

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 31 July 2013

PRE-TRIAL CHAMBER I

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

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

Public

**Decision on the Prosecutor's and Defence requests for leave to appeal the
decision adjourning the hearing on the confirmation of charges**

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence

Emmanuel Altit

Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Herman von Hebel, Registrar

Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues the following decision on the Prosecutor’s and Defence requests for leave to appeal the Chamber’s decision adjourning the hearing on the confirmation of charges.

I. PROCEDURAL HISTORY

1. The confirmation of charges hearing pursuant to article 61(7) of the Rome Statute (the “Statute”) was held from 19 until 28 February 2013.¹ The parties and participants were granted the opportunity to submit thereafter final written submissions. On the last day of the hearing it was clarified that the decision of the Chamber would be issued within 60 days after the final written submissions of the Defence.²

2. On 3 June 2013, the Chamber, issued, by majority, the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Adjournment Decision”).³

¹ Pre-Trial Chamber I, Transcript of Hearing, 19 February 2013, ICC-02/11-01/11-T-14-ENG; *id.*, Transcript of Hearing, 20 February 2013, ICC-02/11-01/11-T-15-ENG, and public redacted version ICC-02/11-01/11-T-15-Red-ENG; *id.*, Transcript of Hearing, 21 February 2013, ICC-02/11-01/11-T-16-ENG, and public redacted version ICC-02/11-01/11-T-16-Red-ENG; *id.*, Transcript of Hearing, 22 February 2013, ICC-02/11-01/11-T-17-ENG, and public redacted version ICC-02/11-01/11-T-17-Red-ENG; *id.*, Transcript of Hearing, 25 February 2013, ICC-02/11-01/11-T-18-ENG, and public redacted version ICC-02/11-01/11-T-18-Red-ENG; *id.*, Transcript of Hearing, 26 February 2013, ICC-02/11-01/11-T-19-ENG, and public redacted version ICC-02/11-01/11-T-19-Red-ENG; *id.*, Transcript of Hearing, 27 February 2013, ICC-02/11-01/11-T-20-ENG, and public redacted version ICC-02/11-01/11-T-20-Red-ENG; *id.*, Transcript of Hearing, 28 February 2013, ICC-02/11-01/11-T-21-ENG.

² Pre-Trial Chamber I, Transcript of Hearing, 28 February 2013, ICC-02/11-01/11-T-21-ENG, p. 51, lines 5-9. The Prosecutor filed her final submissions on 14 March 2013, ICC-02/11-01/11-420-Conf, with Annex A, and public redacted version ICC-02/11-01/11-420-Red, filed on 21 March 2013; on the same day, the Office of Public Counsel for victims filed the final written submissions on behalf of the victims, ICC-02/11-01/11-419. The Defence filed its final submissions on 28 March 2013, ICC-02/11-01/11-429-Conf, with confidential annex, and public redacted version, ICC-02/11-01/11-429-Red, filed on 3 April 2013.

³ Pre-Trial Chamber I, ICC-02/11-01/11-432. The dissenting opinion by Judge Silvia Fernández de Gurmendi is appended to the decision, ICC-02/11-01/11-432-Anx, and corrigendum ICC-02/11-01/11-432-Anx-Corr, filed on 6 June 2013.

3. On 10 June 2013, the Chamber extended, upon request of the Defence,⁴ the time limit for the Defence to present any request for leave to appeal or response to the respective request by the Prosecutor as of the day of notification of the official translation of the Adjournment Decision into French.⁵

4. On the same day, the Prosecutor requested leave to appeal the Adjournment Decision⁶ on three grounds to which the common legal representative of victims, the Office of Public Counsel for victims (the "OPCV")⁷ and the Defence⁸ duly responded.

5. On 25 June 2013, the Defence requested leave to appeal the Adjournment Decision⁹ on two grounds to which the Prosecutor¹⁰ and the OPCV¹¹ duly responded.

II. THE APPLICABLE LAW

6. The Chamber notes article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence and regulation 65 of the Regulations of the Court. Article 82(1)(d) of the Statute reads, in relevant part:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

⁴ The Defence had submitted an urgent request to this effect, ICC-02/11-01/11-433-Conf.

⁵ Pre-Trial Chamber I, Decision on the "Requête urgente de la défense portant sur la détermination de la date à partir de laquelle courent les délais fixés pour qu'elle puisse déposer une éventuelle demande d'autorisation d'interjeter appel de la décision 'adjourner la hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute' (ICC-02/11-01/11-432) et/ou pour qu'elle puisse déposer une éventuelle réponse à une éventuelle demande d'autorisation d'interjeter appel déposée par le Procureur", 10 June 2013, ICC-02/11-01/11-434.

⁶ ICC-02/11-01/11-435.

⁷ ICC-02/11-01/11-437. The Prosecutor's Application was notified to the OPCV on 13 June 2013. The three-day deadline for filing a response pursuant to regulation 65(3) of the Regulations of the Court was 17 June 2013.

⁸ ICC-02/11-01/11-438. On 19 June 2013, the official French translation of the Adjournment Decision was notified to the Defence. The three-day deadline for filing a response pursuant to regulation 65(3) of the Regulations of the Court was 24 June 2013.

⁹ ICC-02/11-01/11-439.

¹⁰ ICC-02/11-01/11-443.

¹¹ ICC-02/11-01/11-442.

(...)

(d) A decision that involves an issue that would significantly affect the fair and 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.

7. The Chamber, mindful of the exceptional character of the remedy of the interlocutory appeal,¹² recalls that for leave to be granted, the following specific requirements must be met:¹³

¹² See, for example, Pre-Trial Chamber II, Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20, paras 15-19; Pre-Trial Chamber II, Decision on Prosecutor's Application for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, 10 July 2006, ICC-01/04-02/05-90, paras 19-21; Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, para. 20; Pre-Trial Chamber III, Decision, on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, para. 6; Pre-Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 September 2009, ICC-01/05-01/08-532, para. 12; Pre-Trial Chamber II, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (IC-01/09-01/11-44)", 2 May 2011, ICC-01/09-01/11-74, para. 7; Pre-Trial Chamber II, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali'", 11 April 2011, ICC-01/09-02/11-27, para. 6; Pre-Trial Chamber, Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, para. 20; see also, Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, 6 March 2009, ICC-01/04-01/07-946-tENG, para. 11.

¹³ See also, for example, 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, paras 9-19; Pre-Trial Chamber I, Decision on Libya application for leave to appeal and request for reconsideration of the "Decision on the 'Urgent Defence Request'", 24 April 2013, paras 25-26. Pre-Trial Chamber, Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-01/11-44)", 2 May 2011, paras 7-8; Pre-Trial Chamber I, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 24 June 2009, ICC-02/05-01/09-21, pp. 4-5; Pre-Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 September 2009, ICC-01/05-01/08-532, paras 14-24; Pre-Trial Chamber I, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the confirmation of charges'", ICC-02/05-02/09-267, pp. 5-6; See also recently in this case, Pre-Trial Chamber I, Decision on the "Demande

(a) the decision involves an “issue” that would significantly affect (i) *both* the fair¹⁴ and expeditious¹⁵ conduct of the proceedings, or (ii) the outcome of the trial and

(b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An “issue” is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination.¹⁶ Most importantly, the “issue” identified by the

d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire I «on three applications for leave to appeal» (ICC-02/11-01/11-307) et plus précisément de la décision de refus d'autoriser la défense à interjeter appel de la «Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court» (ICC-02/11-01/11-286-Conf”, 7 February 2013, ICC-02/11-01/11-389, para. 22; Pre-Trial Chamber I, Decision on the “Demande d'autorisation d'interjeter appel de la ‘Decision on the Requête de la Défense aux fins de levée de certaines expurgations accordées par la Juge unique au Procureur dans sa Décision du 13 novembre 2012 (ICC-02/11-01/11-294)’ (ICC-02/11-01/11-322)”, 6 February 2013, ICC-02/11-01/11-383, para. 16; Pre-Trial Chamber I, Decision on three applications for leave to appeal, 29 November 2012, ICC-02/11-01/11-307, para. 18-20.

¹⁴ See, for example, 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. 11; Pre-Trial Chamber I, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, 31 March 2006, ICC-01/04-135-tENG, paras 34-40; Pre-Trial Chamber II, Decision on Prosecutor’s Application for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, 10 July 2006, ICC-01/04-02/05-90, para. 24; Pre-Trial Chamber II, Decision on the Prosecutor’ Application for Leave to Appeal the “Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paras 18 and 19.

¹⁵ See, for example, Pre-Trial Chamber II, Decision on the Prosecutor’ Application for Leave to Appeal the “Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, para. 20.

¹⁶ 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.

appellant must emanate from the relevant decision itself and cannot represent a hypothetical concern or an abstract legal question.¹⁷

9. Concerning the requirements set out in (a) and (b) above, the Chamber recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) or (b) is fulfilled is fatal to an application for leave to appeal and makes it unnecessary for the Chamber to address the remaining requirements under article 82(1)(d) of the Statute.

III. ANALYSIS

1. The Application by the Prosecutor

10. The Prosecutor seeks the Chamber's leave to appeal the Adjournment Decision on three issues. They are presented, together with the responses by the OPCV and the Defence, in what follows.

a) The First Issue

11. The Prosecutor requests leave to appeal the Adjournment Decision on the following issue: "Whether the [Adjournment] Decision correctly interpreted and applied the evidentiary standard under Article 61(7) ("First Issue")".¹⁸

Arguments by the Prosecutor

12. The Prosecutor avers that while the Chamber's Majority correctly "spells out" the relevant evidentiary threshold consistent with prior case law, it modifies the interpretation of the standard of proof and adopts a "more stringent" approach in its application to the facts of the present case, thus departing from the Court's

¹⁷ See also Pre-Trial Chamber II, Decision on the Prosecutor' Application for Leave to Appeal the "Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 September 2009, ICC-01/05-01/08-532, para. 17.

¹⁸ ICC-02/11-01/11-435, para. 3(i).

jurisprudence.¹⁹ She purports that certain findings in the Adjournment Decision, requiring her at the confirmation stage to “largely complete her investigation”, “present all her evidence”, “present [...] her strongest possible case” and the Majority’s general disposition towards certain categories of evidence, have a “direct impact” on the evidentiary standard to be applied and cannot be reconciled with the lower evidentiary threshold applicable at this stage, the limited scope and purpose of the confirmation proceedings, the Pre-Trial Chamber’s limited powers and the Prosecutor’s authority to rely on documentary or summary evidence pursuant to article 61(5) of the Statute.²⁰

13. The issue purportedly affects the fairness of the proceedings vis-à-vis the Prosecutor as the Majority will apply the same standard to any new evidence when deciding on whether to confirm the charges. It is alleged that a finding of the Appeals Chamber is required to provide fairness to the Prosecutor on the correct legal criteria for assessing evidence.²¹ Further, fairness is allegedly affected by the issue, as it interferes with the Prosecutor’s ability to present her case. Should the Majority’s application of the evidentiary threshold prove to be too high, then it would be unfair “to force the Prosecut[or]” to complete her investigation, offer her best evidence and provide evidence for each of the forty-one incidents.²² The Prosecutor also raises the issue of fairness vis-à-vis the victims and witnesses: in asking the Prosecutor to present all her best evidence, she would “be forced” to call many live witnesses at the confirmation hearing, also in relation to the forty-one incidents, which will increase the risk to their safety and that of their families. At the same time, the Prosecutor predicts that “an incorrect application of the evidence that leads to the denial of confirmation also unfairly denies witnesses and

¹⁹ ICC-02/11-01/11-435, paras 4 and 6.

²⁰ ICC-02/11-01/11-435, para. 5.

²¹ ICC-02/11-01/11-435, para. 15.

²² ICC-02/11-01/11-435, para. 16.

victims a full hearing of the evidence”, a finding under article 74 and the right to seek reparations.²³

14. The Prosecutor also contends that the Adjournment Decision on this issue affects the expeditiousness of the proceedings. She alleges that by requiring her to present all her best evidence at the confirmation stage after having completed the investigation, together with the Majority’s general disposition towards certain types of evidence, the Adjournment Decision effectively “forces” her to call many witnesses to testify *viva voce*. This delay in the closure of the pre-trial phase or the risk that the charges will not be confirmed allegedly has a significant impact on the expeditious conduct of the continuation of the hearing in this case.²⁴ Moreover, the Prosecutor sees the expeditiousness affected as she can make a new request for confirmation under article 61(8) of the Statute, should the charges not be confirmed on the basis of an incorrect evaluation of the evidence. She indicates that “[b]earing in mind the importance of this case, [she] will take this option into consideration”.²⁵

15. Lastly, in the view of the Prosecutor an immediate decision by the Appeals Chamber would materially advance the proceedings as it will “ensure correct assessment by the Chamber of evidence” that has or may be presented.²⁶ In relation to the ruling of the Appeals Chamber regarding the completeness of investigations at the pre-trial stage, the Prosecutor advances that this ruling has been interpreted differently by two judges at the Court and seeks therefore an “authoritative definition” of the Appeals Chamber so as to ensure that these and other proceedings “continue on a solid basis” and with clarity and legal certainty.²⁷

Arguments by the OPCV

²³ ICC-02/11-01/11-435, para. 17.

²⁴ ICC-02/11-01/11-435, para. 18.

²⁵ ICC-02/11-01/11-435, para. 19.

²⁶ ICC-02/11-01/11-435, para. 21.

²⁷ ICC-02/11-01/11-435, para. 22.

16. On behalf of the victims, the OPCV requests the Chamber to grant leave to appeal the Adjournment Decision in relation to the First Issue.²⁸ It endorses the relevant arguments of the Prosecutor and proposes the following reformulation in two inter-related sub-issues: (i) “whether the Majority erred in law in finding that for the purpose of the confirmation of charges the Prosecutor must ‘present all her evidence’ and ‘her strongest possible case based on a largely complete[d] investigation’”;²⁹ and (ii) “whether the Majority erred in law in requesting the Prosecut[or] to present, for the limited purpose of the confirmation of charges, specific types of evidence in addition to the ones explicitly referred to in article 61(5) of the [Statute]”.³⁰

17. Essentially, the OPCV argues that the Adjournment Decision “places on the Prosecut[or] a burden of proof which goes beyond the very limited scope of the confirmation of charges hearing” and affects the fairness of the proceedings vis-à-vis the Prosecutor.³¹ Further, it is alleged that requiring the Prosecutor to present evidence beyond the threshold required will “inevitably have a significant impact on the expeditiousness of the proceedings and may endanger the safety and well-being of witnesses or other persons”.³²

Arguments by the Defence

18. The Defence requests the Chamber to reject the Prosecutor’s Application in relation to the First Issue as she failed to identify with clarity an appealable issue.³³ In particular in relation to the First Issue, the Defence avers that the Prosecutor does not explain in detail on which legal or factual error the Chamber based its

²⁸ ICC-02/11-01/11-437, para. 24.

²⁹ ICC-02/11-01/11-437, para. 18.

³⁰ ICC-02/11-01/11-437, para. 22.

³¹ ICC-02/11-01/11-437, para. 19.

³² ICC-02/11-01/11-437, para. 23.

³³ ICC-02/11-01/11-438, paras 50 and 53.

erroneous interpretation of the evidentiary threshold.³⁴ Rather, it is suggested, the Prosecutor is simply in disagreement with the Chamber.³⁵

Conclusions by the Chamber

19. For the reasons set out below, the Chamber finds that the First Issue presented by the Prosecutor is not formulated with sufficient clarity and does not arise from the Adjournment Decision as currently framed.

20. The Chamber's understanding of the applicable evidentiary threshold at the confirmation stage is set out in paragraphs 17 and 18 of the Adjournment Decision, under the heading 'Evidentiary Threshold', which reads:

17. It is recalled that the drafters of the Statute established progressively higher evidentiary thresholds applicable in the course of the different stages of the proceedings. The evidentiary threshold of "substantial grounds to believe" required for the confirmation of charges is higher than the threshold required for the issuance of a warrant of arrest ("reasonable grounds to believe") but lower than the threshold required for the conviction of an accused ("beyond reasonable doubt"). With a view to giving concrete meaning to the term "substantial grounds", Pre-Trial Chamber I emphasized that "[a]fter an exacting scrutiny of all the evidence, the Chamber will determine whether it is *thoroughly satisfied* that the [Prosecutor's] allegations are sufficiently strong to commit [the person] to trial" (emphasis added). Pre-Trial Chamber II understood the term "substantial" to mean "significant", "solid", "material", "well built", "real" rather than "imaginary". Pre-Trial Chambers have consistently held that to meet the evidentiary burden of "substantial grounds to believe", the Prosecutor must "offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [the] specific allegations".

18. The higher evidentiary threshold at this juncture of the proceedings accords with the gatekeeper function of the Pre-Trial Chamber according to which (i) only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going beyond mere theory or suspicion; (ii) the suspect is protected against wrongful prosecution; (iii) and judicial economy is ensured by distinguishing between cases that should go to trial and those that should not.³⁶

21. The Prosecutor does not explain which part of the above reasoning she challenges. No argument is put forward as to how the Adjournment Decision is supposed to have modified the interpretation of the evidentiary threshold or how

³⁴ ICC-02/11-01/11-438, para. 51.

³⁵ ICC-02/11-01/11-438, para. 52.

³⁶ Footnotes in the original text were omitted here.

the application of the evidentiary threshold is allegedly “more stringent”. As the Prosecutor herself acknowledges, the Chamber has “correctly spelled out the relevant evidentiary threshold”³⁷ and no factual or legal error has been identified by the Prosecutor in this regard, either in the definition of the First Issue or in the accompanying paragraphs.

22. Instead, the Prosecutor selectively picks elements from the Chamber’s reasoning in other sections of the Adjournment Decision, which do not deal with the evidentiary standard. In particular, the Prosecutor appears to argue that the Adjournment Decision misapplied the evidentiary standard by (a) requiring the Prosecutor to have largely completed her investigation, (b) requiring the Prosecutor to present all her evidence and (c) forcing the Prosecutor to call many live witnesses in order to present her “best evidence”. However, the Prosecutor does not explain how these issues are related to the evidentiary standard. In fact, the points raised by the Prosecutor all seem to stem from a misreading of the Adjournment 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.

23. Moreover, none of these issues arise from the Adjournment Decision.

24. First, the Majority stated quite clearly in 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.”³⁸ The Majority thereby 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

³⁷ ICC-02/11-01/11-435, para. 4.

³⁸ ICC-02/11-01/11-432, para. 25, emphasis added.

able to collect such evidence post-confirmation. In 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. However, the Prosecutor cannot invoke the fact that she has not completed her investigation and the possibility that further evidence may be found post-confirmation to justify presenting insufficient evidence at the confirmation hearing.

25. Second, 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. As the Prosecutor did not even explain how she comes to this conclusion, the Chamber will not address it any further.

26. As this Chamber previously held: "If an appealable issue is not clearly identified, the Chamber will simply be unable to carry out an assessment under article 82(1)(d) of the Statute as to whether the issue, if wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or the outcome of the trial."³⁹ It was incumbent on the Prosecutor to clearly identify the First Issue. Shortcomings such as those identified above by the Chamber in the presentation of the issue cannot be remedied by the Chamber. In the present circumstances, the Chamber is therefore unable to proceed with the assessment under article 82(1)(d) of the Statute and thus unable to grant leave to appeal with respect to the First issue.

b) The Second Issue

27. The Prosecutor requests leave to appeal the Adjournment Decision on the following issue: "Whether in this case each 'incident underlying the contextual

³⁹ Pre-Trial Chamber I, Decision on the "Demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire I «on three applications for leave to appeal» (ICC-02/11-01/11-307) et plus précisément de la décision de refus d'autoriser la défense à interjeter appel de la «Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court» (ICC-02/11-01/11-286-Conf", 7 February 2013, ICC-02/11-01/11-389, para. 28

elements' must be established to the standard of proof enshrined in article 61(7) ("Second Issue").⁴⁰

Arguments by the Prosecutor

28. The Prosecutor takes issue with the Majority's ruling requesting her to "consider providing, to the extent possible, further evidence or conducting further investigation 'for each of the incidents allegedly constituting the attack against the 'pro-Ouattara civilian population'".⁴¹ More specifically, she contends that the forty-one incidents referred to in the Document Containing the Charges (the "DCC") are only "subsidiary facts" establishing the existence of an "attack" within the meaning of article 7 of the Statute but do not form part of the "charges" as set out in sections H and I of the DCC. She also suggests that these incidents are "evidence" offered for the existence of the attack and are not "material facts for the purpose of the charges".⁴² As a corollary, she contests that those incidents must be established to the requisite threshold applicable at this stage and argues instead for a cumulative assessment of the evidence related to the incidents "without the need to enter findings on whether each of them has been established".⁴³ Finally, the Prosecutor also raises the question whether the term "incident" can be equated with the term "acts" within the meaning of article 7(2)(a) of the Statute and "whether this has an impact on the applicable standard of proof to those incidents".⁴⁴

29. With regard to whether the Second Issue significantly affects the fair and expeditious conduct of the proceedings and an immediate resolution of the Appeals Chamber may materially advance the proceedings reference is made to paragraphs 13 to 15 above in which the Prosecutor's arguments are summarized.

⁴⁰ ICC-02/11-01/11-435, para. 3(ii).

⁴¹ ICC-02/11-01/11-435, para. 8.

⁴² ICC-02/11-01/11-435, para. 11.

⁴³ ICC-02/11-01/11-435, paras 10 and 11.

⁴⁴ ICC-02/11-01/11-435, para. 12.

Arguments by the OPCV

30. On behalf of the victims, the OPCV requests the Chamber to grant leave to appeal the Adjournment Decision in relation to the Second Issue.⁴⁵ It endorses the relevant arguments of the Prosecutor and proposes the following reformulation in three inter-related sub-issues: (i) “whether the Majority erred in law in interpreting the term ‘attack’ under article 7(2)(a) of the [Statute] as encompassing a certain number of ‘incidents’, rather than a course of conduct involving a multiple commission of acts”;⁴⁶ (ii) “whether the Majority erred in law in specifically requesting the Prosecutor to present additional evidence to establish that each separate ‘incident’ occurred pursuant to or in furtherance of the ‘policy’ under article 7(2)(a) of the [Statute]”;⁴⁷ and (iii) “whether the Majority erred in fact and in law in finding that ‘the individual incidents alleged by the Prosecutor in support of her allegation that there was an [attack] are part of the facts and circumstances for the purpose of article 74(2) of the Statute and therefore must be proved to the requisite threshold of ‘substantial grounds to believe’”⁴⁸.

31. In relation to the first sub-issue, the OPCV essentially argues that the “attack” within the meaning of article 7(2)(a) of the Statute is a course of conduct and does not necessitate the examination of separate acts/incidents.⁴⁹ With regard to the second sub-issue the OPCV purports that requiring the Prosecutor to present additional evidence to establish that each separate ‘incident’ occurred would be “burdensome, not relevant and simply unnecessary”.⁵⁰ In support of the third sub-issue, the OPCV agrees with the Prosecutor that the forty-one incidents are “subsidiary facts and do not relate to ‘facts and circumstances’ forming the charges

⁴⁵ ICC-02/11-01/11-437, para. 38.

⁴⁶ ICC-02/11-01/11-437, para. 26.

⁴⁷ ICC-02/11-01/11-437, para. 30.

⁴⁸ ICC-02/11-01/11-437, para. 33.

⁴⁹ ICC-02/11-01/11-437, paras 27-29 and 32.

⁵⁰ ICC-02/11-01/11-437, para. 32.

set out in sections H and I of the DCC”.⁵¹ The OPCV reiterates that requiring the Prosecutor to present evidence on the incidents will “increase the risk” to the safety and well-being of witnesses “thereby affecting the fairness of the proceedings”.⁵²

Arguments by the Defence

32. The Defence requests the Chamber to reject the Prosecutor’s Application in relation to the Second Issue as she failed to identify with clarity an appealable issue.⁵³ In particular, it maintains that the Prosecutor does not explain in detail on which factual or legal error the Chamber based its legal argumentation.⁵⁴ In relation to the distinction made between “material” and “subsidiary” facts, the Defence contends that such a distinction is not made in the French version of the DCC.⁵⁵ It argues that the Chamber was not satisfied with the manner in which the charges had been presented and that the Prosecutor is simply in disagreement with the Majority’s position.⁵⁶

Conclusions by the Chamber

33. For the reasons set out below, the Chamber finds that the Second Issue is an appealable issue which satisfies the criteria of article 82(1)(d) of the Statute, subject to the modifications as set out hereunder.

34. In the Adjournment Decision the Chamber sets out its approach with regard to the examination of the contextual elements of crimes against humanity, in particular the existence of an “attack” within the meaning of article 7(2)(a) of the Statute. This approach has been adopted in response to the Prosecutor’s allegation

⁵¹ ICC-02/11-01/11-437, para. 35.

⁵² ICC-02/11-01/11-437, para. 37.

⁵³ ICC-02/11-01/11-438, paras 50 and 56.

⁵⁴ ICC-02/11-01/11-438, para. 55.

⁵⁵ ICC-02/11-01/11-438, para. 55.

⁵⁶ ICC-02/11-01/11-438, para. 56.

that a series of incidents constitute the attack. These incidents were part of the DCC and mentioned one by one during the confirmation hearing. The relevant part in the Adjournment Decision reads:

21. For example, the individual incidents alleged by the Prosecutor in support of her allegation that there was an “attack directed against any civilian population” are part of the facts and circumstances for the purposes of article 74(2) of the Statute and therefore must be proved to the requisite threshold of “substantial grounds to believe”. This is especially so in this case in which the Prosecutor identifies particular incidents that *constitute* the attack against the civilian population. In other words, the incidents are “facts” which “support the [contextual] legal elements of the crime charged”.

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

23. When alleging the existence of an “attack directed against any civilian population” by way of describing a series of incidents, the Prosecutor must establish to the requisite threshold that a sufficient number of incidents relevant to the establishment of the alleged “attack” took place. This is all the more so in case none of the incidents, taken on their own, could establish the existence of such an “attack”.⁵⁷

35. The Prosecutor challenges the Chamber’s finding that the incidents are part of the “facts and circumstances” of the case and contests that the incidents must be established to the requisite threshold applicable at this stage. Rather, in the view of the Prosecutor, those incidents are “evidence offered to establish the existence of

⁵⁷ Footnotes in the original text were omitted here.

the attack and not material facts for the purpose of the charges”.⁵⁸ To the extent that the Prosecutor argues that the Majority erred in holding that only incidents that have been proved with sufficient evidence can be taken into consideration in the Chamber’s determination whether the overall attack has been established, the Chamber agrees that this issue stems from the Adjournment Decision.

36. However, 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.⁵⁹ Therefore, with a view to receiving meaningful guidance by the Appeals Chamber, the Chamber is of the view that it must be reformulated 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, 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.

37. The Chamber notes, in this regard, 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’. The 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.

38. The Chamber finds that this issue has the potential to significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial. The manner in which the contextual elements are assessed in this particular case

⁵⁸ ICC-02/11-01/11-435, para. 11.

⁵⁹ ICC-02/11-01/11-432, para. 23.

constitutes an issue which affects “in a material way”⁶⁰ the Prosecutor’s ability to prove her allegations and may have an impact on how she conducts her investigations. The issue may therefore affect the expeditious conduct of the proceedings as the length of the pre-confirmation investigation may be influenced by it. The issue has also obvious implications for the outcome of the trial, as it requires the Prosecutor to prove certain allegations, which, if she fails to do so, may be fatal to the charges.

39. In the opinion of the Chamber an immediate resolution of the Appeals Chamber will materially advance the proceedings. Authoritative and substantial guidance by the Appeals Chamber on the manner in which the contextual elements of crimes against humanity are to be assessed in this particular case will “map a course of action along the right lines”⁶¹ and will assist the Chamber in its future article 61(7) decision, thereby safeguarding the integrity of the proceedings. If incorrect, the Second Issue contained in the Adjournment Decision, unless soon remedied by the Appeals Chamber, will be a “setback to the proceedings”⁶² which have commenced already since 5 December 2011 with the suspect’s initial appearance. Mindful of the time schedule of this case, the Chamber is of the view that “a prompt reference of the issue to the court of appeal” is necessary.⁶³

c) The Third Issue

40. The last issue for which the Prosecutor requests leave to appeal the Adjournment Decision is formulated as follows: “Whether the Pre-Trial Chamber

⁶⁰ 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. 10.

⁶¹ 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. 15.

⁶² 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. 16.

⁶³ 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. 18.

has the power to order the Prosecut[or] to amend the [DCC] by including additional facts (“Third Issue”).⁶⁴

Arguments by the Prosecutor

41. In relation to this issue, the Prosecutor essentially maintains that the Majority instructed the Prosecutor to amend the DCC by including additional facts “which are not currently part of the case”.⁶⁵ She questions whether the Chamber is authorized 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”.⁶⁶

42. It is further alleged that this issue significantly affects the fairness of the proceedings. The issue purportedly relates to the distribution of powers between the Prosecutor and the Pre-Trial Chamber and their respective independence. Disrespecting this distribution, proceedings would be unfair “first and foremost in relation to the Prosecutor”, who is “affected in the exercise of [her] statutory powers” and her “ability to investigate and present what she believes is the case that can be properly established before the Chambers of the Court”.⁶⁷ More specifically, the Prosecutor contends that if the Chamber “involves itself in shaping the facts of the charges, this will unavoidably impact” on the Prosecutor’s case development, investigation and protection plans, litigation strategy, logistical and financial planning.⁶⁸

43. In the opinion of the Prosecutor, this issue also affects the expeditious conduct of the proceedings. Expanding the factual scope of the charges allegedly has direct consequences for the parties’ presentation of evidence, investigation,

⁶⁴ ICC-02/11-01/11-435, para. 3(iii).

⁶⁵ ICC-02/11-01/11-435, paras 23, 28 and 29.

⁶⁶ ICC-02/11-01/11-435, para. 23.

⁶⁷ ICC-02/11-01/11-435, para. 24.

⁶⁸ *Ibid.*

protection of witnesses and may result in additional litigation. In particular, the Defence may feel prejudiced by the inclusion of additional facts included “at the initiative of the Chamber”.⁶⁹ Moreover, the issue also affects the length of the trial in which those additional facts, if confirmed, would need to be proven beyond reasonable doubt.⁷⁰ Further, the Prosecutor purports that undoubtedly this aspect of the judgment pursuant to article 74 of the Statute would be appealed.⁷¹

44. The Prosecutor also advances that the issue affects the outcome of the trial as this aspect of the Adjournment Decision forces her “to bring before the Trial Chamber a significantly extended case”.⁷² Lastly, she maintains that an immediate resolution of the Appeals Chamber will materially advance the proceedings as the “authoritative determination of the Appeals Chamber” will help the proceedings “move forward” “along the right lines”.⁷³

Arguments by the OPCV

45. The OPCV requests the Chamber to grant leave to appeal the Adjournment Decision in relation to the Third Issue.⁷⁴ It endorses the relevant arguments of the Prosecutor and proposes the following reformulation in two inter-related sub-issues: (i) “whether the Majority exceeded the mandate vested with a Pre-Trial Chamber in shaping the factual allegations of the charges and in requesting the Prosecutor to reframe the charges in order to adapt them to its understanding of the case”;⁷⁵ and (ii) “whether the Majority erred in law in requesting the Prosecutor to submit a new ‘Amended DCC setting out in detail and with precision the facts

⁶⁹ ICC-02/11-01/11-435, para. 26.

⁷⁰ CC-02/11-01/11-435, para. 27.

⁷¹ ICC-02/11-01/11-435, para. 28.

⁷² ICC-02/11-01/11-435, para. 29.

⁷³ ICC-02/11-01/11-435, para. 31.

⁷⁴ ICC-02/11-01/11-437, para. 46.

⁷⁵ ICC-02/11-01/11-437, para. 40.

of the case, including all incidents forming the contextual elements of crimes against humanity’”⁷⁶.

46. In relation to the first sub-issue, the OPCV’s main argument is that it is for the Prosecutor to select the facts of the charges and not the Chamber.⁷⁷ As regards the second sub-issue, the OPCV alleges that requesting the Prosecutor to present a new amended DCC, setting out in detail the factual allegations, “would be burdensome, and not relevant and/or *ultra vires*”.⁷⁸

Arguments by the Defence

47. The Defence requests the Chamber to reject the Prosecutor’s Application in relation to the Third Issue as she failed to identify with clarity an appealable issue.⁷⁹ In particular, the Defence maintains that the Third Issue is formulated even vaguer than the abovementioned two issues.⁸⁰ First, it argues that the issue is a result of a misinterpretation of the Majority’s decision. Contrary to what the Prosecutor alleges, the Chamber did not request that the charges be reformulated but rather that indispensable facts be furnished so as to support the case as presented by the Prosecutor herself.⁸¹ Consequently, the issue as formulated by the Prosecutor does not arise from the Adjournment Decision and must therefore be rejected.⁸² Secondly, the Defence argues that the Prosecutor does not explain why the Chamber’s request to modify the DCC or provide further supplementary information would be contrary to the statutory documents.⁸³

⁷⁶ ICC-02/11-01/11-437, para. 43.

⁷⁷ ICC-02/11-01/11-437, paras 41 and 42.

⁷⁸ ICC-02/11-01/11-437, para. 45.

⁷⁹ ICC-02/11-01/11-438, paras 50 and 59.

⁸⁰ ICC-02/11-01/11-438, para. 57.

⁸¹ ICC-02/11-01/11-438, para. 58.

⁸² *Ibid.*

⁸³ ICC-02/11-01/11-438, para. 59.

Conclusions by the Chamber

48. For the reasons set out below, the Chamber finds that the Third Issue presented by the Prosecutor does not arise from the Adjournment Decision but rests on a misinterpretation of the Chamber's ruling.

49. After having set out its reasons for invoking article 61(7)(c)(i) of the Statute and having considered the impact on the rights of the Defence, the Chamber presented the roadmap for the procedure to come. The Adjournment Decision reads in the relevant part:

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

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

46. The Defence will have the right to object to the charges, challenge the new evidence presented by the Prosecutor and present new evidence in response to the further evidence submitted by the Prosecutor.⁸⁴

50. It is clear from these paragraphs, when read in the context of the rest of the Adjournment Decision, that the Chamber did not *order* the Prosecutor to *amend* the DCC by including *additional facts*. First, the Chamber *requested* the Prosecutor "to *consider* providing further evidence or conducting further investigation with

⁸⁴ Footnotes in the original text were omitted here.

respect to all charges”.⁸⁵ Whether or not she makes use of this option remains thus fully within the Prosecutor’s discretion. In fact, the Prosecutor may request at any time that the hearing be resumed in case she decides to not conduct further investigations and/or she is ready to present the evidence she deems sufficient to support the charges. The Prosecutor is also free to decline the Chamber’s invitation to consider presenting further evidence. This is clear from the discretionary wording of article 61(7)(c)(i) of the Statute and the relevant parts of the Adjournment Decision.

51. The 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. To avoid any ambiguity in this regard, the Chamber has instructed the Prosecutor to set out her charges “in detail and with precision”.⁸⁶ This instruction relates to the form of the charges and not to their content. Therefore, in contrast to what the Prosecutor alleges, the Chamber does not interfere with the Prosecutor’s selection of facts to be included in the DCC. The Chamber’s instructions regarding specificity are merely intended to ensure the rights of the Defence in this regard. The Chamber therefore does not interfere with the Prosecutor’s independence in her selection “of which facts to charge”, much less order her to include “additional facts”.⁸⁷ All the Adjournment Decision requires is that, if the Prosecutor decides to continue relying on all or some of the 45 incidents which allegedly constitute the ‘attack’, the new Amended DCC must provide sufficient detail and precision about each of them.

52. As the Third Issue does not arise from the Adjournment Decision, the Chamber is unable to proceed with the assessment under article 82(1)(d) of the Statute. The Chamber is thus unable to grant leave to appeal the Third Issue.

⁸⁵ See also paragraph 44 and point b) of the operative part of the Adjournment Decision.

⁸⁶ ICC-02/11-01/11-432, para. 45.

⁸⁷ ICC-02/11-01/11-435, para. 23.

2. The Application by the Defence

53. The Defence seeks the Chamber's leave to appeal the Adjournment Decision and puts forth the following question: "*l'utilisation en l'espèce de l'article 61(7)(c)(i) par la Chambre préliminaire conduit-elle à une violation des droits de la défense ?*". ("the Issue")⁸⁸

Arguments by the Defence

54. The Defence maintains that the Adjournment Decision goes beyond a simple adjournment, because the Chamber asked the Prosecutor to recommence her investigations and to present her case structured in a different manner.⁸⁹ The Defence also argues that the calendar set by the Chamber does not conform to the right of the suspect to be tried without undue delay. It recalls that Laurent Gbagbo ("Mr Gbagbo") was arrested on 11 April 2011 and that his detention will be prolonged for an additional year on account of the Prosecutor's failure to conduct a genuine investigation.⁹⁰ The Defence contends that, mindful of, *inter alia*, the rights of the Defence, the Chamber should have rejected the charges and released Mr Gbagbo from detention.⁹¹

55. More specifically, the Defence defines two errors allegedly committed by the Chamber when invoking article 61(7)(c)(i) of the Statute⁹² which are summarized below.

56. In the first place, the Defence maintains that the Chamber erred both in terms of law and fact "*dans l'évaluation du comportement du Procureur*".⁹³ The Defence takes issue with the Chamber's statement that the past jurisprudence of the Court may

⁸⁸ ICC-02/11-01/11-439, para. 2.

⁸⁹ ICC-02/11-01/11-439, Para. 9

⁹⁰ ICC-02/11-01/11-439, para. 10.

⁹¹ ICC-02/11-01/11-439, para. 11.

⁹² ICC-02/11-01/11-439, para. 13.

⁹³ ICC-02/11-01/11-439, para. 14.

have appeared more forgiving. In particular, the Defence maintains that the Adjournment Decision actually rests upon two factors, namely the absence of genuine investigation and the lack of probative evidence in support of the case.⁹⁴ In light of this, it is alleged that the Chamber erred twice; first by incorrectly allowing the Prosecutor to recommence the investigation at the expense of the rights of Mr Gbagbo,⁹⁵ which, according to the Defence, constitutes an error of law.⁹⁶ Second, by committing an error of fact in assuming that the Prosecutor could not anticipate from past jurisprudence the Chamber's disposition towards evidence which was not of sufficient probative value.⁹⁷ To the contrary, it is argued that the Prosecutor was aware of the Court's decisions concerning evidentiary issues, such as reports of non-governmental organizations containing statements of anonymous witnesses, hearsay evidence and press articles.⁹⁸

57. In the second place, the Defence maintains that the Chamber erred both in terms of law and fact "*dans la détermination des critères pertinents à l'évaluation d'un 'délai raisonnable' qui ne porterait pas atteinte aux droits de la défense*".⁹⁹ It is alleged that in considering the gravity of the crimes, the Chamber did not duly take into account the right of the suspect to be tried without undue delay.¹⁰⁰ In particular, the Chamber allegedly failed to define "gravity" in the particular circumstances of the case, as all crimes subject to the jurisdiction of the Court must be considered as grave.¹⁰¹ This interpretation implies, in the opinion of the Defence, that no extension of the proceedings could ever constitute an infringement of the rights of the Defence.¹⁰² The Defence also alleges the Chamber should have clarified the

⁹⁴ ICC-02/11-01/11-439, paras 21-23.

⁹⁵ ICC-02/11-01/11-439, para. 24.

⁹⁶ ICC-02/11-01/11-439, para. 25.

⁹⁷ ICC-02/11-01/11-439, paras 27-30.

⁹⁸ ICC-02/11-01/11-439, para. 34.

⁹⁹ ICC-02/11-01/11-439, para. 14.

¹⁰⁰ ICC-02/11-01/11-439, para. 35.

¹⁰¹ ICC-02/11-01/11-439, para. 36.

¹⁰² ICC-02/11-01/11-439, para. 36.

criteria applied when differentiating between this case and other cases in which the charges were rejected without asking the Prosecutor for more information.¹⁰³

58. Further, the Defence alleges that the Chamber erroneously took into account (i) the issue of Mr Gbagbo's fitness to take part in the proceedings while not considering the failures of the Prosecutor;¹⁰⁴ and (ii) the complexity of the case without providing any further specification,¹⁰⁵ an argument which had been purportedly rejected by the Prosecutor earlier on a different issue.¹⁰⁶

59. The Defence also considers the Adjournment Decision to be in contradiction to the stated purpose of the confirmation proceedings, which is to protect suspects against unfounded allegations.¹⁰⁷ The Defence emphasises that the pre-trial phase should be more limited, in terms of time, than other phases of the proceedings.¹⁰⁸

60. The Defence stresses that the invocation of article 61(7)(c)(i) of the Statute must not infringe the right of the suspect to be tried without undue delay.¹⁰⁹ While accepting that, exceptionally, clarifications may be requested from the Prosecutor on specific issues, it is of the view that the Chamber should have rejected the charges in the present circumstances as the Chamber's request concerns the entirety of evidence.¹¹⁰

61. According to the Defence the Issue significantly affects both the fairness of the proceedings, as the right of the suspect to be tried without undue delay is a constitutive element of fair trial¹¹¹, as well as the outcome of the trial.¹¹² In addition,

¹⁰³ *Ibid.*

¹⁰⁴ ICC-02/11-01/11-439, para. 37.

¹⁰⁵ ICC-02/11-01/11-439, para. 38.

¹⁰⁶ ICC-02/11-01/11-439, para. 39.

¹⁰⁷ ICC_02/11-01/11-439, para. 40.

¹⁰⁸ ICC-02/11-01/11-439, para. 41.

¹⁰⁹ ICC-02/11-01/11-439, para. 45.

¹¹⁰ ICC-02/11-01/11-439, para. 42.

¹¹¹ ICC-02/11-01/11-439, paras 46 and 47.

¹¹² ICC-02/11-01/11-439, para. 48.

the Defence argues that an immediate resolution by the Appeals Chamber will materially advance the proceedings,¹¹³ also for reasons of judicial economy.¹¹⁴ Lastly, the Defence contends to be prejudiced by the Adjournment Decision at this stage, the legality of which it will not be able to appeal in the context of the confirmation of charges decision.¹¹⁵

Arguments by the Prosecutor

62. In response, the Prosecutor contends that the Defence “has failed to identify a ‘concrete or specific issue’” and that the Issue, as presented by the Defence, does not arise from the Adjournment Decision.¹¹⁶ More specifically, the Prosecutor argues that the Defence only makes generic reference to the defence rights and does not identify which aspect of the use of article 61(7)(c)(i) of the Statute it takes issue with.¹¹⁷ In fact, the Defence attempts to “re-litigat[e] the *entire* [Adjournment] Decision before the Appeals Chamber”.¹¹⁸

63. In relation to certain Defence arguments raised under the first sub-issue, namely the Prosecutor’s alleged investigative failures and lack of knowledge of the law, the Prosecutor avers that those errors are not linked to the Issue and presented without any reference to the specific Defence right infringed.¹¹⁹ As regards the purported findings by the Chamber relating to the Prosecutor’s failures, she contends that no such finding was made by the Chamber.¹²⁰ In relation to certain Defence arguments raised under the second sub-issue, namely the alleged infringement of the Defence right to be tried without undue delay, the Prosecutor argues that this is merely a disagreement by the Defence with the findings of the

¹¹³ ICC-02/11-01/11-439, para. 51.

¹¹⁴ ICC-02/11-01/11-439, para. 52.

¹¹⁵ ICC-02/11-01/11-439, paras 53 and 54.

¹¹⁶ ICC-02/11-01/11-443, paras 2 and 8.

¹¹⁷ ICC-02/11-01/11-443, para. 9.

¹¹⁸ ICC-02/11-01/11-443, para. 9.

¹¹⁹ ICC-02/11-01/11-443, para. 10.

¹²⁰ ICC-02/11-01/11-443, para. 11.

Chamber which “does not create an appealable issue”.¹²¹ In this context, it is also argued that the Adjournment Decision did not contain any finding as regards the continued detention of Mr Gbagbo.¹²² Finally, the Prosecutor alleges that appellate review of the issues presented by the Defence “would be premature” at this stage.¹²³

64. In the view of the Prosecutor, the Issue does not satisfy the requirements of article 81(2)(d) of the Statute.¹²⁴ In particular, the Defence argument that the Adjournment Decision caused undue delay, which consequently affects the fairness of the proceedings, in the view of the Prosecutor cannot be sustained as any article 61(7)(c)(i) decision will “*by definition*, feature a period of delay for the purposes of presenting or locating more evidence”.¹²⁵ In addition, the Prosecutor avers that the Defence has not demonstrated that the Issue *significantly* affects the fair conduct of the proceedings.¹²⁶ Lastly, the Prosecutor recalls that some of the delay “occasioned by the [Adjournment] Decision” is to ensure that the Defence can exercise its rights under article 61(6) of the Statute.¹²⁷

65. The Prosecutor also asserts that the Issue does not significantly affect the outcome of the trial as the arguments advanced by the Defence in this respect are “entirely speculative”. Rather, it is suggested that the “matter can be litigated with greater clarity (...) once a decision on the confirmation of charges is made”.¹²⁸ Essentially, the same line of reasoning is advanced in relation to the Defence

¹²¹ ICC-02/11-01/11-443, para. 12.

¹²² ICC-02/11-01/11-443, para. 13.

¹²³ ICC-02/11-01/11-443, para. 14.

¹²⁴ ICC-02/11-01/11-443, para. 15.

¹²⁵ ICC-02/11-01/11-433, para. 16.

¹²⁶ ICC-02/11-01/11-433, para. 17.

¹²⁷ ICC-02/11-01/11-433, para. 17.

¹²⁸ ICC-02/11-01/11-433, para. 19.

allegation that an immediate resolution by the Appeals Chamber would materially advance the proceedings.¹²⁹

Arguments by the OPCV

66. The OPCV alleges, in essence, that the Defence presents disparate arguments in relation to points of law but presents no issue that arises from the Adjournment Decision. Rather, it is suggested that the Defence merely disagrees with the Chamber's choice to resort to a decision under article 61(7)(c)(i) of the Statute rather than rejecting the charges.¹³⁰ Further, the Issue as presented by the Defence does not significantly affect the fair and expeditious conduct of the proceedings and the Defence has not demonstrated that an immediate resolution by the Appeals Chamber would materially advance the proceedings.¹³¹ The OPCV also comments on the Defence's past conduct during the proceedings and maintains that it cannot allege any infringement of the suspect to be tried without undue delay as its past conduct has affected the fairness, integrity and expeditiousness of the proceedings.¹³²

Conclusions by the Chamber

67. The Defence has framed the Issue as a single question of principle. However, the Issue is formulated in an exceedingly broad manner (i.e. "whether the application of article 61(7)(c)(i) by the Pre-Trial Chamber leads to a violation of the rights of the Defence"), making it seem more like a general disagreement with the way in which the Chamber exercised its discretion under article 61(7) than a proper appealable issue. The Chamber notes, in this regard that, although the Defence advances a number of points of criticism of the Adjournment Decision, it does not allege that the Chamber abused its discretion as a result of these purported errors.

¹²⁹ ICC-02/11-01/11-433, para. 21.

¹³⁰ ICC-02/11-01/11-442, paras 28-31 and 40.

¹³¹ ICC-02/11-01/11-442, paras 26 and 32.

¹³² ICC-02/11-01/11-442, paras 45-47.

In the absence of a clear allegation to that effect, the Chamber is unable to certify the Issue as one of alleged abuse of discretion. Under these circumstances, the Issue must indeed be considered as a mere disagreement with the Adjournment Decision, for which no leave to appeal can be granted as per the jurisprudence of the Appeals Chamber.¹³³

68. Moreover, the Issue and the underlying criticisms are to a large extent based on the erroneous premise that the Majority made a finding that the Prosecutor has totally and completely failed in her investigation and the presentation of her case.¹³⁴ In fact, the Chamber has not yet expressed itself in this regard. To the extent that the Issue is based upon this mistaken interpretation, it therefore does not arise from the Adjournment Decision.

69. With regard to the Defence's arguments concerning the alleged infringement by the Adjournment Decision of the suspect's right to be tried without undue delay, the Chamber considers that they 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. Again, the Defence seems to have taken issue with the way in which the Chamber exercised its discretion, which it indisputably has under article 61(7) of the Statute, without clearly explaining how the Majority is alleged to have abused this discretion.

70. The Chamber reiterates, in this regard, that it is incumbent on the parties to identify the issue(s) they wish to appeal clearly and unambiguously.¹³⁵ It is not the Chamber's duty to decompose broadly formulated issues in order to identify potential issues for certification.

¹³³ See paragraph 8 of this decision.

¹³⁴ ICC-02/11-01/11-239, para. 11.

¹³⁵ See paragraph 26 of the present decision.

71. Under these circumstances, the Chamber is unable to grant leave to appeal to the Defence.

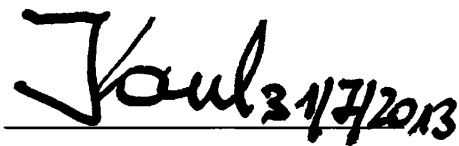
FOR THESE REASONS, THE CHAMBER, BY MAJORITY

- a) **GRANTS** the Prosecutor's Application in relation to the Second Issue as reformulated by the Chamber in paragraph 36;
- b) **REJECTS** the remainder of the Prosecutor's Application;
- c) **REJECTS** the Defence Application.

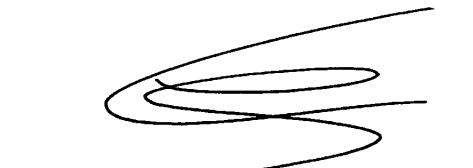
Judge Silvia Fernández de Gurmendi attaches a dissenting opinion to this decision.

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

Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Hans-Peter Kaul



Judge Christine Van den Wyngaert

Dated this Wednesday, 31 July 2013

At The Hague, The Netherlands