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Internationale**

**International  
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Court**



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Date: **4 August 2014**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Silvia Fernández de Gurmendi, Presiding Judge  
Judge Ekaterina Trendafilova  
Judge Christine Van den Wyngaert

**SITUATION IN CÔTE D'IVOIRE**

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

**Confidential**

**Response of the Common Legal Representative of victims to the "*Demande d'autorisation d'interjeter appel de la « Décision relative à la confirmation des charges » du 12 juin 2014 (ICC-02/11-01/11-656-Conf-tFRA)*" submitted by the Defence on 29 July 2014**

**Source:** Office of Public Counsel for Victims

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

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## I. PROCEDURAL BACKGROUND

1. On 12 June 2014, Pre-Trial Chamber I (the “Chamber”) issued the “Decision on the confirmation of charges against Laurent Gbagbo” (the “Decision”),<sup>1</sup> whereby the Chamber, by majority, confirmed all charges against Mr. Gbagbo under article 61(7)(a) of the Rome Statute and committed him for trial.

2. On 18 July 2014, the official French translation of the Decision and the appended dissenting opinion was notified.<sup>2</sup>

3. On 29 July 2014, the Defence filed confidentially a request for leave to appeal the Decision (the “Request”).<sup>3</sup>

4. On 30 July 2014, the Single Judge granted a request by the Principal Counsel of the OPCV, acting as Common Legal Representative of victims (the “Common Legal Representative”),<sup>4</sup> for access to the Request.<sup>5</sup> The Single Judge also decided that the time limit for the Common Legal Representative to file a response, if any, must be calculated as of the date of notification of the Request.<sup>6</sup> The OPCV was notified of the Request on the same day.

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<sup>1</sup> See the “Decision on the confirmation of charges against Laurent Gbagbo” (Pre-Trial Chamber I), No. ICC-02/11-01/11-656-Red, 12 June 2014, p. 131 (the “Decision”).

<sup>2</sup> See the “Décision relative à la confirmation des charges portées contre Laurent Gbagbo” (Pre-Trial Chamber I), No. ICC-02/11-01/11-656-Conf-tFRA, 18 July 2014; and the “Opinion dissidente de la juge Christine Van den Wyngaert”, No. ICC-02/11-01/11-656-Anx-tFRA, 18 July 2014.

<sup>3</sup> See the “Demande d’autorisation d’interjeter appel de la « Décision relative à la confirmation des charges » du 12 juin 2014”, No. ICC-02/11-01/11-676-Conf, 26 July 2014 (the “Request”).

<sup>4</sup> See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012, pp. 25-26; and the “Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384-Corr, 6 February 2013, pp. 22-23.

<sup>5</sup> See the e-mail message received from the Associate Legal Adviser to the Pre-Trial Division on 30 July 2014 at 10:58 h.

<sup>6</sup> *Idem*.

5. Pursuant to regulations 23*bis* and 65 of the Regulations of the Court, the Common Legal Representative submits the following response to the Request, following the classification chosen by the Defence. However, the Common Legal Representative notes that this submission does not contain confidential information and could therefore be reclassified as “public”.

## II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

### 1. The criteria contained in article 82(1)(d) of the Rome Statute

6. Article 82(1)(d) of the Rome Statute limits the possibility to file an appeal against *“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 jurisprudence of the Court has established the complementary character of the two components mentioned in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.<sup>7</sup>

8. In this regard, the Appeals Chamber has determined that “[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”.<sup>8</sup> The Appeals

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<sup>7</sup> See the “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” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, par. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

<sup>8</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 7, par. 8.

Chamber has also stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,<sup>9</sup> and has defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.<sup>10</sup> Accordingly, the mere dispute over the correctness of a Chamber’s reasoning does not constitute sufficient ground to be granted leave to appeal a decision.<sup>11</sup>

9. The Appeals Chamber has also considered that “[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”.<sup>12</sup>

10. Moreover, the Chamber presented with an application for leave to appeal must not enter into examining or considering “arguments on the merits or the substance of the appeal” because said arguments are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal is granted.<sup>13</sup> At most, the Chamber may engage to a certain extent with some of the arguments to determine whether there exists an “appealable issue” arising from the impugned decision.<sup>14</sup>

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<sup>9</sup> *Idem*, par. 9.

<sup>10</sup> *Ibid.*

<sup>11</sup> See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, par. 6; and the “Decision on Prosecution’s Application for Leave to Appeal the ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’” (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, par. 12.

<sup>12</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 7, par. 10.

<sup>13</sup> See the “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”, *supra* note 7, par. 22. See also the “Decision on two requests for leave to appeal the ‘Decision on the request by DRC-DO1-WWWW-0019 for special protective measures relating to his asylum application’” (Trial Chamber I), No. ICC-01/04-01/06-2779, 4 August 2011, par. 10.

<sup>14</sup> See the “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’” (Pre-Trial Chamber II), No. ICC-01/04-02/06-322, 7 July 2014, par. 19.

11. Consistent with this jurisprudence, this Chamber has found that applications for leave to appeal should not contain in detail the arguments relating to the merit or substance of the proposed appeal which the party intends to raise before the Appeals Chamber,<sup>15</sup> but only the appealable issue(s) *"by way of indicating a specific factual and/or legal error"*.<sup>16</sup> Therefore, revising generally the thrust of previous arguments without demonstrating relevant conditions for leave is not sufficient for a party to satisfy the requirements set forth in article 82(1)(d) of the Rome Statute.

12. According to established jurisprudence, the analysis of whether an appealable issue would "significantly affect" the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute refers to *"the potential of an issue to significantly hinder, limit or otherwise have a considerable bearing on the scope and the exercise of the rights of the parties in pursuing their legitimate interests in the proceedings before the Court"*,<sup>17</sup> and whether *"a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision"*.<sup>18</sup> In turn, "expeditiousness" must be read as *"closely linked to the concept of proceedings 'within a reasonable time',*

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<sup>15</sup> See also the "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", *supra* note 7, par. 15; the "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 VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-135, 31 March 2006, par. 25; the "Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-112, 20 December 2007, par. 16; and the "Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims' Applications for Participation" (Pre-Trial Chamber II), No. ICC-02/04-01/05-296, 2 June 2008, p. 8.

<sup>16</sup> See the "Decision on three applications for leave to appeal" (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), par. 70.

<sup>17</sup> See the "Decision on the 'Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision' filed by the Defence of Saif Al Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-556, 11 June 2014, par. 22.

<sup>18</sup> See the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure" (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, par. 14.

*namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*".<sup>19</sup>

13. The Appeals Chamber has stated that in order to determine whether an issue would significantly affect the "outcome of the trial" under article 82(1)(d) of the Rome Statute, "[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".<sup>20</sup>

## **2. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Request**

14. The Defence seeks leave to appeal the Decision regarding a myriad of questions, which can be grouped in the following sixteen "issues":

- i. Whether the violations of the procedural integrity at the preliminary stage render the Decision unlawful (the "First Issue");<sup>21</sup>
- ii. Whether the Chamber, by avoiding to decide on the Defence requests related to the submissions of the Common Legal Representative, committed a miscarriage of justice, applied a double standard, favoured the Common Legal Representative and violated the fairness of the procedure (the "Second Issue");<sup>22</sup>
- iii. Whether the Chamber attached a presumption of credibility to the Prosecution evidence, thereby reversing the burden of proof (the "Third Issue");<sup>23</sup>
- iv. Whether the Majority issued a Decision without considering the exculpatory evidence (the "Fourth Issue");<sup>24</sup>
- v. Whether the Majority could reinterpret itself the evidence by using the vague concept of "other evidence" (the "Fifth Issue");<sup>25</sup>

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<sup>19</sup> *Idem*, par. 18.

<sup>20</sup> See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 7, par. 13.

<sup>21</sup> See the Request, *supra* note 3, paras. 15-43.

<sup>22</sup> *Idem*, paras. 45-50.

<sup>23</sup> *Ibid.*, paras. 56-70.

<sup>24</sup> *Ibid.*, paras. 71-74.

<sup>25</sup> *Ibid.*, paras. 75-76.

- vi. Whether the Chamber should have declared inadmissible the evidence for which the chain of custody was not established (the "Sixth Issue");<sup>26</sup>
- vii. Whether the Majority applied an unbalanced approach towards the evidence submitted by the Defence and by the Prosecutor (the "Seventh Issue");<sup>27</sup>
- viii. Whether the Judges could interpret the facts on the basis of "other evidence" without defining the latter and could agree on the Prosecutor's position without providing any evidence to support it (the "Eighth Issue");<sup>28</sup>
- ix. Whether the Majority could add to the charges presented by the Prosecutor, use evidence not mentioned in the Document Containing the Charges, and re-characterise the Prosecutor's allegations without hearing the suspect (the "Ninth Issue");<sup>29</sup>
- x. Whether the Majority could find that there were substantial grounds to believe that Mr. Gbagbo committed the crimes on the basis of the unproven assumption that Mr. Blé Goudé is guilty (the "Tenth Issue");<sup>30</sup>
- xi. Whether the Judges could rule on the Document Containing the Charges despite the Prosecutor not answering the questions contained in the 3 June 2013 Decision (the "Eleventh Issue");<sup>31</sup>
- xii. Whether the Majority could rule on the existence of an organisation without previously addressing its constitutive elements and the applicable law (the "Twelfth Issue");<sup>32</sup>
- xiii. Whether the Majority committed an error of law in establishing the existence of a policy of a State or an organization within the meaning of article 7(2) (the "Thirteenth Issue");<sup>33</sup>
- xiv. Whether the Majority committed one or more errors of law in confirming the charges under article 7(1)(k) (the "Fourteenth Issue");<sup>34</sup>
- xv. Whether the Majority committed an error of law in confirming several modes of liability cumulatively (the "Fifteenth Issue");<sup>35</sup> and
- xvi. Whether the errors related to the different modes of liability affect the Decision (the "Sixteenth Issue").<sup>36</sup>

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<sup>26</sup> *Ibid.*, paras. 77-78.

<sup>27</sup> *Ibid.*, paras. 79-87.

<sup>28</sup> *Ibid.*, paras. 88-93.

<sup>29</sup> *Ibid.*, paras. 94-105.

<sup>30</sup> *Ibid.*, paras. 106-115.

<sup>31</sup> *Ibid.*, paras. 118-122.

<sup>32</sup> *Ibid.*, paras. 124-126.

<sup>33</sup> *Ibid.*, paras. 127-129.

<sup>34</sup> *Ibid.*, paras. 130-133.

<sup>35</sup> *Ibid.*, paras. 135-148.

<sup>36</sup> *Ibid.*, paras. 149-155.

15. The Common Legal Representative submits that the Request does not satisfy the requirements of article 82(1)(d) of the Rome Statute. The Defence neither shows the existence of “issues” which arise from the Decision, nor shows how any of these alleged “issues” significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

16. The Common Legal Representative respectfully submits that the Defence merely provides brief and superficial submissions on alleged errors of fact and law, failing to identify appealable issues and reiterating arguments already made and dismissed by the Chamber in the Decision or in prior rulings. In other words, as evidenced by the structure and wording of the Request,<sup>37</sup> and contrary to the relevant jurisprudence of the Court,<sup>38</sup> the Defence only provides details on the merits or substance of the intended appeal, without addressing in detail the requirements of article 82(1)(d) of the Rome Statute for leave to appeal to be granted. In fact, the Request even indicates that more alleged errors will be identified once leave for appeal is granted.<sup>39</sup> As a result, the Request is closer to a request for reconsideration addressed to the Chamber or an appeal filed directly before the Appeals Chamber.

### **I. The First Issue**

17. The Common Legal Representative submits that the First Issue does not arise from the Decision but eventually from prior rulings of the Chamber that were not subject to interlocutory appeal within the statutory deadline and which cannot be subject to reconsideration now. Accordingly, the First Issue is not an appealable issue under article 82(1)(d) of the Rome Statute.

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<sup>37</sup> See the Request, *supra* note 3, par. 156.

<sup>38</sup> See *supra* paras. 10-11.

<sup>39</sup> See the Request, *supra* note 3, paras. 60, 91, 101, 123, 134 and 149.

18. In particular, the sub-issues identified by the Defence within the First Issue do not arise from the Decision itself, but are the result of “*prendre en compte toute la phase préliminaire – et pas seulement l’audience de confirmation des charges stricto sensu*” and “*considérer de façon globale le comportement des parties et participants à la procédure et les réponses apportées par la Chambre aux demandes de la Défense*”.<sup>40</sup>

19. In this regard, the Common Legal Representative submits that it is not possible to consider the entire preliminary phase when seeking leave to appeal a decision under article 82(1)(d) of the Rome Statute. This provision expressly refers to a “decision” alone, as clarified by the Appeals Chamber in its seminal decision on the topic.<sup>41</sup> Otherwise, the temporal scope of article 82(1)(d) would be unlimited.

20. Moreover, the Common Legal Representative disagrees with the Defence’s use in its Request of the Single Judge’s reasoning for determining the existence of “exceptional circumstances” to grant an extension of pages under regulation 37(2) of the Regulations of the Court.<sup>42</sup> The language used in this regulation is different from that of article 82(1)(d) of the Rome Statute. Consequently, the legal standard in that provision is different and cannot be applied to argue the possibility for an interlocutory appeal.

21. The Common Legal Representative submits that under article 82(1)(d) of the Rome Statute the Defence may request leave to appeal referring only to the Decision itself. Any current challenge under the guise of article 81(2)(d) to rulings issued prior to the Decision is inadmissible. Requests for leave to appeal against prior decisions were already made by the Defence and dismissed by the Chamber or should have been made within the time limit prescribed in the Rules of Procedure and Evidence.<sup>43</sup>

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<sup>40</sup> *Idem*, paras. 13 and 16.

<sup>41</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 7, paras. 16 and 19.

<sup>42</sup> See the Request, *supra* note 3, par. 13.

<sup>43</sup> *Idem*, footnote 26.

As a result, the First Issue must be considered as a request for reconsideration of said decisions, not admissible in the current circumstances.<sup>44</sup>

22. Assuming *arguendo* the validity of the procedural approach suggested by the Defence for the Chamber to rule on the First Issue, none of the sub-issues identified in the Request arises from the Decision or significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial.

23. The Common Legal Representative submits that the first sub-issue does not arise from the Decision. The fact that the Chamber did not issue express pronouncements on all the Defence's requests concerning the actions of the Common Legal Representative does not mean that the Chamber did not consider them. In fact, the Common Legal Representative understands the Chamber's silence as an implied dismissal of the Defence complaints that the Common Legal Representative was acting as a second prosecutor or had an inappropriate behaviour. In any event, pursuant to the jurisprudence of this Chamber, leave to appeal may only be granted in respect of a "decision" rendered by the Chamber and the absence thereof cannot be equated to a "decision" within the meaning of article 82(1)(d) of the Rome Statute.<sup>45</sup>

24. The Common Legal Representative makes a similar submission regarding the second sub-issue identified by the Defence, namely the lack of legal certainty of the Chamber in its decisions on requests for leave to appeal. This issue does not arise because the Chamber explained and applied in each of said decisions the same criteria in order to be granted leave to appeal under article 82(1)(d) of the Rome

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<sup>44</sup> See the "Redacted version of the 'Response to the '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 »'", 19 February 2014, No. ICC-02/11-01/11-611-Red, paras. 15-16.

<sup>45</sup> See the "Decision on the 'Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision' filed by the Defence of Saif Al Islam Gaddafi", *supra* note 17, par. 20.

Statute, following the jurisprudence of the Appeals Chamber.<sup>46</sup> The definition of the relevant legal criteria has remained constant, but the result of the application thereof to the Defence's different requests for leave to appeal has been unavoidably different.

25. Moreover, the certainty on the legal criteria used by the Chamber to rule on requests for leave to appeal cannot be affected by the separate or dissenting opinions issued by the members of the Chamber ruling on different requests. Said opinions are the individual views of the judges in particular instances, and as such are not binding on them when they partake in the issuance of other decisions in different instances.<sup>47</sup>

26. Regarding the third sub-issue put forward by the Defence, the Common Legal Representative submits that the Defence fails to explain how the lack of a further hearing has significantly affected the fair and expeditious conduct of the proceedings. Given the lack of explanation by the Defence, leave for appeal concerning this sub-issue should not be granted.<sup>48</sup> In any event, the Common Legal Representative submits that the Chamber considered the possible impact on the rights of the Defence of the absence of an additional hearing when granting the Defence a substantial extension of 300 pages for its final submissions.<sup>49</sup>

27. Similarly, the Common Legal Representative submits that the Defence does not clarify in the fourth sub-issue which particular exonerating circumstances have not been investigated by the Prosecutor. As a consequence, this alleged issue cannot

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<sup>46</sup> See the almost *verbatim* explanation of article 82(1)(d) of the Rome Statute introduced before the analysis of the issues in respect of which the Defence requested leave to appeal in each of the decisions listed in the Request, *supra* note 3, footnote 26.

<sup>47</sup> See *e.g.* ECHR, *Başkaya and Okçuoğlu v. Turkey*, Judgment of 8 July 1999, apps. nos. 23536/94 and 24408/94, par. 39; and ECHR, *Nejdet Şahin and Perihan Şahin v. Turkey*, Judgment of 20 October 2011, app. no. 13279/05, par. 61.

<sup>48</sup> See the "Decision on the 'Demande d'autorisation d'interjeter appel de la décision de la Juge unique du 19 juin 2014 sur la « Prosecution's request to disclose material in a related proceeding pursuant to Regulation 42(2) » (ICC-02/11-01/11-659)'" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-667, 11 July 2014, par. 19.

<sup>49</sup> See the "Decision on Defence requests related to the continuation of the confirmation proceedings" (Pre-Trial Chamber I), No. ICC-02/11-01/11-619, 14 February 2014, par. 31.

be seen to affect the fairness and expeditiousness of the proceedings or the outcome of the trial. The Common Legal Representative also notes that the Defence relies upon the reference to article 54(1)(a) of the Rome Statute in the decision adjourning the confirmation hearing,<sup>50</sup> but fails to notice that the Chamber made this reference to remind the Prosecutor of her statutory obligation to extend her investigation over all facts and circumstances relevant to the assessment of criminal responsibility, not to remind her to investigate exonerating circumstances equally.<sup>51</sup>

28. Finally, the Common Legal Representative submits that the fifth sub-issue identified by the Defence, namely the inclusion of article 25(3)(b) of the Rome Statute as a mode of liability, does not arise from the Decision. The Defence fails to notice the decision whereby the Defence was not granted leave to appeal the Chamber's ruling that the Prosecutor's document containing the charges was admissible on this particular issue.<sup>52</sup> Said dismissal allowed the Chamber to consider this mode of liability as contained in the charges. Accordingly, no procedural irregularity arises from the Decision in this regard.

## II. The Second Issue

29. The Common Legal Representative submits that the Second Issue does not arise from the Decision. As argued in relation to the First Issue,<sup>53</sup> the silence of the Chamber on a request does not give rise to the possibility to ask leave to appeal a "constructive" decision on said request. Leave to appeal may only be granted in respect of a decision rendered by the Chamber. Accordingly, the alleged refusal of the Majority to rule on the Defence requests concerning the Common Legal

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<sup>50</sup> See the Request, *supra* note 3, par. 38.

<sup>51</sup> See the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute" (Pre-Trial Chamber I), No. ICC-02/11-01/11-432, 3 June 2013, par. 35.

<sup>52</sup> See the "Decision the 'Demande d'autorisation d'interjeter appel de la 'Decision on Defence requests related to the continuation of the confirmation proceedings' du 14 février 2014 (ICC-02/11-01/11-619)'" (Pre-Trial Chamber I), No. ICC-02/11-01/11-649, 12 May 2014 (dated 9 May 2014), paras. 30-31.

<sup>53</sup> See *supra* note 45.

Representative submissions is not an issue pursuant to article 82(1)(d) of the Rome Statute.

30. Even if, *arguendo*, the Second Issue arises from the Decision as argued by the Defence, the Common Legal Representative submits that it concerns a minor procedural matter which does not amount to a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.<sup>54</sup> In fact, contrary to the Defence’s contention that “la majorité des Juges s’est fondée explicitement sur un certain nombre de développements du Représentant pour prendre sa décision”,<sup>55</sup> the Decision only makes reference to said “développements du Représentant” once, in general and in a preliminary paragraph of the Decision where the Chamber states that its decision is based “on an assessment of the evidence relied upon by the Prosecutor and the Defence”.<sup>56</sup> Nowhere else in the Decision does the Chamber refer to or rely upon the submissions made by Common Legal Representative.

### III. The Third, Fourth, Fifth, Sixth and Eighth Issues

31. The Common Legal Representative submits that the Third to Sixth Issue and the Eighth Issue identified by the Defence are not appealable “issues” under article 82(1)(d) of the Rome Statute, but mere disagreements or conflicting opinions with the correctness of the Decision issued by the Chamber and, in particular, with the assessment of the evidence carried out by the Chamber.

32. Firstly, the Defence complains of the Chamber’s assessment of the evidence submitted by the Prosecutor and challenges the probative value of some documents relied upon by the Chamber,<sup>57</sup> concluding that the Decision is based on “une base fragile” and noting that the Chamber expressly states that its assessment of the

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<sup>54</sup> See “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 7, par. 9.

<sup>55</sup> See the Request, *supra* note 3, par. 49.

<sup>56</sup> See the Decision, *supra* note 1, par. 20.

<sup>57</sup> See the Request, *supra* note 3, paras. 58 and 66.

evidence is “*limited*” and impliedly presumes the credibility of the Prosecutor’s evidence.<sup>58</sup> Secondly, the Defence complains that the Chamber has not been persuaded by some evidence and arguments presented by the Defence, failing to provide explanations for its conclusions.<sup>59</sup> Thirdly, it argues that the Decision makes imprecise reference to the evidence it relies upon, excluding the evidence presented by the Defence conflicting with the findings of the Chamber.<sup>60</sup> Fourthly, the Defence claims that the Decision does not distinguish between admissible and inadmissible pieces of evidence, in spite of the fact that the Defence challenged some of them.<sup>61</sup> And lastly, the Defence argues that the Decision ignores evidence presented by the Defence and is arbitrary in favour of the Prosecutor.<sup>62</sup>

33. The Common Legal Representative submits that these submissions only disclose the Defence’s disagreement with the evidentiary analysis carried out by the Chamber in the Decision and seek to reopen the evidentiary debate conducted during the confirmation hearing.

34. Addressing sequentially each of the Defence’s submissions, firstly the Defence fails to note in its Request that the Chamber indicated expressly that “*each of [the arguments advanced by the parties and participants in their submissions] has been carefully considered as part of the Chamber’s determination*”.<sup>63</sup> Secondly, the Defence fails to mention that the Decision explains in detail and referring to evidence the reasons why the Chamber does not share the Defence’s point of view on the contested documents.<sup>64</sup> Thirdly, the Defence fails to notice that the Decision makes clear reference to the evidence, submitted by both parties, which brings the Chamber to

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<sup>58</sup> *Idem*, paras. 65 and 69-70.

<sup>59</sup> *Ibid.*, paras. 72-74.

<sup>60</sup> *Ibid.*, paras. 75-76 and 89-90.

<sup>61</sup> *Ibid.*, par. 77.

<sup>62</sup> *Ibid.*, paras. 92-93.

<sup>63</sup> See the Decision, *supra* note 1, par. 23.

<sup>64</sup> *Idem*, paras. 111-112 and corresponding footnotes.

the findings contested by the Defence.<sup>65</sup> Fourthly, the Defence fails to indicate the particular pieces of evidence which are relied upon in the Decision and should have been found inadmissible by the Chamber.<sup>66</sup> And lastly, the Defence appears to ignore the reference in the Decision to evidence supporting the findings alleged to have been made without evidentiary foundation.<sup>67</sup>

#### IV. The Seventh and Tenth Issues

35. The Common Legal Representative submits that the Seventh and Tenth issues do not amount either to appealable “issues” arising from the Decision, in the sense of article 82(1)(d) of the Rome Statute, but reflect the Defence’s disagreement with the Decision.

36. In this occasion, the Defence’s disagreement with the Decision is worded as an alleged bias of the Majority in favour of the Prosecutor’s case and a corresponding lack of objectivity.<sup>68</sup> In particular, the Defence alleges that the Decision contains statements which are contradictory, unsupported by evidence, vague, not properly worded and discretionary,<sup>69</sup> all of it to the benefit of the Prosecutor’s case.

37. The issues identified by the Defence are nothing else than further evidence of the Defence’s disagreement with the Decision. Once again, the Defence limits itself to making brief and superficial submissions on its interpretation of discrete findings of the Decision, without demonstrating that the points of disagreement are issues that

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<sup>65</sup> *Ibid.*, paras. 26-27, par. 40, footnote 88, and paras. 124-125 and corresponding footnotes.

<sup>66</sup> See the “Decision requesting observations from the parties on the schedule of the confirmation of charges hearing” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-107, 4 May 2012, par. 12; and the “Decision on the schedule for the confirmation of charges hearing and related issues” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-186, 16 July 2012, par. 19.

<sup>67</sup> See the Decision, *supra* note 1, paras. 26-27, par. 40, footnote 88, and paras. 124-125 and corresponding footnotes.

<sup>68</sup> See the Request, *supra* note 3, paras. 81 and 115.

<sup>69</sup> *Idem*, paras. 79, 80, 82-83, 86 and 109.

would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

## V. The Ninth Issue

38. The Common Legal Representative submits that the Ninth Issue is not an appealable “issue” arising from the Decision, in the sense of article 82(1)(d) of the Rome Statute, but once again a mere disagreement of the Defence with aspects of the Decision. The Defence’s disagreement concerns the scope of the findings made in the Decision. The Defence claims that the Decision contains allegations additional to those filed by the Prosecutor and relies on evidence and arguments not mentioned by the latter.<sup>70</sup>

39. The Common Legal Representative submits that the examples referred to by the Defence are not factual additions or modifications to the charges, but conclusions drawn by the Chamber from the evidence disclosed to the Defence by the Prosecutor.<sup>71</sup> Similarly, the Common Legal Representative submits that in said examples the Chamber did not legally re-characterise the charges, but interpreted the evidence disclosed to the Defence in a way different from the submissions made by the Prosecutor and the Defence. The latter fails to notice that in analysing the charges brought by the Prosecutor, the Chamber is bound by the evidence disclosed between the parties, not by the legal arguments made by the parties on said evidence (*iura novit curia*).

40. Assuming *arguendo* that the Ninth Issue arises from the Decision, the Common Legal Representative contends that it is not an appealable issue under article 82(1)(d) of the Rome Statute because the findings identified as erroneous by the Defence are not “essential for the determination of matters arising in the judicial cause under

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<sup>70</sup> *Ibid.*, paras. 98 and 105.

<sup>71</sup> The conclusions of the Chamber in paragraphs 66, 70 and 77(xii) of the Decision are based on evidence disclosed to the Defence, *inter alia* in Pre-Confirmation INCRIM packages 4, 8, 9, 16, 21 and 22.

*examination*".<sup>72</sup> The identification of particular victims as pro-Outtara, the murder of one single person in a market and the detailed identification of the pro-Gbagbo forces mentioned by the Defence are only part of the findings sustaining the confirmation of the charges by the Chamber.<sup>73</sup>

## **VI. The Eleventh, Thirteenth and Sixteenth Issues**

41. The Common Legal Representative submits that the Eleventh, Thirteenth and Sixteenth Issue are not appealable "issues" arising from the Decision, in the sense of article 82(1)(d) of the Rome Statute, but mere disagreements of the Defence with the assessment by the Chamber of the additional evidence submitted by the Prosecution pursuant to the decision adjourning the confirmation hearing, with the finding by the Chamber of the existence of the context of crimes against humanity, and with the interpretation and application by the Chamber of the modes of liability provided for in article 25(3) of the Rome Statute.

42. The Defence simply advances its views on the correct assessment of the matters addressed in the Decision, often relying on the Dissenting Opinion to the Decision.<sup>74</sup> However, the Defence fails to identify a subject requiring a decision for its resolution and how said subject may significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>75</sup>

## **VII. The Twelfth and Fourteenth Issues**

43. The Common Legal Representative submits that the Twelfth and Fourteenth Issue are not "issues" arising from the Decision but misrepresentations of the Decision in the Request.

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<sup>72</sup> See "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 7, par. 9.

<sup>73</sup> Cf. the Request, *supra* note 3, paras. 94-95 and 99, with the Decision, *supra* note 1, paras. 266-276.

<sup>74</sup> See the Request, *supra* note 3, paras. 128 and 152.

<sup>75</sup> See *supra* paras. 8-9.

44. Regarding the Twelfth Issue, the Defence states that the Judges have not motivated their decision by not identifying their understanding of the term “organization” under article 7(2) of the Rome Statute.<sup>76</sup> However, the Decision clearly indicates that the Chamber understands as applicable to the facts of the case the two interpretations of this term identified in said Decision.<sup>77</sup>

45. Regarding the Fourteenth Issue, the Defence claims that the Chamber has not analysed the relevant facts and fails to address the intention of the perpetrators when discussing the possible characterisation of their conduct as crimes of other inhumane acts under article 7(1)(k) of the Rome Statute.<sup>78</sup> However, the Decision clearly refers to the modalities in which the alleged criminal acts were performed and discusses the mental attitude of the perpetrators towards the deadly consequences of their conduct.<sup>79</sup>

### VIII. The Fifteenth Issue

46. The Common Legal Representative agrees with the Defence that the Fifteenth Issue arises from the Decision, as already anticipated by the Chamber,<sup>80</sup> but contends that this issue does not “significantly” affect the “fair and expeditious conduct of the proceedings or the “outcome of the trial”, and that its immediate resolution by the Appeals Chamber may not “materially” advance the proceedings.

47. The Common Legal Representative submits that the confirmation of multiple modes of liability in a cumulative manner does not have a “significant” effect on the rights of the Defence for the Decision to be submitted for review to the Appeals Chamber. The modes of liability confirmed by the Chamber will be addressed by the

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<sup>76</sup> See the Request, *supra* note 3, par. 125.

<sup>77</sup> See the Decision, *supra* note 1, par. 217.

<sup>78</sup> See the Request, *supra* note 3, paras. 131 and 133.

<sup>79</sup> See the Decision, *supra* note 1, paras. 198 and 201.

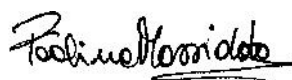
<sup>80</sup> See the “Decision the ‘Demande d’autorisation d’interjeter appel de la ‘Decision on Defence requests related to the continuation of the confirmation proceedings’ du 14 février 2014 (ICC-02/11-01/11-619)”, *supra* note 52 par. 30.

Trial Chamber, tasked with deciding on the alleged criminal responsibility of the Accused. Before the Trial Chamber, the Defence will be able to effectively challenge each mode of liability.

48. Moreover, the Common Legal Representative contends that the cumulative confirmation of different modes of liability in the Decision does not affect the fairness and expeditiousness of the proceedings as understood by the practice of the Court. Applying the test developed by the Chambers,<sup>81</sup> the Decision does not limit the Defence in protecting its interests in the proceedings and will not necessarily lead to a wrongful decision. Quite the contrary, the early notice of the different possible characterisations of the facts confirmed by the Chamber ensures that the Defence and the proceedings can be more focused hereafter.

49. In these circumstances, a resolution of the Fifteenth Issue by the Appeals Chamber will not materially advance the proceedings. Even more so considering that pursuant to regulation 55 of the Regulations of the Court, the Trial Chamber may decide at any moment during the trial to legally re-characterise the facts confirmed by the Decision. The Fifteenth Issue ignores this possibility, recognised by the Appeals Chamber.<sup>82</sup>

**FOR THE FOREGOING REASONS**, the Common Legal Representative respectfully requests the Pre-Trial Chamber to reject the Request.



**Paolina Massidda**  
**Principal Counsel**

Dated this 4<sup>th</sup> day of August 2014  
At The Hague, The Netherlands

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<sup>81</sup> See *supra* paras. 12-13.

<sup>82</sup> See the "Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons'" (Appeals Chamber), No. ICC-01/04-01/07-3363, 27 March 2013, par. 24.