

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 February 2014

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 document

**Decision on Defence requests related to the continuation of the confirmation
proceedings**

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

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

Herman von Hebel

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”) hereby issues this decision on the following requests presented by the Defence of Laurent Gbagbo (“Mr Gbagbo”) related to the continuation of the present confirmation proceedings:

- (i) “*Corrigendum de la ‘Requête afin que soit déclaré irrecevable au fond le Document Contenant les Charges (ICC-02/11-01/11-592-Conf-Anx2-Corr2) déposé par le Procureur le 20 janvier 2014’*”, filed on 31 January 2014;¹
- (ii) “*Demande afin que soit organisée la continuation de l’audience orale de confirmation des charges*”, filed on 3 February 2014;²
- (iii) “*Requête afin que la Chambre ordonne qu’ait lieu une expertise portant sur la méthode de travail utilisée et les éléments pris en compte par l’auteur du rapport intitulé ‘on the alleged shelling sites within Abidjan, the Ivory Coast – Mission date 8-12 July 2013’ (CIV-OTP-0049-0048) divulgué par le Procureur*”, filed on 3 February 2014;³
- (iv) “*Requête afin que soit ordonnée une expertise portant sur les pièces vidéographiques suivantes : CIV-OTP-0002-1059, CIV-OTP-0002-1060, CIV-OTP-0002-1061, CIV-OTP-0002-1062, CIV-OTP-0003-0716, CIV-OTP-0003-0717, CIV-OTP-0003-0718, CIV-OTP-0037-0387, CIV-OTP-0043-0267, CIV-OTP-0032-0053, CIV-OTP-0042-0587, CIV-OTP-0040-0342, CIV-OTP-0040-0426, CIV-OTP-0041-0229, CIV-OTP-0039-0141 et CIV-OTP-0044-0738*”, filed on 4 February 2014;⁴
- (v) “*Demande de prorogation des délais fixés par la Chambre préliminaire le 17 décembre 2013 afin de permettre à la défense de déposer des observations écrites sur la preuve du Procureur*”, filed on 4 February 2014;⁵ and

¹ ICC-02/11-01/11-598-Conf-Corr (a public redacted version is also available, see ICC-02/11-01/11-598-Corr-Red).

² ICC-02/11-01/11-599.

³ ICC-02/11-01/11-600-Conf.

⁴ ICC-02/11-01/11-602-Conf (a public redacted version is also available, see ICC-02/11-01/11-602-Red).

⁵ ICC-02/11-01/11-603.

(vi) “*Requête aux fins d’augmentation du nombre de pages autorisé en vue du dépôt par la défense d’observations écrites sur la preuve du Procureur (Norme 37(1))*”, filed on 5 February 2014.⁶

In the present decision, the Chamber also decides on the “*Demande d’autorisation d’interjeter appel de la ‘Decision on Defence request on the suspension of time limits during judicial recess’ du 27 décembre 2013 (ICC-02/11-01/11-585)*”, filed by the Defence on 6 January 2014.⁷

1. The confirmation of charges hearing in the present case was held from 19 until 28 February 2013.⁸ In advance of the commencement of the hearing, and in accordance with article 61(3) of the Rome Statute (the “Statute”) and rule 121(3) of the Rules of Procedure and Evidence (the “Rules”), the Prosecutor, on 17 January 2013, filed the document containing the charges brought against Mr Gbagbo (the “DCC of 17 January 2013”).⁹

2. On 3 June 2013, the Chamber issued, by majority, Judge Silvia Fernández de Gurmendi dissenting, the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Adjournment Decision”).¹⁰ In this decision, the Chamber decided to adjourn the confirmation of charges hearing, requested the Prosecutor to

⁶ ICC-02/11-01/11-607.

⁷ ICC-02/11-01/11-586.

⁸ 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.

⁹ ICC-02/11-01/11-357-Anx1-Conf (a public redacted version is also available, see ICC-02/11-01/11-357-Anx1-Red).

¹⁰ ICC-02/11-01/11-432.

consider providing further evidence or conducting further investigation with respect to all charges, and established a calendar for further proceedings.¹¹ The calendar for the continuation of the confirmation proceedings has been subsequently amended on 17 December 2013.¹²

3. On 13 January 2014, in compliance with the time limit ultimately established by the Chamber, the Prosecutor filed an amended document containing the charges on which she seeks to bring Mr Gbagbo to trial (the “Amended DCC”).¹³

4. As noted above, all six Defence requests addressed in the present decision have been filed between 31 January 2014 and 6 February 2014. The Prosecutor responded to five Defence requests,¹⁴ while the Office of Public counsel for victims (the “OPCV”), acting as legal representatives of the victims, admitted to participate in the present proceedings, responded to three.¹⁵

5. In brief, the Defence requests that: (i) the Amended DCC be declared inadmissible and, accordingly, that the Prosecutor be ordered to provide a

¹¹ *Ibid.*, pp. 22-24.

¹² Pre-Trial Chamber I, “Decision establishing a calendar for further proceedings”, 17 December 2013, ICC-02/11-01/11-576, p. 6.

¹³ ICC-02/11-01/11-592-Anx1 and the identical, but footnoted ICC-02/11-01/11-592-Conf-Anx2-Corr2 (a public redacted version is also available, see ICC-02/11-01/11-592-Conf-Anx2-Corr2-Red).

¹⁴ See ICC-02/11-01/11-606, dated 5 February 2014 (Prosecutor’s response to Defence filing ICC-02/11-01/11-599); ICC-02/11-01/11-612, dated 7 February 2014 (Prosecutor’s response to Defence filing ICC-02/11-01/11-598-Conf-Corr); ICC-02/11-01/11-613, dated 7 February 2014 (Prosecutor’s response to Defence filing ICC-02/11-01/11-603); ICC-02/11-01/11-615-Conf, dated 10 February 2014 (Prosecutor’s consolidated response to Defence filings ICC-02/11-01/11-600-Conf and ICC-02/11-01/11-602-Conf). No response was received from the Prosecutor to Defence filing ICC-02/11-01/11-607.

¹⁵ See ICC-02/11-01/11-609, dated 6 February 2014 (OPCV response to Defence filing ICC-02/11-01/11-599); ICC-02/11-01/11-610, dated 6 February 2014 (OPCV response to Defence filing ICC-02/11-01/11-603); ICC-02/11-01/11-611-Conf, dated 7 February 2014 (OPCV response to Defence filing ICC-02/11-01/11-598-Conf-Corr). No response was received from the OPCV to Defence filings ICC-02/11-01/11-600-Conf, ICC-02/11-01/11-602-Conf and ICC-02/11-01/11-607.

further amended document containing the charges;¹⁶ (ii) the time limit previously established by the Chamber for the Defence written observations on the Prosecutor's evidence and submission of its list of evidence be significantly extended;¹⁷ (iii) the parties' submissions in relation to the charges brought against Mr Gbagbo be provided in the course of an oral hearing rather than in writing;¹⁸ (iv) the page limit for the Defence written submissions, in case the Chamber rejects that the Defence submissions be presented orally, be extended to 300 pages;¹⁹ (v) the Chamber order an expertise in relation to a ballistic report relied upon by the Prosecutor;²⁰ and (vi) the Chamber order an expertise in relation to certain videos relied upon by the Prosecutor.²¹

I. The Defence request to declare the Amended DCC inadmissible (ICC-02/11-01/11-598-Conf-Corr) and the Defence request for extension of time (ICC-02/11-01/11-603)

6. On 31 January 2014, the Defence filed a request seeking that the Chamber declare inadmissible the Amended DCC and, accordingly, order the Prosecutor to present a further new DCC curing the deficiencies of that currently submitted.²² According to the Defence, the Amended DCC is inadmissible as it: (i) lacks the necessary clarity and precision required by the Statute in order to inform the suspect in detail of the content of the charges, in particular in relation to the definition of the crimes charged and the alleged modes of liability; and (ii) contains charges which have been amended beyond what is permissible in the context of an adjournment of the confirmation of charges hearing under article 61(7)(c)(i) of the Statute, since

¹⁶ ICC-02/11-01/11-598-Conf-Corr.

¹⁷ ICC-02/11-01/11-603.

¹⁸ ICC-02/11-01/11-599.

¹⁹ ICC-02/11-01/11-607.

²⁰ ICC-02/11-01/11-600-Conf.

²¹ ICC-02/11-01/11-602-Conf.

²² ICC-02/11-01/11-598-Conf-Corr.

(a) the modes of liability under articles 25(3)(b), 28(a) and 28(b) of the Statute have been added to those already envisaged in the DCC of 17 January 2013 and (b) the facts and circumstances described in the charges, in particular in relation to those facts alleged to establish the contextual elements of crimes against humanity, have been amended.²³

7. The Prosecutor responded to this Defence request on 7 February 2014.²⁴ According to the Prosecutor, the Defence request must be rejected since the Amended DCC does not alter the substance or scope of the charges, neither in terms of facts nor in terms of their legal characterisation, and the additional details contained in the Amended DCC, included pursuant to the Chamber's instructions in the Adjournment Decision, "are intended to reflect the result of the additional investigations conducted by the Prosecution as well as to provide more detailed notice of the charges to the suspect so as to fully comply with his right under Article 67(1)(a)".²⁵ The Prosecution further submits that "[e]ven if, *arguendo*, the Amended DCC did exceed the scope of the Adjournment Decision, this would not result in unfair prejudice to the suspect [given that] [t]he procedure laid out in the Adjournment Decision for the further proceedings in this case ensures that the rights of the suspect are fully respected".²⁶

8. On 7 February 2014, the Chamber also received the response to this Defence request from the OPCV.²⁷ The OPCV submits that the Defence request must be dismissed *in limine* and decided together with the examination of the charges and evidence pursuant to rule 122(6) of the Rules, as done by the Chamber at the commencement of the confirmation of charges

²³ *Ibid.*, p. 18.

²⁴ ICC-02/11-01/11-612.

²⁵ *Ibid.*, para. 4.

²⁶ *Ibid.*, para. 5.

²⁷ ICC-02/11-01/11-611-Conf.

hearing with respect to a similar request from the Defence.²⁸ In the alternative, the OPCV argues that the Defence request must be rejected as unfounded given that the charges in the Amended DCC have not been amended²⁹ and are sufficiently precise as required by the legal texts of the Court.³⁰

9. The Chamber notes articles 61 and 67(1) of the Statute, rule 121 of the Rules, and regulations 35 and 52 of the Regulations of the Court (the “Regulations”).

10. At the outset, given the subject matter of this Defence request and its impact on the continuation of the confirmation proceedings, the Chamber deems it appropriate that the request be adjudicated at the present stage of the proceedings rather than being joined with the examination of the charges and the evidence presented.

11. For the following reasons, the Chamber is not persuaded that any of the challenges raised by the Defence to the Amended DCC, individually or in combination, warrant that the Amended DCC be declared inadmissible.

12. First, the Chamber addresses the Defence argument that the Amended DCC must be declared inadmissible because *“le DCC ne satisfait pas aux exigences minimales de précision requises quant à la démonstration de l’existence des éléments juridiques constitutifs tant des crimes que des modes de responsabilité. Le Procureur ne prend même pas la peine de faire la liste des conditions juridiques qu’il devrait remplir pour démontrer que les charges devraient être confirmées au standard requis”*.³¹ In particular, the Defence challenges the Amended DCC on the basis

²⁸ *Ibid.*, paras 14-21.

²⁹ *Ibid.*, paras 23-37.

³⁰ *Ibid.*, paras 38-46.

³¹ ICC-02/11-01/11-598-Conf-Corr, para. 52.

that “*il ne satisfait aux exigences de précision concernant la définition des crimes et des modes de responsabilité*”.³²

13. The Chamber notes that article 67(1)(a) of the Statute provides for the suspect’s right “[t]o be informed promptly and in detail of the nature, cause and content of the charge”. Rule 121(3) of the Rules mandates the Prosecutor to provide, within a reasonable time before the confirmation of charges hearing, a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial. In giving more details with respect to the exact content required of the document containing the charges, regulation 52 of the Regulations provides that such document shall include: (i) “[t]he full name of the person and any other relevant identifying information”; (ii) “[a] statement of the facts [...] which provides a sufficient legal and factual basis to bring the person to trial”; and (iii) “[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7, or 8 and the precise form of participation under articles 25 and 28”.

14. The Chamber therefore considers that the Prosecutor is not required to provide her legal interpretation of the elements of crimes and modes of liability. As noted above, regulation 52 of the Regulations makes it clear that, for the purposes of informing the suspect of the nature, cause and content of the charges brought against him or her, it suffices that the Prosecutor clearly sets out the relevant facts and identifies their proposed legal characterisation. While the Prosecutor may indeed provide submissions as to the proposed interpretation of the applicable law for the purposes of the confirmation proceedings, any such submission does not constitute part of the charges of which the suspect is entitled to be informed in full. This is also consistent with the fundamental principle of *iura novit curia*, which places the responsibility to

³² *Ibid.*, p. 18.

interpret the applicable law on the Judges rather than the parties. Accordingly, the fact that the Amended DCC does not contain detailed submissions on the Prosecutor's understanding of the legal requirements of each crime charged and of each alleged form of responsibility does not render this document imprecise and, as such, inadmissible, as suggested by the Defence.

15. Second, the Chamber notes the Defence argument that in the Amended DCC, the Prosecutor modifies the facts and circumstances described in the charges contained in the DCC of 17 January 2013 in relation to the contextual elements of the alleged crimes against humanity with which Mr Gbagbo is charged.³³ Both the Prosecutor and the legal representative of victims contest this assertion, notably stating that the Amended DCC provides "further factual details" and reference to additional evidence, but does not change the facts and circumstances of the charges.³⁴

16. The Chamber observes that, contrary to the Defence assertion, the facts and circumstances underpinning the contextual elements of the crimes charged as described in the charges in the Amended DCC do not exceed the facts and circumstances alleged to the same effect in the DCC of 17 January 2013. Indeed, the factual parameters of the alleged widespread and systematic attack against the civilian population as part of which the charged crimes were allegedly committed by Mr Gbagbo as outlined in the Amended DCC remain the same as those shaping the attack described in the DCC of 17 January 2013. In these circumstances, the Chamber is not persuaded that the facts and circumstances described in the charges contained in the Amended DCC alleged to establish the contextual elements of crimes against humanity have been amended in a way which warrants that the Amended DCC be declared inadmissible.

³³ ICC-02/11-01/11-598-Conf-Corr, paras 31-36.

³⁴ ICC-02/11-01/11-612, paras 10-13; ICC-02/11-01/11-611-Conf, para. 26.

17. Finally, the Defence submits that, in proposing an additional legal characterisation of the alleged facts with respect to the possible forms of criminal responsibility of Mr Gbagbo for the crimes charged, the Prosecutor has exceeded what is allowed in the context of an adjournment of the confirmation hearing under article 61(7)(c)(i) of the Statute, and that, accordingly, the Amended DCC must be declared inadmissible. The Chamber notes that in the DCC of 17 January 2013, the Prosecutor alleged that Mr Gbagbo was responsible for the crimes charged under article 25(3)(a) or 25(3)(d) of the Statute. In the Amended DCC, the Prosecutor alleges that the same facts and circumstances may equally establish Mr Gbagbo's responsibility under articles 25(3)(b), 28(a) and 28(b) of the Statute.

18. The Chamber considers that, in the present circumstances, the inclusion of further modes of liability under which the Prosecutor seeks to bring Mr Gbagbo to trial, on the basis of the same facts and circumstances, would not warrant the dismissal *in limine* of the Amended DCC.

19. The Chamber notes that the Prosecutor does not argue that the alleged facts may constitute a different crime under the Statute but confirms that the same facts may fall under several modes of liability, as anticipated during the confirmation hearing.³⁵ The Chamber recognises that the modes of liability under the Statute may significantly overlap in certain cases and does not discard that such an overlap of applicable modes of liability, if any, may be supported by the evidence provided for the instant case, including the additional evidence collected after the adjournment. In this regard, the Chamber notes that the confirmation of charges hearing was adjourned in order to permit the Prosecutor to provide further evidence or conduct further investigation "in respect of all charges" originally presented against

³⁵ Pre-Trial Chamber I, Transcript of Hearing, 22 February 2013, ICC-02/11-01/11-T-17-Red-ENG, p. 28, lines 14 to 16.

Mr Gbagbo and a considerable amount of additional time was granted to that effect.³⁶ It was therefore foreseeable that the Prosecutor would undertake further investigative steps that could result in a considerable amount of additional evidence eventually leading to a different or amended legal characterisation of the same alleged facts and circumstances. Expecting that more evidence would be collected, the Chamber also set out a detailed calendar for disclosure of further incriminating evidence to the Defence, establishing a final date for disclosure in relation to the moment when the relevant evidence would have been obtained by the Prosecutor.³⁷

20. The Chamber notes that if it were to dismiss *in limine* the Prosecutor's Amended DCC, as requested by the Defence, a modification of the mode of liability could still be triggered by the Chamber, the Prosecutor or even by the Trial Chamber if the charges were to be confirmed.

21. In this regard, the Chamber notes that amendments to the facts and circumstances described in the charges, and modifications of the legal characterisation of these facts and circumstances are allowed at different stages of proceedings and under different conditions, by a number of statutory provisions such as: article 61(4) of the Statute (allowing the Prosecutor to continue the investigation and amend, before the confirmation of charges hearing, the charges presented in the document containing the charges); article 61(7)(c)(ii) of the Statute (giving the Chamber authority to request, on the basis of the confirmation of charges hearing, the Prosecutor to consider amending a charge because the evidence presented appears to establish a different crime); article 61(9) of the Statute (providing that, after the charges are confirmed and before the trial has begun, the Prosecutor may

³⁶ The Adjournment Decision, which was issued on 3 June 2013, set the final time limit for the Prosecutor's disclosure of evidence to the Defence and presentation of the document containing the charges and list of evidence at 15 November 2013.

³⁷ Adjournment Decision, pp. 22-23.

amend the charges with the permission of the Pre-Trial Chamber); and regulation 55 of the Regulations (permitting the Trial Chamber to change the legal characterisation of facts provided that this does not exceed the facts and circumstances described in the charges). The Chamber underlines that in all these scenarios, amendment of charges or modification of the legal characterisation of facts described in the charges are permissible under the condition that the suspect/accused is given reasonable notice thereof.

22. The Chamber recognises that none of the provisions above specifically addresses the procedural phase of the case at hand. However, in light of the circumstances of the adjournment and the fact that the issue of the legal characterisation could in any case be raised at a later stage, the Chamber is of the view that it would not be in the interest of judicial economy and interest of justice to reject the DCC. Taking into account these interests, the Chamber believes that it is preferable to put the Defence on notice, at the earliest possible opportunity, that additional modes of liability may be considered, and to provide it with sufficient time to prepare.

23. The Chamber is of the view that the Defence, having received disclosure of the additional evidence relied upon by the Prosecutor in consecutive batches, is in a position to meaningfully exercise all the procedural rights for the purposes of the confirmation of charges provided for in the legal framework of the Court. The Chamber also notes, as submitted by the Prosecutor, that the Defence has been on notice of the facts which may equally give rise to the additional modes of liability included in the Amended DCC since 17 January 2013.³⁸ Further, the Chamber considers that the time limit of 30 days upon receipt of the Amended DCC for the Defence presentation of its list of evidence and written response to the Amended DCC, established by the

³⁸ ICC-02/11-01/11-612, para. 16.

Adjournment Decision, fully conforms, and partly even exceeds, the time limit provided by rule 121(3) and (6) of the Rules in relation to an initial – and therefore new – DCC. Accordingly, in principle, no adjustment to the calendar of the confirmation proceedings would need to be made in order to give the Defence “reasonable notice” of the Prosecutor’s allegation that the facts and circumstances described in the charges may equally give rise to Mr Gbagbo’s responsibility under articles 25(3)(b) and 28 of the Statute.

24. Notwithstanding the above, the Chamber is also cognisant of the significant amount of additional evidence provided by the Prosecutor as a result of the broad scope of the adjournment of the confirmation of charges hearing. Therefore, the Chamber considers that the extension of time requested by the Defence may exceptionally be granted in part, as good cause appears to exist within the terms of regulation 35 of the Regulations. In this regard, the Chamber notes that the Defence specifically requests that the time limit for the submission of its written observations on the Prosecutor’s evidence and its list of evidence, originally set at 13 February 2014,³⁹ be extended to 27 March 2014.⁴⁰ In light of the circumstances, the Chamber is of the view that setting the time limit for the Defence presentation of its list of evidence and written response to the Amended DCC at 17 March 2014 provides sufficient time for the Defence to prepare and meaningfully respond to the Amended DCC.

25. It follows from the extension of time hereby granted to the Defence for its submissions on the Prosecutor’s evidence and presentation of its list of

³⁹ This time limit was recently suspended by the Single Judge in order to allow proper disposals of the various matters raised by the Defence and pending before the Chamber, which are addressed in the present decision. Pre-Trial Chamber I, “Decision suspending the time limit for the Defence submission of its observations on the Prosecutor’s evidence and disclosure to the Prosecutor of the evidence it intends to present, if any, and filing of its amended list of evidence”, ICC-02/11-01/11-614, 10 February 2014.

⁴⁰ ICC-02/11-01/11-603. See also the Prosecutor’s response (ICC-02/11-01/11-613) and the OPCV response (ICC-02/11-01/11-610) to this Defence request.

evidence that a new calendar for the continuation of the confirmation proceedings needs to be established. In doing so, the Chamber shall maintain the same time periods between the different submissions of the parties and participants as envisaged in the calendar established on 17 December 2013.⁴¹

II. The Defence request that the parties' submissions in relation to the charges brought against Mr Gbagbo be provided in the course of an oral hearing rather than in writing (ICC-02/11-01/11-599) and the Defence alternative request for extension of page limit (ICC-02/11-01/11-607)

26. On 3 February 2014, the Defence filed a request seeking that the parties' submissions in relation to the charges brought against Mr Gbagbo be provided in the course of an oral hearing rather than in writing as originally established in the Adjournment Decision.⁴² On 5 February 2014, the Defence alternatively requested, in case the Chamber confirms that the continuation of the confirmation proceedings will take place in writing, that the page limit for its written observations on the Prosecutor's evidence be extended to 300 pages.⁴³

27. In its first request, the Defence asserts that a further oral hearing is warranted because, in general, it better safeguards the rights of the defence,⁴⁴ and because, in this specific case, the substantial changes in the Amended DCC compared to the charges contained in the DCC of 17 January 2013 require an oral discussion.⁴⁵ In her response to this Defence request, the Prosecutor, while declaring herself "content with the procedure established by the Chamber", stated that she is "not opposed to further oral submissions being made by the parties and participants, provided that the scope of such further oral hearing is focused and relevant to issues that will assist the

⁴¹ ICC-02/11-01/11-576.

⁴² ICC-02/11-01/11-599.

⁴³ ICC-02/11-01/11-607.

⁴⁴ ICC-02/11-01/11-599, paras 2 to 18.

⁴⁵ ICC-02/11-01/11-599, paras 19 to 52.

Chamber in its conduct of the confirmation of the charges proceedings, such as submissions pertaining to the additional evidence”.⁴⁶ The OPCV, in its response to the Defence request, submitted that “there is no need to convene a further oral hearing” given that “the procedure established by the Chamber fully preserves the rights and prerogatives of the parties and participants”,⁴⁷ and, noting that the holding of a further hearing “will undoubtedly impact on the schedule established by the Chamber for the conclusion of the confirmation of the charges hearing”,⁴⁸ also asserted that “victims have constantly, and continue to express, concerns about the length of the confirmation of the charges proceedings and [...] they have indicated that they wish that said proceedings be concluded in a reasonable time”.⁴⁹

28. The second Defence request under consideration (*i.e.* the extension of page limit for its written submissions), to which neither the Prosecutor nor the OPCV responded, fundamentally rests on the same arguments relied upon by the Defence in its request for a further oral hearing, and is presented in case of rejection of the latter.⁵⁰

29. The Chamber notes article 61 of the Statute, rule 121 of the Rules and regulation 37 of the Regulations.

30. The Chamber notes that a hearing on the confirmation of charges against Mr Gbagbo has already been conducted in February 2013, which gave parties and participants the opportunity to present their arguments in full. The adjournment decided by the Chamber, while broad in nature, should not be equated with a “new” confirmation process requiring further oral submissions in the context of a hearing. There is certainly no legal

⁴⁶ ICC-02/11-01/11-606, para. 2.

⁴⁷ ICC-02/11-01/11-609, para. 6.

⁴⁸ *Ibid.*, para. 8.

⁴⁹ *Ibid.*, para. 7.

⁵⁰ ICC-02/11-01/11-607, para. 56.

requirement for an additional hearing and it is thus for the Chamber to decide whether such a hearing would be necessary in the specific circumstances of the case.

31. In light of the thorough and substantive discussion that has taken place at the hearing already held, the Chamber considers that no prejudice to the fairness of the proceedings or interests of justice will occur if the parties and participants are required to provide their additional submissions in writing. In any case fundamental is that the parties are given a meaningful opportunity to address fully all relevant aspects they intend to raise. For this purpose, the Chamber is satisfied that the extension of page limit requested by the Defence is justified in the present circumstances. Accordingly, the Chamber grants up to 300 pages to the Defence for its written submissions on the Prosecutor's evidence. In this regard, the Chamber notes that the OPCV also requests that the page limit for its submissions be extended from 20 to 40 pages.⁵¹ In order to preserve the victims' right to participate fully, the Chamber grants the OPCV the requested extension of page limit.

32. In sum, the Chamber is not persuaded that conducting a further oral hearing has any tangible benefit for the current proceedings. The Defence request that the parties' submissions be presented orally rather than in writing is therefore rejected. The requests for extension of page limit of the Defence and the OPCV are granted.

⁵¹ E-mail from the OPCV sent to the Chamber, the Prosecutor and the Defence on 10 February 2014.

III. The Defence requests that the Chamber order an expertise in relation to a ballistic report (ICC-02/11-01/11-600-Conf) and an expertise in relation to a number of videos (ICC-02/11-01/11-602-Conf) relied upon by the Prosecutor

33. On 3 February 2014, the Defence filed a request seeking the Chamber to order an expertise in relation to a ballistic report relied upon by the Prosecutor for purposes of the confirmation of charges.⁵² On 4 February 2014, a similar request for having an expertise conducted was filed by the Defence in relation to a number of videos relied upon by the Prosecutor.⁵³ In its requests, the Defence challenges the admissibility and reliability of the evidence concerned and requests that the Chamber, acting under articles 56(2) and 57(3)(b) of the Statute: (i) appoint a (named) expert to examine the methodology applied by the expert relied upon by the Prosecutor who submitted a ballistic report included in the Prosecutor's list of evidence as well as the probative value of this report;⁵⁴ and (ii) request the Registrar to submit to the Chamber a list of three experts among whom to designate one expert to determine the authenticity, and accordingly the admissibility, of a number of videos relied upon by the Prosecutor in support of the Amended DCC.⁵⁵

34. The Prosecutor filed a consolidated response to these two Defence requests, submitting that they should both be rejected.⁵⁶ According to the Prosecutor: (i) "the legal basis invoked by the Defence, Articles 57(3)(b) and 56(2)(c) is flawed"; (ii) "the Chamber should not exercise it [sic] discretion pursuant to Regulation 44(4) of the Regulations of the Court, in light of the limited scope and purpose of the confirmation hearing, the calendar of the proceedings established by the Chamber and, the current circumstances of the

⁵² ICC-02/11-01/11-600-Conf.

⁵³ ICC-02/11-01/11-602-Conf.

⁵⁴ ICC-02/11-01/11-600-Conf, p. 20.

⁵⁵ ICC-02/11-01/11-602-Conf, p. 20.

⁵⁶ ICC-02/11-01/11-615-Conf.

case, including the timing of the requests”; and (iii) “notwithstanding the absence of such expertise, the Defence is in a position to challenge the Prosecution’s evidence”.⁵⁷

35. The Chamber notes articles 56, 57(3)(b), 61 and 67 of the Statute, rule 121 of the Rules and regulations 24(5) and 44(4) of the Regulations.

36. At the outset, the Chamber notes that, on 12 February 2014, the Defence requested leave to reply to the Prosecutor’s response to the two Defence requests under consideration.⁵⁸ The Chamber notes that in accordance with regulation 24(5) of the Regulations participants may only reply to a response with the leave of the Chamber. In the present case, and in light of the issues which the Defence proposes to address in its reply, the Chamber is of the view that no additional submission on the part of the Defence is necessary for the determination of the matter under consideration. The Defence request for leave to reply is therefore rejected.

37. Turning to the merits of the requests for having an expertise conducted, the Chamber is of the view that article 57(3)(b), in conjunction with article 56(2)(c) of the Statute, relied upon by the Defence is not the correct legal basis in relation to the requests under consideration. The two provisions give the Chamber the authority to take measures listed in article 56 of the Statute (including the appointment of experts) in the presence of unique investigative opportunities also upon request of the Defence and not only of the Prosecutor.

38. The Chamber observes that neither of the two expertise required by the Defence would qualify as a unique investigative opportunity – which is not even asserted by the Defence. Indeed, while a unique investigative opportunity arises in relation to collection of evidence “which may not be

⁵⁷ *Ibid.*, para. 3.

⁵⁸ ICC-02/11-01/11-616-Conf.

available subsequently for the purposes of a trial”, both the ballistic report and the videos will remain available, allowing that expertise be conducted in the future. As such, the expertise sought by the Defence does not qualify as a unique investigative opportunity within the meaning of article 56 of the Statute.

39. In the Chamber’s view, the correct legal basis in light of which the Defence requests under consideration may instead be addressed is regulation 44 of the Regulations, according to which “[t]he Chamber may *proprio motu* instruct an expert”. The Chamber is not persuaded that, in the present circumstances, it is appropriate to exercise its prerogative under regulation 44(4) of the Regulations and appoint an expert as requested by the Defence. Several considerations lead the Chamber to this conclusion.

40. At first, the Chamber notes that the requests under consideration were filed by the Defence on 3 and 4 February 2014, while the evidence concerned was disclosed to the Defence well in advance of the final time limit for the Prosecutor’s disclosure of the evidence she intends to rely upon for the purposes of the confirmation proceedings. In particular, the ballistic report (CIV-OTP-0049-0048) was disclosed to the Defence on 3 October 2013. In relation to the videos, the Chamber notes that out of the 13 videos relied upon by the Prosecutor and regarding which the Defence requests an expertise be conducted,⁵⁹ 8 were disclosed in 2012 before the commencement of the confirmation of charges hearing,⁶⁰ four between July and August 2013,⁶¹ and

⁵⁹ In this regard, the Chamber notes that other three videos referred by the Defence are not included in the amended list of evidence presented by the Prosecutor, namely CIV-OTP-0002-1059, CIV-OTP-0041-0229 and CIV-OTP-0039-0141 (see ICC-02/11-01/11-592-Conf-Anx3-Corr).

⁶⁰ CIV-OTP-0002-1060, CIV-OTP-0002-1061, CIV-OTP-0002-1062, CIV-OTP-0003-0716, CIV-OTP-0003-0717, CIV-OTP-0003-0718 (all disclosed on 3 February 2012), CIV-OTP-0032-0053 (disclosed on 19 November 2012) and CIV-OTP-0037-0387 (disclosed on 20 December 2012).

⁶¹ CIV-OTP-0040-0342 (disclosed as incriminating evidence on 5 July 2013) and CIV-OTP-0043-0267, CIV-OTP-0042-0587 and CIV-OTP-0040-0426 (disclosed on 9 August 2013).

one on 3 October 2013.⁶² In these circumstances, the requests to start the proceedings for the appointment of experts – which would necessarily result in a significant delay of the further confirmation proceedings – cannot but be considered tardy.

41. Furthermore, in light of the limited scope and purpose of the confirmation hearing and the nature of the expertise proposed by the Defence, the Chamber does not consider it necessary to appoint, by itself, experts to conduct them.

42. In this regard, the Chamber notes that the Defence may challenge the admissibility and probative value of the evidence concerned (as indeed done at length in the two requests under consideration) and that this is not dependent upon an expertise being ordered by the Chamber. Moreover, the Defence, if deemed useful in the overall context of its strategy, may instruct its own experts to carry out the expertise it is now seeking from the Chamber, or could have done so in a timely manner after disclosure of the concerned evidence. Any result the defence may intend to use for the purposes of the confirmation hearing will be considered fully by the Chamber, like any piece of evidence relied upon by the parties, insofar as duly disclosed within the final time limit established in the present decision.

43. Finally, the Chamber considers that if the Defence requests under consideration were to be granted (even with the extension of time granted to the Defence in the present decision) further significant delays in the proceedings would necessarily arise.

⁶² CIV-OTP-0044-0738.

IV. Additional matter: the Defence request for leave to appeal the “Decision on Defence request on the suspension of time limits during judicial recess”

44. The Chamber turns now to an additional matter which is also linked to the calendar for the continuation of the confirmation proceedings.

45. On 27 December 2013, the Single Judge issued a decision,⁶³ rejecting a request filed by the Defence on 20 December 2013 in which the Defence requested the Chamber to suspend all deadlines during the winter judicial recess (*i.e.* between 14 December 2013 and Monday, 6 January 2014).⁶⁴

46. On 6 January 2014, the Defence requested leave to appeal the Decision of 27 December 2013 with respect to the following issues:

- 1) *La Juge Unique peut-elle prendre une décision aussi importante sans répondre aux arguments de la défense concernant le respect du droit du travail ?*
- 2) *La Juge Unique peut-elle prendre une décision aussi importante en ne se fondant sur aucune base légale ?*
- 3) *La Juge Unique peut-elle utiliser la notion de droit à d’être jugé sans retard excessif dont dispose tout accusé pour empêcher cet accusé de faire valoir ses droits ?*⁶⁵

47. On 10 January 2014, the Prosecutor filed her response on this Defence request for leave to appeal, submitting that the request must be rejected.⁶⁶

48. The Chamber notes article 82(1)(d) of the Statute.

49. With a view to establishing whether the requirements under article 82(1)(d) are met and determining any impact of the Decision of 27 December 2013 on the present proceedings, the Chamber considers it useful to quote in

⁶³ Pre-Trial Chamber I, “Decision on Defence request on the suspension of time limits during judicial recess”, ICC-02/11-01/11-585, 27 December 2013.

⁶⁴ ICC-02/11-01/11-584.

⁶⁵ ICC-02/11-01/11-586, para. 23.

⁶⁶ ICC-02/11-01/11-590.

full the relevant part of the Defence initial request for suspension, which reads as follows:

[L]e Procureur a divulgué les 10, 16, 18 et le 19 décembre 2013 trente-six éléments de preuve (soit 662 pages et dix minutes vingt-sept secondes de vidéo). Les divulgations des 16, 18 et 19 décembre font suite aux décisions des Juges rendues juste avant ou pendant les vacances judiciaires. Le 20 décembre 2013, le Procureur déposait une demande de pages additionnelles concernant le DCC, la défense devra répondre à cette demande. Compte tenu du calendrier extrêmement serré arrêté par la Chambre le 17 décembre 2013 la défense doit en outre, préparer pendant cette période de vacances judiciaires la suite de l'audience de confirmation des charges, analyser les éléments de preuve divulgués par le Procureur, préparer des missions sur terrain, collecter des éléments de preuve, préparer des divulgations, continuer ses efforts en matière de coopération, etc. Par ailleurs, en application de la décision de la Chambre du 17 décembre 2013, la défense doit sélectionner avant le 13 janvier 2014 les éléments de preuve qui nécessiteraient des expurgations et si nécessaire préparer une demande de prorogation de délai.⁶⁷

50. The Chamber notes that the time limits for the Defence running at the time of the Decision of 27 December 2013, and for which the Defence appears to have requested suspension during the judicial recess, were eventually amended. Indeed, on 10 January 2014, pursuant to a Defence request,⁶⁸ the Chamber granted an extension of time of two weeks for the Defence submissions of its proposals for redactions. The relevant time limit was accordingly moved from 13 January 2014 to 27 January 2014. Similarly, in the present decision, the Chamber grants the Defence an extension of time of over 30 days for the presentation of its list of evidence and observations on the Prosecutor's evidence, moving the relevant time limit from 13 February 2014 to 17 March 2014.

51. In these circumstances, the Chamber is of the view the issue of whether the Chamber erred in declining to suspend the relevant time limits during the three weeks of the winter judicial recess which the Defence proposes for its envisaged appeal against the Decision of 27 December 2013 constitutes an

⁶⁷ ICC-02/11-01/11-584, para. 41.

⁶⁸ ICC-02/11-01/11-587.

abstract question rather than a topic which is essential for the determination of the matter under judicial consideration. Accordingly, no tangible benefit with respect to either the fair and expeditious conduct of the current proceedings or the outcome of trial would arise from a determination by the Appeals Chamber of the issues proposed by the Defence in relation to the Decision of 27 December 2013. Indeed, even if the Appeals Chamber were to consider that the issues raised by the Defence were wrongly decided in the Decision of 27 December 2013, there would be no impact, let alone of a significant nature, on the proceedings against Mr Gbagbo.

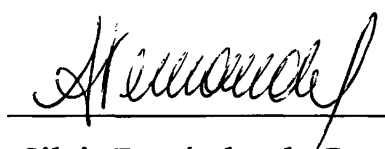
FOR THESE REASONS, THE CHAMBER

- a) **ORDERS** the Defence to submit its observations on the Prosecutor's evidence and to disclose to the Prosecutor the evidence it intends to present, if any, and to file its amended list of evidence by **Monday, 17 March 2014**;
- b) **DECIDES** that the Prosecutor and the OPCV on behalf of the victims participating the proceedings may file final written submissions in response to the Defence by **Monday, 31 March 2014**;
- c) **DECIDES** that the Defence may submit final written submissions in response to the Prosecutor's and the victims' observations by **Monday, 14 April 2014**;
- d) **REJECTS** the Defence request that the submissions by the parties and participants for the purposes of the confirmation proceedings be provided orally rather than in writing;
- e) **GRANTS** the Defence up to 300 pages for its observations on the Prosecutor's evidence;

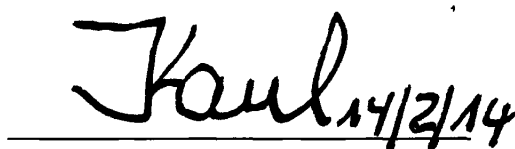
- f) **GRANTS** the OPCV up to 40 pages for its final written submissions in response to the Defence;
- g) **REJECTS** the Defence request to appoint an expert in relation to a ballistic report relied upon by the Prosecutor;
- h) **REJECTS** the Defence request to appoint an expert in relation to certain videos relied upon by the Prosecutor;
- i) **REJECTS** the Defence request for leave to appeal the “Decision on Defence request on the suspension of time limits during judicial recess”; and
- j) **REJECTS** the Defence request for leave to reply.

Judge Christine Van den Wyngaert appends a separate opinion.

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 Friday, 14 February 2014

At The Hague, The Netherlands