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PRE-TRIAL CHAMBER I

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

SITUATION IN CÔTE D'IVOIRE

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

Public Document

Response to 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)" filed by the Defence on 24 February 2014

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I. PROCEDURAL BACKGROUND

1. On 3 June 2013, the majority of Pre-Trial Chamber I (the “Chamber”), Judge Fernández de Gurmendi dissenting,¹ issued the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Adjournment Decision”), whereby the Chamber decided to adjourn the confirmation of charges hearing and requested the Prosecution to consider providing further evidence or conducting further investigation with respect to all charges.² The Chamber also ordered the Prosecution to submit by no later than 15 November 2013 an amended document containing the charges, an amended list of evidence and an updated consolidated Element Based Chart.³

2. On 8 November 2013, the Chamber suspended the calendar established in the Adjournment Decision considering the significance of the Prosecution’s appeal against the Adjournment Decision pending at that time.⁴

3. On 16 December 2013, the Appeals Chamber dismissed the Prosecution’s appeal against the Adjournment Decision, confirming the latter.⁵

4. On 17 December 2013, the Chamber ordered the Prosecution to submit by 13 January 2014 an amended document containing the charges, an amended list of evidence and an updated consolidated Element Based Chart.⁶

¹ See the “Dissenting opinion of Judge Silvia Fernández de Gurmendi”, No. ICC-02/11-01/11-432-Anx-Corr, 6 June 2013.

² 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 (the “Adjournment Decision”), p. 22.

³ *Idem*, p. 23.

⁴ See the “Decision on the ‘Prosecution’s request pursuant to Regulation 35 for variation of time limit to file updated document containing the charges, list of evidence and consolidated elements-based chart’” (Pre-Trial Chamber I), No. ICC-02/11-01/11-557, 8 November 2013, paras. 12-13.

⁵ See the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’” (Appeals Chamber), No. ICC-02/11-01/11-572 OA5, 16 December 2013.

5. On 13 January 2014, the Prosecution filed its *Document amendé de notification des charges*, the *Inventaire amendé des éléments de preuve à charge*, and the *Tableau amendé des éléments constitutifs des crimes*.⁷ The Prosecution filed *corrigenda* for some of these documents one day later.⁸

6. On 20 January 2014, the Prosecution filed a second corrected version of the *Document amendé de notification des charges*, with footnotes (the “Amended DCC”).⁹

7. On 27 January 2014, the Single Judge rejected the Defence’s request to declare inadmissible the Amended DCC on formal grounds.¹⁰

8. On 5 February 2014, the Chamber rejected the Defence’s request for a status conference to urgently discuss a number of issues upon finding, *inter alia*, that the Defence had filed written requests dealing with most of the issues proposed for discussion at the status conference.¹¹

⁶ See the “Decision establishing a calendar for further proceedings” (Pre-Trial Chamber I), No. ICC-02/11-01/11-576, 17 December 2013, p. 6.

⁷ See the “Prosecution’s Submission of *Document amendé de notification des charges*, *l’Inventaire amendé des éléments de preuve à charge*, and *le Tableau amendé des éléments constitutifs des crimes*, and Response to issues raised by Pre-Trial Chamber I”, No. ICC-02/11-01/11-592, 13 January 2014, with eight annexes, including “Annexe 1 : Document amendé de notification des charges”, No. ICC-02/11-01/11-592-Anx1, 13 January 2014.

⁸ See the « Annexe 2 », No. ICC-02/11-01/11-592-Conf-Anx2-Corr, 14 January 2014; the « Annexe 3 », No. ICC-02/11-01/11-592-Conf-Anx3-Corr, 14 January 2014; the « Annexe 4 », No. ICC-02/11-01/11-592-Conf-Anx4-Corr, 14 January 2014; and the « Annexe 6 », No. ICC-02/11-01/11-592-Conf-Anx6-Corr, 14 January 2014.

⁹ See the « Annexe 2 - Version publique expurgée de ICC-02/11-01/11-592-Conf-Anx2-Corr2 : Document amendé de notification des charges avec notes de bas de page », No. ICC-02/11-01/11-592-Anx2-Corr2-Red, 4 February 2014 (the “Amended DCC”).

¹⁰ See the “Decision on the ‘Requête afin que le « Document amendé de notification des charges » déposé par le Procureur le 13 janvier 2014 et les documents afférents soient déclarés irrecevables et écartés par la Chambre préliminaire.’” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-595, 27 January 2014.

¹¹ See the “Decision on a Defence request for a status conference” (Pre-Trial Chamber I), No. ICC-02/11-01/11-604, 5 February 2014, paras. 9-10.

9. On 10 February 2014, in order to allow proper disposal of six Defence requests pending before the Chamber, the Single Judge suspended the time limit set out *inter alia* for the Defence to submit its observations on the Prosecutor's further evidence.¹²

10. On 14 February 2014, the Chamber issued its "Decision on Defence requests related to the continuation of the confirmation proceedings" (the "Decision"),¹³ finding *inter alia* that the Amended DCC was admissible on substantive grounds,¹⁴ and rejecting the Defence's 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.¹⁵ The Chamber also modified the number of pages for observations and responses regarding the Prosecutor's evidence. The OPCV was authorised to file up to 40 pages of final written submissions on behalf of the victims participating in the proceedings in response to the Defence's observations on the Prosecutor's evidence.¹⁶

11. On 24 February 2014, the Defence requested leave to appeal the Decision, following rule 155 of the Rules of Procedure and Evidence (the "Request").¹⁷

12. Pursuant to regulation 65 of the Regulations of the Court, the Principal Counsel of the OPCV, acting as Common Legal Representative of Victims (the "Common Legal Representative"),¹⁸ submits the following response to the Request.

¹² See the "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" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-614, 10 February 2014, paras. 2-3, referring *inter alia* 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 »", No. ICC-02/11-01/11-598-Corr-Red, 31 January 2014; and the "Demande afin que soit organisée la continuation de l'audience orale de confirmation des charges", No. ICC-02/11-01/11-599, 3 February 2014.

¹³ 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 (the "Decision").

¹⁴ *Idem*, par. 11.

¹⁵ *Ibid.*, par. 32.

¹⁶ *Ibid.*, par. 31 and p. 25.

¹⁷ See 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)", No. ICC-02/11-01/11-620, 24 February 2014 (the "Request").

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

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

13. 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”*.

14. 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.¹⁹

15. 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”*.²⁰ The Appeals Chamber has also stated that *“[o]nly an ‘issue’ may form the subject-matter of an appealable decision”*,²¹ and has defined the term “issue” as *“an identifiable subject or topic*

¹⁸ 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. See also 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.

¹⁹ 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-US-Exp, 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.

²⁰ 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 19, par. 8.

²¹ *Idem*, par. 9.

requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".²² Accordingly, the mere dispute over the correctness of a Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.²³

16. 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'".²⁴

17. Moreover, pursuant to the constant jurisprudence of the Court, "the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal",²⁵ and "[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances".²⁶

18. In this regard, since the Appeals Chamber will interfere with a discretionary decision only under limited conditions, a difference of opinion as to a Chamber's exercise of its discretion is an appealable issue only if the Chamber improperly exercised its discretion.²⁷

²² *Ibid.*

²³ 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.

²⁴ 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 19, par. 10.

²⁵ See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'" (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, par. 4. See also the "Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses'" (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, par. 20.

²⁶ See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", *supra* note 25, par. 4. See also the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, par. 7.

²⁷ See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009" (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009, par. 80. See also the "Decision on 'Defence Request for Leave to Appeal the

19. 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.²⁸

20. Consistent with this jurisprudence, this Chamber has found that applications for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s) “*by way of indicating a specific factual and/or legal error*”.²⁹ 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.

21. According to established jurisprudence, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of “fairness” must be understood as making reference to situations “*when 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*”.³⁰ In turn, “expeditiousness” must be read as “*closely linked to the concept of proceedings ‘within a*

²⁸ Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation' (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, par. 30.

²⁸ 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 19, par. 22.

²⁹ See the “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.

³⁰ See e.g. 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.

*reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned".*³¹

22. 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".³²

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

23. The Defence seeks leave to appeal the Decision regarding the following "issues":

- i. Has the Pre-Trial Chamber committed an error of law by considering that the "facts and circumstances" underlying the charges have not been amended by the Prosecutor, without explaining or giving reasons for adopting this position? (the "First Issue");³³
- ii. Has the Pre-Trial Chamber deprived its decision of any legal basis by authorising the Prosecutor to add three modes of liability in the Amended DCC on the sole basis of the "interests of justice"? (the "Second Issue");³⁴
- iii. Can the notification to the Defence of the new elements of the charges and of the new modes of liability "compensate" the lack of legal basis for the amendment of the charges, and has said notification arrived too late to satisfy the statutory requirements? (the "Third Issue");³⁵

³¹ *Idem*, par. 18.

³² 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 19, par. 13.

³³ See the Request, *supra* note 17, par. 9.1) and section 1.1 (the "First Issue").

³⁴ *Idem*, par. 9.2) and section 1.2 (the "Second Issue").

³⁵ *Ibid.*, par. 9.3) and section 1.3 (the "Third Issue").

- iv. May the judges decide on a request that is not made by means of a document formally filed as a request and that is therefore not officially part of the record of the case? (the “Fourth Issue”);³⁶
- v. May the Legal Representative of the victims enjoy a special dispensation vis-à-vis the parties, considering that she is only a participant? (the “Fifth Issue”)³⁷
- vi. May the Chamber issue an unreasoned decision broadening the scope of intervention of the participants? (the “Sixth Issue”)³⁸
- vii. May the Chamber decide on the confirmation of the charges without holding an oral hearing even when the Prosecutor has gone beyond the limits set by the judges on 3 June 2013, has amended the facts of the charges and added modes of liability? (the “Seventh Issue”)³⁹
- viii. May the Chamber refuse to hold a hearing without giving reasons for such refusal? (the “Eighth Issue”)⁴⁰

24. 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 an “issue” which could arise from the Decision and could be the subject of an interlocutory appeal, nor shows how any of the alleged “issues” would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

a. No “issue” arises from the Decision

25. The Common Legal Representative submits that the Request fails to identify any “issue” as required by article 82(1)(d) of the Rome Statute. Most arguments contained in the Request were already considered and dismissed by the Chamber in

³⁶ *Ibid.*, par. 9.4) and section 1.4 (the “Fourth Issue”).

³⁷ *Ibid.*, par. 9.4) and section 1.5 (the “Fifth Issue”).

³⁸ *Ibid.*, par. 9.4) and section 1.6 (the “Sixth Issue”).

³⁹ *Ibid.*, par. 11 and section 1.7 (the “Seventh Issue”).

⁴⁰ *Ibid.*, section 1.8 (the “Eighth Issue”).

the Decision. In fact, the Defence reiterates or makes arguments similar to those previously advanced before the Chamber concerning most of the subjects addressed in the Request, without presenting additional submissions.

26. The Defence's insistence on arguments already considered and disregarded by the Chamber resembles a request for reconsideration of the Decision, rather than a request for leave to appeal under article 82(1)(d) of the Rome Statute. In this regard, the Common Legal Representative reiterates her recent submissions that reconsideration of decisions is limited to exceptional circumstances, unlike the current one.⁴¹

27. The Common Legal Representative further submits that, at most, the Request reflects a mere disagreement of the Defence with the conclusions of the Chamber, which as such does not suffice for leave to appeal to be granted under article 82(1)(d) of the Rome Statute.⁴² The Request cannot be seen as the proper course for submissions regarding a mere dispute over the correctness of the Chamber's reasoning, and should therefore be dismissed.⁴³

28. Regarding the three "issues" mentioned by the Defence related to the part of the Decision dealing with the request to declare the Amended DCC inadmissible,⁴⁴ the Common Legal Representative contends that these issues do not actually arise from the Decision and result only from a misreading of said Decision by the Defence.

29. Firstly, the Chamber did not reject the Defence's arguments on the inadmissibility of the Amended DCC "*estimant que les « intérêts de la justice »*"

⁴¹ 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. 16-17.

⁴² See *supra* note 22.

⁴³ See *supra* note 23.

⁴⁴ See the Request, *supra* note 17, paras. 9.1), 9.2) and 9.3).

permettaient au Procureur de changer la qualification juridique des charges dans son DCC modifié".⁴⁵ The Chamber found instead that "*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 [...] 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*".⁴⁶ Accordingly, there still has not been an amendment to the charges and, consequently, the First Issue does not arise from the Decision.⁴⁷

30. Secondly, the Chamber did not base its rejection of the Defence's request to declare the Amended DCC inadmissible solely on the "interests of justice".⁴⁸ A simple reading of the Decision suffices to conclude that the Chamber considered as well "*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*".⁴⁹ Accordingly, the Second Issue does not arise from the Decision.

31. The Common Legal Representative further submits that all the arguments made by the Defence regarding the Second Issue might only be advanced before the Appeals Chamber if leave to be appeal is granted.⁵⁰ As such, said arguments do not relate to the existence of an appealable issue and must be disregarded.⁵¹

32. Thirdly, the Chamber did not reject the Defence's arguments on the inadmissibility of the Amended DCC on the basis that the filing of the Amended DCC and the disclosure of the additional evidence put the Defence on sufficient notice of the modes of liability proffered against Mr. Gbagbo. No issue of sufficiency or otherwise therefore arises.⁵² A simple reading of the Decision suffices to conclude that the Chamber considered that "*the Defence has been on notice of the facts which may*

⁴⁵ *Idem*, par. 9.

⁴⁶ See the Decision, *supra* note 13, par. 22 (emphasis added).

⁴⁷ See the Request, *supra* note 17, section 1.1.

⁴⁸ *Idem*, section 1.2.

⁴⁹ See the Decision, *supra* note 13, par. 22.

⁵⁰ See the Request, *supra* note 17, paras. 22-26.

⁵¹ See *supra* paras. 19-20.

⁵² See the Request, *supra* note 17, section 1.3.

*equally give rise to the additional modes of liability included in the Amended DCC since 17 January 2013”.*⁵³ Accordingly, the Third Issue does not arise from the Decision either.

33. Furthermore, the Common Legal Representative submits that regarding the Third Issue the Defence fails again to address the existence of an appealable issue and instead makes arguments that might only be relevant before the Appeals Chamber if leave to appeal is granted.⁵⁴ These arguments must therefore be disregarded.⁵⁵

34. Lastly, the Common Legal Representative notes that the First, Second and Third Issues are used by the Defence to merely repeat arguments dismissed in the Decision regarding the alleged application of article 61(7)(c)(ii) of the Rome Statute to the case at hand.⁵⁶ This approach justifies the direct denial of the Request concerning these three issues.⁵⁷

35. Regarding the three issues mentioned by the Defence in relation with the part of the Decision dealing with the extension of the page limit granted to the OPCV,⁵⁸ the Common Legal Representative submits that these issues do not arise from the Decision and result only from a misunderstanding of the Decision by the Defence and from the lack of a response by the Defence in due time to the e-mail request made by the OPCV.

⁵³ See the Decision, *supra* note 13, par. 23.

⁵⁴ See the Request, *supra* note 17, par. 32.

⁵⁵ See *supra* paras. 19-20.

⁵⁶ Cf. the Request, *supra* note 17, paras. 16, 22, 25 and 30-31 with 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 »”, *supra* note 12, paras. 10-11, 15-17, 25-26 and 62.

⁵⁷ See *supra* note 23.

⁵⁸ See the Request, *supra* note 17, paras. 35-36.

36. Firstly, the Decision did not decide on the e-mail request made by the OPCV, but merely “noted” said request and decided to extend the page limit of the response to be provided by the participating victims to the Defence’s observations on the Prosecutor’s evidence.⁵⁹ The Defence fails to notice that the Chamber may also extend a page limit *proprio motu*.⁶⁰ Therefore, the Fourth Issue does not arise from the Decision.

37. Secondly, the Defence could have responded to the e-mail request made by the Common Legal Representative via e-mail since the Chamber reportedly indicated that it was more “appropriate” but not compulsory for the Defence to submit a formal filing in response.⁶¹ The fact that the Defence did not make use of this possibility regarding this particular e-mail request, unlike it has done in past occasions,⁶² does not mean that the OPCV enjoyed “*un regime dérogatoire par rapport aux parties*”.⁶³ Therefore, the Fifth Issue does not arise from the Decision.

38. Thirdly, the Chamber did motivate its decision to grant the OPCV an extension of pages for its response to the Defence’s observations on the Prosecutor’s evidence, referring to the purpose “*to preserve the victims’ right to participate fully*”.⁶⁴ The Common Legal Representative submits that the arguments advanced *ex post facto* by the Defence opposing her e-mail request are a different opinion concerning the scope of intervention by victims in the proceedings. Mere statements of disagreement

⁵⁹ See the Decision, *supra* note 13, par. 31.

⁶⁰ See Regulation 37(1) of the Regulations of the Court.

⁶¹ See the Request, *supra* note 17, footnote 31.

⁶² 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 »’”, *supra* note 41, footnote 15. The Common Legal Representative sent an e-mail to the Pre-Trial Chamber on 3 February 2014 and the Defence e-mailed a response to the Pre-Trial Chamber two hours later.

⁶³ See the Request, *supra* note 17, section 1.5.

⁶⁴ See the Decision, *supra* note 13, par. 31.

do not determine *per se* the existence of an “issue”.⁶⁵ Accordingly, the Sixth Issue does not arise from the Decision either.

39. Regarding the two issues mentioned by the Defence in relation with the part of the Decision dealing with the Defence’s request that the parties’ submissions in relation to the charges be provided in the course of an oral hearing rather than in writing,⁶⁶ the Common Legal Representative submits that they do not arise from the Decision but merely represent the Defence’s efforts to litigate *ex novo* before the Appeals Chamber the motion dismissed by the Chamber.

40. The Chamber did not base its rejection of the Defence’s request to hold a further oral hearing on the fact that the parties and participants had the possibility to present their arguments “*in full*” during the hearing conducted in February 2013 and that a “*new*” confirmation process was unnecessary.⁶⁷ A simple reading of the Decision suffices to conclude that the Chamber considered “*the thorough and substantive discussion that has taken place at the hearing already held*” and the extension of pages granted to the parties to “*address fully all relevant aspects they intend to raise*”.⁶⁸ All in all, the Defence makes again general statements of disagreement with the Decision, thereby failing to identify any appealable issue.⁶⁹ Accordingly, the Seventh and Eighth Issues do not arise from the Decision.

41. Furthermore, the Common Legal Representative submits that regarding the Seventh and Eighth Issues the Defence fails again to address the existence of an appealable issue and instead makes arguments that might only be relevant before the

⁶⁵ See *supra* note 22. See also the “Decision on three applications for leave to appeal”, *supra* note 29, par. 76.

⁶⁶ See the Request, *supra* note 17, paras. 37-47.

⁶⁷ *Idem*, paras. 43-44.

⁶⁸ See the Decision, *supra* note 13, par. 22.

⁶⁹ See *supra* note 65.

Appeals Chamber if leave to appeal is granted.⁷⁰ These arguments must therefore be disregarded.⁷¹

42. Lastly, the Common Legal Representative notes that, in a pleading similar to that made for the First, Second and Third Issues,⁷² the Seventh and Eighth Issues are used by the Defence to merely repeat arguments dismissed in the Decision regarding the alleged convenience to hold a further oral hearing.⁷³ This approach justifies the direct denial of the Request concerning both issues.⁷⁴

b. The “issues” mentioned by the Defence do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial

43. If the Chamber were to find that the “issues” mentioned by the Defence arise from the Decision, the Common Legal Representative submits that none of these issues has an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial, as required by article 82(1)(d) of the Rome Statute.

44. Regarding the First, Second and Third Issues, the Common Legal Representative contends that they do not affect the fairness of the proceedings. Accepting *arguendo* that the Chamber allowed an actual amendment to the charges under article 61(7)(c)(ii) of the Rome Statute,⁷⁵ said amendment is motivated and does not place the Defence at a substantial disadvantage vis-à-vis the Prosecution.

45. Contrary to the Defence’s arguments, the Chamber explained the reasons for declaring admissible the Amended DCC. In particular, the Chamber found that the changes in the incidents underlying the contextual elements of the crimes against humanity alleged in the Amended DCC did not exceed the facts and circumstances

⁷⁰ See the Request, *supra* note 17, paras. 39, 43 and 47.

⁷¹ See *supra* paras. 19-20.

⁷² See *supra* note 56.

⁷³ Cf. the Request, *supra* note 17, par. 40 with the “Demande afin que soit organisée la continuation de l’audience orale de confirmation des charges”, *supra* note 12, paras. 2 and 51.

⁷⁴ See *supra* note 23.

⁷⁵ See the Request, *supra* note 17, paras. 15-16, 22-25 and 27-29.

of the case because the “*factual parameters*” of the contextual elements in the Amended DCC remain unchanged vis-à-vis those pleaded in the original DCC.⁷⁶ As evidenced by the Defence’s questions, this finding could have been expressed in a clearer manner, but the Common Legal Representative submits that it is nonetheless a reasoned finding.

46. Moreover, the Defence fails to notice that the only member of the bench who considered the addition of new incidents related to the contextual elements of crimes against humanity to be an amendment to the facts and circumstances of the charges, did not find the amendment to be unfair to the Defence because the latter has been given adequate notice and time to respond to the allegedly amended charges.⁷⁷

47. The Common Legal Representative further submits that the First, Second and Third Issues do not have an impact on the expeditiousness of the proceedings either. Contrary to the Defence’s contention, the Chamber put the Defence on notice of the alleged amendment of the charges as soon as possible,⁷⁸ and did so in order to prevent undue delays in the future.⁷⁹

48. Lastly, the First, Second and Third Issues do not “significantly” affect the outcome of the proceedings, as required by article 82(1)(d) of the Rome Statute. As noted by the Chamber,⁸⁰ further amendments to the facts and modifications to their legal characterisation may still be triggered later on by the very Chamber, the Prosecutor or even by the Trial Chamber if the charges are confirmed.

49. Regarding the Fourth, Fifth and Sixth Issues, the Common Legal Representative contends that they do not affect the fairness of the proceedings.

⁷⁶ See the Decision, *supra* note 13, par. 16.

⁷⁷ See the “Separate Opinion of Judge Christine Van den Wyngaert” (Pre-Trial Chamber I), No. ICC-02/11-01/11-619-Anx, 14 February 2014, par. 2.

⁷⁸ See the Decision, *supra* note 13, par. 21.

⁷⁹ *Idem*, par. 22.

⁸⁰ See the Decision, *supra* note 13, paras. 20-21.

Accepting *arguendo* that the Chamber afforded participating victims the allegedly special treatment without providing sufficient reasons,⁸¹ the Defence equally enjoys and has made use of the possibility to file and respond to different types of requests via e-mail instead of using a document formally filed with the Registry.⁸² No distinction in this regard has been made by the Chamber between the Defence and the participating victims.

50. Moreover, the Defence fails to notice that the Decision is actually not the reason of the alleged unfairness. In order not to prejudice Mr. Gbgabo's right to be tried without undue delay, the Defence should have replied to the e-mail request made by the Common Legal Representative or filed a response thereto if it considered that the Common Legal Representative's request for an extension of pages was not sufficiently motivated (*nemo turpitudinem suam allegans auditur*).

51. In fact, the Request must be denied simply because the Defence has not alleged the improper exercise by the Chamber of its discretion when deciding to extend the page limit pursuant to regulation 37 of the Regulations of the Court.⁸³ The Defence has instead challenged the reasons argued by the Common Legal Representative in her e-mail request.⁸⁴

52. The Common Legal Representative further submits that the Fourth, Fifth and Sixth Issues do not affect the expeditiousness of the proceedings either. In fact, the Common Legal Representative indicated in her e-mail request that the reason for not filing a formal submission requesting the extension of the page limit was to expedite the proceedings, considering that the Single Judge had just issued a decision suspending the time limits and had indicated that a decision addressing the different

⁸¹ See the Request, *supra* note 17, paras. 35-36.

⁸² See *supra* note 62.

⁸³ See *supra* note 27.

⁸⁴ See the Request, *supra* note 17, par. 36.

Defence requests pending at the time would be issued shortly.⁸⁵ The disposal of this issue in the Decision can only be seen as a measure to expedite the proceedings.

53. Lastly, the Fourth, Fifth and Sixth Issues do not affect the outcome of the case. As clarified by the Chamber,⁸⁶ the Defence still enjoys two weeks to submit final written submissions in response to the victims' observations, regardless of whether the Common Legal Representative devotes the twenty additional pages to "*analyser la preuve du procureur et à répondre aux soumissions écrites de la défense portant sur cette preuve*".⁸⁷

54. Finally, regarding the Seventh and Eighth Issues, the Common Legal Representative contends that they do not affect the fairness of the proceedings. Accepting *arguendo* that the refusal to hold a further oral hearing is based on the allegedly misguided consideration that the charges have not been amended in the Amended DCC,⁸⁸ the lack of oral arguments concerning the Amended DCC does not mean that the Defence will not be provided with a genuine opportunity to present its case. In fact, Pre-Trial Chamber II has recently found that "[a] *written procedure* [for the confirmation of charges] *cannot be held per se as 'unfair', or 'less fair' than the oral proceedings, in particular when all requirements of publicity and equality of arms are duly respected*".⁸⁹

55. Moreover, the Decision is sufficiently motivated in this regard,⁹⁰ and places the Defence in equal conditions to comment on the observations and evidence submitted to the Chamber that might influence the eventual decision pursuant to article 61(7) of the Rome Statute.

⁸⁵ See the "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", *supra* note 12, par. 3.

⁸⁶ See the Decision, *supra* note 13, par. 25.

⁸⁷ See the Request, *supra* note 17, par. 36.

⁸⁸ *Idem*, paras. 45-47.

⁸⁹ See the "Decision on the 'Requête en autorisation d'appel (art. 82.1.d)' submitted by the Defence for Mr Mangenda" (Pre-Trial Chamber II), 14 January 2014, p. 6.

⁹⁰ See the Decision, *supra* note 13, paras. 30-32.

56. The Common Legal Representative further submits that the Seventh and Eighth Issues do not affect the expeditiousness of the proceedings either. To the contrary, proceeding in writing with the confirmation hearing is more likely to accelerate the proceedings, thereby satisfying Mr. Gbagbo's right under article 67(1)(c) to be tried without undue delay.

57. Lastly, the Seventh and Eighth Issues do not affect the outcome of the proceedings. The additional time and pages granted by the Chamber to file written submissions mean that the only difference with holding a further oral hearing is that the Chamber will receive the parties and participants' arguments in writing rather than orally.

58. Since none of the eight issues mentioned in the Request affect the fair and expeditious conduct of the proceedings or the outcome of the trial, it is unnecessary to consider whether an immediate resolution by the Appeals Chamber on any of these issues may materially advance the proceedings.⁹¹

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber to reject the Request *in limine*, or, in the alternative, to reject the Request as unfounded.



Paolina Massidda
Principal Counsel

Dated this 27th day of February 2014

At The Hague, The Netherlands

⁹¹ See the "Decision on the Defence Request for Leave to Appeal the Decision Rejecting the Postponement of the Rule 118(3) Hearing" (Pre-Trial Chamber I), No. ICC-02/11-01/11-530, 8 October 2013, par. 42.