. 51.
[74] Adjournment Decision, para. 21.

56. The Third Issue is intimately and inextricably linked to that point of contention. As already indicated above,[75] it is the Majority's interpretation and not the Prosecutor's allegation that the incidents constitute the attack and form part of the facts and circumstances of the charges. When the Majority orders the Prosecutor to include all these incidents as facts of the case in the DCC, this order cannot be understood in any reasonable way other than as an order to include them among the material facts that will need to be pleaded and proved to the threshold of substantial grounds to believe. This amounts to an order to the Prosecutor to endorse in the DCC the understanding of the Chamber on how the facts of the case need to be framed and presented. In other words, it is indeed an order that the "form" of the DCC adapts to what the Majority considers to be the appropriate "content" of the charges.

57. Whether such an order is or is not permissible is an issue that arises from the Adjournment Decision, which cannot be answered by the same Chamber that has issued it but needs to be placed before the Appeals Chamber since also the other requirements under article 82(1)(d) of the Statute are met with respect to the Third Issue.

58. I consider that the Third Issue affects the fairness of the proceedings, because it concerns the distribution of powers between the Prosecutor and the Chamber. In my view it affects not only the independence of the Prosecutor, and therefore aspects of fairness *vis-à-vis* the Prosecutor, but also the procedural interests of the Defence, and potentially the interests of other participants in the proceedings.

59. In relation to the remaining requirement of article 82(1)(d) of the Statute, I am of the view that reference of the matter to the Appeals Chamber would ensure that the future proceedings in the case are not tainted by improper interference by the Pre-Trial Chamber in the area of exclusive competence of the Prosecutor. Thus, an

[75] See above, para. 41.

immediate resolution of the Third Issue by the Appeals Chamber would materially advance the proceedings.

60. In sum, I am satisfied that all the necessary requirements under article 82(1)(d) of the Statute are met with respect to the Third Issue and would have therefore granted leave to appeal.

III. Defence Application: *"[L]'utilisation faite par la Chambre préliminaire dans sa décision du 3 juin 2013 de l'article 61 (7) (c) (i) conduit-elle à une violation des droits de la défense ?"*

61. The Majority states that "the Issue is formulated in an exceedingly broad manner,[76] and it constitutes a mere disagreement with, or is based upon a "mistaken interpretation" of, the Adjournment Decision.[77]

62. I agree with the Majority that the Issue is formulated too broadly. However, I do not agree that the Defence Application needs to be entirely rejected for that reason. A careful review of the concerns underlying the Application reveals that the submissions of the Defence relate in fact to two specific aspects of the Adjournment Decision, namely: (i) the alleged errors of the Chamber in its evaluation of the conduct of the Prosecutor; and (ii) the alleged errors in the determination of whether "undue delay" is caused by the Adjournment Decision.

63. Therefore, I consider that the Defence Application should not be rejected for lack of proper identification of an appealable issue, but should be considered further in light of the substance of the arguments that are advanced therein.

64. The Majority considers that the Defence does not raise an appealable issue, given that the Defence fails to allege that the Chamber abused its discretion under article 61)(7) of the Statute and that "[i]n the absence of a clear allegation to that

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[76] Decision, para. 67.
[77] *Ibid.*, paras 67-68.

effect, the Chamber is unable to certify the Issue as one of alleged abuse of discretion".[78] However, a plain reading of the Defence Application makes clear that the proposed issue is not "one of alleged abuse of discretion" and the Majority provides no reason for why it considers that only an issue relating to abuse of discretion would allow it to certify this issue as appealable. In my view, this consideration is unfounded. In focusing on a matter that the Defence has not raised, and moreover was not required to raise, the Majority ignores the real submissions of the Defence.

65. In my opinion, the two aspects of the Adjournment Decision identified by the Defence involve an explicit or implicit balancing of the rights of the Defence against other legitimate interests. Whether the Adjournment Decision violates the rights of the Defence is therefore an issue arising out of the decision.

66. The Defence arguments concerning the *"évaluation du comportement du Procureur"* relate to paragraph 37 of the Adjournment Decision, which states that "past jurisprudence [...] may have appeared more forgiving [and] the Prosecutor in this case may not have deemed it necessary to present all her evidence or largely complete her investigation". The Majority goes on to state that it "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."[79]

67. The Defence submits that this line of reasoning involves an issue concerning the respect of its rights. I agree. The Majority makes explicit reference to "fairness" as a reason to adjourn the hearing rather than to decline to confirm the charges. In my view, any determination of fairness in this context must give proper consideration to the rights of all parties and participants with legitimate interests. Whether the Majority properly balanced the interests involved or, in the words of

[78] *Ibid.*, para. 67.
[79] Adjournment Decision, para. 37.

the Defence, excused the Prosecutor at the cost of the Defence, is therefore an issue arising out of the Adjournment Decision.

68. The issue of according due respect to Defence rights arises even more clearly from the Chamber's determination that the Adjournment Decision will not unduly infringe the rights of the Defence.[80] The Majority now considers that the Defence arguments concerning the alleged infringement of the suspect's right to be tried without undue delay "amount to little more than criticisms of the Chamber's reasoning, without however clearly identifying any specific factual or legal errors that could be certified for appeal".[81] I disagree with this conclusion of the Majority, which fails to address all relevant submissions of the Defence.

69. Indeed, the Defence provides detailed insight into the contours of the proposed appeal and alleges errors in the relevant part of the Adjournment Decision. In particular, the Defence alleges that the following were improperly relied upon by the Majority as reasons justifying the lengthy adjournment against the right of Mr Gbagbo to be tried without undue delay: (i) the "seriousness of the charges presented against Mr Gbagbo"; (ii) the fact that the Chamber "was requested by the Defence to examine the question of Mr Gbagbo's fitness to take part in the proceedings"; and (iii) the "complexity of the case".[82] All of these are in my view properly identified aspects of the Adjournment Decision which demonstrate that the issue proposed for appeal by the Defence does arise therefrom, and in respect of which the criteria of article 82(1)(d) of the Statute can be assessed.

70. Accordingly, I would have determined that the issue proposed by the Defence arises out of the Adjournment Decision. However, I would have limited the definition of the issue in light of the substantive submissions of the Defence as follows:

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[80] Decision, paras 38-43.
[81] *Ibid.*, para. 69.
[82] Defence Application, paras 35-39; see also Adjournment Decision, paras 40-41.

Whether the Chamber's use of article 61(7)(c)(i) of the Statute violated the rights of the Defence:

(a) in holding that, out of fairness, it was prepared to give the Prosecutor a limited amount of additional time to present or collect further evidence; and/or

(b) in determining 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.

71. Considering that fairness of proceedings is at the core of the issue proposed for appeal by the Defence, it is in my view self-evident that the issue affects the fair conduct of the proceedings. Finally, I consider that immediate resolution of the issue would materially advance the proceedings. Indeed, if the Appeals Chamber was to determine that the Adjournment Decision violated the rights of the Defence, it would be able to remedy the situation and ensure that future proceedings in the case follow the right course.

72. Accordingly, I would have granted leave to appeal with respect to the issue proposed by the Defence, as specified above.

Judge Silvia Fernández de Gurmendi

Dated this 31 July 2013

At The Hague, The Netherlands