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Date: **2 October 2013**

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
 Judge Sang-Hyun Song
 Judge Akua Kuenyehia
 Judge Erkki Kouroula
 Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public Document

**Defence Response to the Observations submitted by the Legal Representative of
 Victims on the Prosecutor's Appeal against Pre-Trial Chamber I's *Decision*
adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i)
of the Rome Statute(ICC-02/11-01/11-432)**

Source: Defence team for President Gbagbo

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

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I. Procedural background

1. The Defence refers to the procedural background provided in its Response of 21 August 2013 to the Legal Representative of Victims' request to participate in the present appeal.¹

II. Discussion

2. (1) In the main, the Defence requests the Appeals Chamber to find the Legal Representative's observations inadmissible. (2) In the alternative, the Defence requests the Appeals Chamber to find that the Legal Representative's observations fall outside the authorised legal scope, and to dismiss them. (3) In the further alternative, the Defence requests the Appeals Chamber to find that the Legal Representative's observations have no legal basis and to dismiss them accordingly.

1. In the main: on the admissibility of the Legal Representative's observations

1.1 Applicable law

3. Regulation 36 of the Regulations of the Court provides that, "An average page shall not exceed 300 words".

4. Regulation 37 of the Regulations of the Court provides that, "(1). A document filed with the Registry shall not exceed 20 pages [...]. (2) The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances".

5. Pursuant to regulations 36 and 37 of the Regulations of the Court, a twenty-page document must therefore have six thousand words at most.

1.2 Application in the present case

6. The "Observations" filed by the Legal Representative on 27 September 2013² do not respect the requirements of regulations 36 and 37 of the Regulations of the Court. Indeed, the twenty-page document consists of seven thousand seven hundred and thirty-eight words, or

¹ICC-02/11-01/11-487.

one thousand seven hundred and thirty-eight words too many.

7. The Legal Representative should have requested leave from the Chamber to file a document of more pages and/or words than provided for in the Regulations. She did not do so.

8. Accordingly, the Defence respectfully requests the Appeals Chamber to declare the Legal Representative's observations of 27 September 2013 inadmissible.

2. In the alternative: the Legal Representative's observations fall outside the scope established by the Statute and the Appeals Chamber in order to restrict the imbalance detrimental to a party resulting from the intervention of the victims

9. The Defence would first draw the Chamber's attention to the fact that, once again, the Legal Representative's observations – by their general character and content far removed from any concerns relating directly to the victims, and the fact that they are constructed solely in terms of the support she can provide the Prosecutor – have led her to act as an auxiliary Prosecutor, resulting in an imbalance, detrimental to the Defence and calling into question the fairness of the proceedings. All the fears the Defence has expressed in the past are here confirmed. The Legal Representative's observations, (2.1) far from pertaining to the "personal interests" of the victims, (2.2) illustrate her desire to turn herself into a second prosecutor; (2.3) the Legal Representative even goes beyond the Prosecutor in how she addressees the points raised by the Prosecutor in her appeal document.

2.1 The Legal Representative's observations do not concern the "personal interests" of the victims

10. In its submissions on the victims' application for participation, the Defence expressed concern regarding the risk to the fairness of proceedings and therefore to the fairness of the trial engendered by an intervention by the victims which exceeds the terms – contemplated by article 68(3) of the Statute³ – mere "views and concerns" based on the "personal interest" of the victims. It follows from this article, from the spirit and the letter of the Statute, and from jurisprudence, that the Legal Representative's role cannot be to present her opinions on the applicable law but only to present observations when the personal interest of one or more of

² ICC-02/11-01/11-513.

³ ICC-02/11-01/11-487.

the victims she represents is involved.⁴ Discussing the entire proceedings and examining every legal question at issue like a party is not the role of the Representative.

11. In its Decision of 29 August 2013 authorising the participation of the victims, the Appeals Chamber recalled the limited nature of this participation and unambiguously stated that “[t]he victims may participate in the present appeal by making written submissions *limited to their views and concerns with respect to their personal interests* in the issues raised in this appeal”.⁵

12. However, at no point in her observations did the Legal Representative express any defined “personal interest”; at no point did she explain how her “observations” are relevant to the presumed “personal interests” of the victims whom she represents. The Legal Representative’s observations are merely abstract considerations on the applicable law, which are indistinguishable from any document that might, for example, be filed by an amicus curiae. These “observations” therefore clearly far exceed the designated scope, in particular, by the Appeals Chamber. In this respect, they should be dismissed.

2.2 The Legal Representative’s observations seek only to lend support to the Prosecutor’s appeal

13. It appears that the real purpose of the Legal Representative of Victims is merely to bolster the Prosecutor by lending support to her arguments. Moreover, she does so quite explicitly: “The Common Legal Representative fully supports the Prosecution’s appeal and its line of reasoning in identifying the two grounds of appeal put before the Appeals Chamber and how they relate to the issue at hand. Accordingly, the Common Legal Representative fully endorses the arguments of the Prosecution and she will not repeat said argumentation”.⁶

14. This is why the Legal Representative returns, in varying degrees of detail, to most of the points raised by the Prosecutor, in order to accord them greater weight by repeating them, or sometimes by approaching them differently. It is interesting to note that the Legal Representative’s submissions become more extensive when the Prosecutor appears to be in difficulty.

⁴ ICC-02/11-01/11-487, para. 71.

⁵ ICC-02/11-01/11-492, para. 11 (emphasis added).

⁶ ICC-02/11-01/11-513, para.6.

15. The Legal Representative's approach is consonant with her *modus operandi* here which leads her to act systematically as a second prosecutor, intervening particularly to lend support to the Prosecutor when she is in difficulty.⁷ In so doing, she disrupts the balance of the proceedings to the disadvantage of the Defence which undermines the fairness of the proceedings.

16. The Legal Representative's reassurances to the Appeals Chamber of her compliance with the texts and the letter of the decision authorising her intervention in the proceedings⁸ cannot conceal this simple observation: since the commencement of the proceedings, the Defence has had to fight on two fronts in every legal discussion.

2.3 The considerations of the Legal Representative even go beyond the Prosecutor's arguments in its appeal document and exceed the scope of its analysis

17. The Defence notes that the Legal Representative's arguments largely exceed the scope of the Prosecutor's analysis as set out in its appeal document. Thus, both the arguments of the Legal Representative on the assumed role of the Accused in the commission of the acts falling under the alleged contextual elements of the crimes against humanity,⁹ and her tendentious analysis of the previous decisions of the Court on how the Chambers deal with reports by NGOs or UN agencies¹⁰ are points not addressed by the Prosecutor and constitute fresh arguments she did not use. The approach chosen by the Legal Representative poses problems in several respects.

18. First, such a commitment to the side of the Prosecutor shows, if proof were needed, that the Defence is indeed confronted by not one, but two adversaries at every stage of the proceedings. It is clear that the delicate balance between the Prosecution and the Defence cannot be maintained under these conditions. The principle of equality of arms is thus breached and respect for the rights of the Defence is not assured.

19. Second, such an approach places the Defence in a delicate position: whereas it has ten days to respond to an appeal by the Prosecution,¹¹ that is, to discuss the arguments presented

⁷ ICC-02/11-01/11-488, paras. 59-61.

⁸ ICC-02/11-01/11-460, para. 38.

⁹ ICC-02/11-01/11-513, paras. 12-13.

¹⁰ ICC-02/11-01/11-513, paras. 32 *et seq.*

¹¹ Regulation 65(5) of the Regulations of the Court.

by the other party during the proceedings, it finds itself systematically, as here, under formal notice to respond in five days to a completely new submission from the Legal Representative. By allowing the participants to express their views, the drafters of the Statute did not intend to allow them to lead the discussions, as would a party. The drafters envisioned that the participants should be permitted to express their views only on an exceptional basis, on specific points, as demonstrated by the rationale behind the time limits for response accorded to each of the protagonists in the proceedings.

20. Third, the fact that the Representative has developed a new line of reasoning and fresh arguments would, were the Chamber to follow it, *de facto* create a right of appeal for the victims, a right in no manner whatsoever envisaged by the Statute. If the appellant party does not present a line of argument sufficiently well-founded to persuade the Judges, they should not permit a participant, in this instance the Legal Representative, to address the shortcomings in the arguments and thus take the place of the party which has failed to make its case convincingly. The Appeals Chamber cannot allow the Legal Representative, under the guise of “observations”, to present what clearly constitutes her own appeal document, whose purpose is to compensate for the inadequacies of the Prosecutor’s appeal document, thereby circumventing the procedure envisaged by the Rome Statute.

21. The Defence therefore respectfully requests the Appeals Chamber not to take the Legal Representative’s observations into consideration, since these observations exceed the legal scope defined by the Statute and jurisprudence:

- 1) These observations bear no relation to the existence of possible “personal interests” of the victims;
- 2) They demonstrate the Legal Representative’s wish to act as a second prosecutor;
- 3) They go beyond the scope of the discussion initiated by the Prosecutor in her appeal document.

3. In the further alternative: comments on the content of the Legal Representative’s observations

22. If, in the unusual event that the Appeals Chamber considered it necessary to take into account the Legal Representative’s observations, the Defence would make the following comments on the Legal Representative’s arguments in relation to (3.1) the Prosecutor’s first ground of appeal and (3.2) the Prosecutor’s second ground of appeal.

3.1 On the Legal Representative's observations concerning the Prosecutor's first ground of appeal

23. The Legal Representative's choice to be guided by the Prosecutor and to support her arguments has led the Legal Representative to commit the same errors in interpreting the adjournment decision as she did. According to the Legal Representative – and this is the core of her argument – the Pre-Trial Chamber erred “in considering an ‘*attack*’ as encompassing a certain number of ‘*incidents*’, rather than a ‘*course of conduct involving a multiple commission of acts*’”, as established by article 7(2)(a) of the Rome Statute”.¹²

24. The Pre-Trial Chamber could not have committed such an error, since, in its decision on adjournment, it did not examine whether the *legal* criteria for establishing an “attack” as a contextual element of crimes against humanity were verified here¹³ or discuss these criteria. In fact, such a discussion would arise from a definitive decision on the charges and not from a decision on adjournment as in the present case.¹⁴ The Chamber merely observed that the Prosecutor herself relied on the alleged existence of a number of incidents to attempt to justify her argument. The Chamber drew the logical conclusion: it was incumbent on the Prosecution to prove that the incidents in fact took place in the manner in which the Prosecutor claimed that they did.¹⁵

25. This misunderstanding of the Pre-Trial Chamber's decision led the Legal Representative to advance arguments on the legal definition of the contextual element of crimes against humanity which are of no relevance to this appeal.

26. In the same way, the semantic argument developed by the Legal Representative in her discussions further to the Prosecution's submissions¹⁶ on the use of the term “incident” and the term “acts”, seeks merely to divert the Appeals Chamber from the true issue at stake in the present appeal, namely: “Must the Prosecutor provide evidence in support of its factual allegations in order to have a factual basis on which it could then build its legal case? In other words, must it make a real effort to persuade the Bench or merely make unsubstantiated assertions? In this regard, it seems clear that insofar as the Chamber considered that Prosecutor had not provided sufficient evidence to demonstrate the existence of “incidents”

¹² ICC-02/11-01/11-513, para. 8.

¹³ ICC-02/11-01/11-509, para. 62.

¹⁴ ICC-02/11-01/11-509, para. 61.

¹⁵ ICC-02/11-01/11-509, paras. 63-64.

¹⁶ ICC-02/11-01/11-513, para. 19.

which would in its view illustrate that a widespread or systematic attack had in fact occurred, it held that the Prosecutor had not provided evidence that “acts” which would constitute the crime against humanity had taken place.¹⁷

27. The Legal Representative’s wish to support the Prosecution’s position, reaffirmed at every stage of her reasoning, led her to formulate and introduce into discussions factors not put forward by either the Prosecution or the Defence and which do not flow from the decision on adjournment. She thus initiated a discussion on the definition of war crimes which is not related to the issue under appeal.¹⁸

28. In the same way, the Legal Representative developed arguments relating to the alleged role of the Accused in the “attack”,¹⁹ as if the Pre-Trial Chamber had required proof of a link between the Accused and the events which might constitute the contextual elements of the crime against humanity. However, much to the contrary, the Pre-Trial Chamber clearly stated that “[t]he crimes which are alleged to prove the suspect’s individual criminal responsibility must be linked to the suspect personally, whereas incidents proving the contextual circumstances do not require such an individualised link”.²⁰ Then why did the Legal Representative follow such a line of reasoning?

29. Reading her observations gives the impression that the Legal Representative has tried to make the Chamber say what it did not about the alleged link that must be proven between the Accused and the contextual element of crimes against humanity in order to draw a conclusion which would support the Legal Representative’s reasoning concerning evidence; for the Legal Representative, it involves “demonstrating” *a contrario* that in terms of proof, the contextual element of crimes against humanity need not be established as rigorously as the individual criminal responsibility of the Accused:

Responsibility for a crime against humanity arises instead where a person’s participation in at least one of the acts included said attack is demonstrated. Accordingly, the drafters did not wish to impose the highest level of scrutiny when considering the contextual element of crimes against humanity. Had the drafters wished to establish a high level of scrutiny in this regard, they would have required demonstrating the suspect’s involvement in the implementation of all aspects of the widespread or systematic attack, including the implementation of the policy supporting said attack. However, they distinctly rejected requiring the proof of this level of participation.²¹

¹⁷ ICC-02/11-01/11-509, paras. 68-73.

¹⁸ ICC-02/11-01/11-513, para. 9.

¹⁹ ICC-02/11-01/11-513, paras. 12-13.

²⁰ ICC-02/11-01/11-432, para. 22.

²¹ ICC-02/11-01/11-513, para. 13.

30 In making this argument, the Legal Representative makes a leap of logic with problematic consequences: why would the fact that there is no need to prove a link between the contextual element and the Accused necessarily mean that the Chamber must conduct a superficial and not particularly rigorous examination of the existence of the contextual element of the crime against humanity? How could such an observation – which, it should be recalled, is absent in the Pre-Trial Chamber’s decision – mean that the Chamber does not have to consider with the “highest level of scrutiny” the very existence of the contextual element? These are two different issues arising from two different levels of reflection: (1) a legal standpoint, where the Accused’s behaviour would allow his role to be determined within the framework of the contextual elements of the crime against humanity and would therefore constitute a relevant legal criterion; and (2) an evidentiary standpoint, in the context of which the issue of the content and soundness of the proof that the attack took place must be discussed. The present Appeal falls under this second standpoint.

31. Furthermore, the Legal Representative addresses the issue of the link between the Accused and the contextual elements backwards. It is because the existence of a “widespread or systematic attack” is an absolute prerequisite for establishing an individual’s criminal responsibility that it must be proved according to the same standard applicable to all other aspects of individual criminal responsibility (*actus reus* and *mens rea*). This is precisely what the Pre-Trial Chamber recalled when it stated: “Taking into consideration that contextual elements form part of the substantive merits of the case, the Chamber sees no reason to apply a more lenient standard in relation to the incidents purportedly constituting the contextual element of an “attack” for the purposes of establishing the existence of crimes against humanity than the standard applied in relation to other alleged facts and circumstances in the case”.²²

32. Lastly, the Defence notes that despite her wish to provide systematic support to the Prosecutor by agreeing fully with her at every stage of her submission, in her argument, the Legal Representative failed to elaborate on the issue of the link between the individual incidents/acts and the widespread or systematic attack revealing, in fact, that the Chamber’s interpretation is sound and beyond discussion. In support of her argument, the Legal Representative cites the following excerpt from an ICTY Decision: “[a]s long as there is a link with the widespread or systematic attack against a civilian population, a single act could

²² ICC-02/11-01/11-513, para. 16.

qualify as a crime against humanity”.²³ However, in its decision on adjournment, did the Pre-Trial Chamber state anything else when it required that the Prosecutor establish a link between the perpetrators of the acts and State or organisational policy, within the meaning of article 7(2)? Without seeming to realise it, the Legal Representative’s argument is consistent with the Chamber’s reasoning and expresses disagreement with the Prosecutor.

33. In sum, the Legal Representative’s arguments on the first ground of appeal (1) constitute in part a repetition of the Prosecutor’s arguments and contain the same errors; (2) introduce new discussion points and issues not relevant in the context of the present appeal; (3) do not succeed in forming a sufficiently strong argumentative structure to challenge the Pre-Trial Chamber’s reasoning and even reinforce the Pre-Trial Chamber’s reasoning when view from a certain angle.

3.2 The observations of the Legal Representative regarding the Prosecutor’s second ground of appeal

34. The Legal Representative’s observations here concern two points raised in the Prosecutor’s appeal: first, the degree of progress in its investigation (the Prosecutor claims that the Pre-Trial Chamber required it to largely complete its investigation at the confirmation of charges stage and penalised it for failing to do so) and, on the issue of the compelling nature of the evidence presented (must the Prosecutor present sufficiently probative evidence to gain the support of the Chamber, even briefly, or is unsubstantiated “evidence” sufficient? At issue is the “best evidence”); second, the fact that the Pre-Trial Chamber exhibited a “general disposition towards certain types of evidence”.

35. Before responding to arguments raised by the Legal Representative, the Defence recalls that the Prosecutor’s second ground of appeal to the Appeals Chamber falls outside the scope defined by the Pre-Trial Chamber in its decision for leave to appeal.²⁴ Whereas the Judges unequivocally excluded the matter of the standard of proof applicable to the confirmation of charges hearing from the issues which the Prosecutor was authorised to raise on appeal, the Prosecutor has nonetheless attempted to reintroduce the issue by alleging a non-existent nexus between this matter and the “issue” for which leave to appeal was granted.

²³ ICC-02/11-01/11-513, para. 16.

²⁴ ICC-02/11-01/11-509, paras. 24-33.

Accordingly, the Defence notes that all the Legal Representative's observations on this point should be disregarded completely.

3.2.1 The Legal Representative claims that the Pre-Trial Chamber required the Prosecutor to have largely completed her investigation at the stage of the confirmation of charges and presented her best evidence

36. The Legal Representative argues that the Pre-Trial Chamber erred "in deciding that the Prosecutor has to present her strongest possible case based on a largely completed investigation and, that it is necessary to present all her evidence in order to meet the evidentiary threshold for the confirmation of the charges."²⁵ Two comments on this argument are necessary.

37. First, it is wrong to assert that the Chamber considered that the Prosecutor had "to present all her evidence in order to meet the evidentiary threshold for the confirmation of the charges".²⁶ This interpretation stems from a misinterpretation of the decision. The meaning of paragraph 37 of the decision on adjournment referred to by the Legal Representative is different:

Although the Chamber is not prepared to accept allegations proven solely through anonymous hearsay in documentary evidence, the Chamber notes that past jurisprudence, which predates the abovementioned decisions of the Appeals Chamber, may have appeared more forgiving in this regard. Therefore, the Prosecutor in this case may not have deemed it necessary to present all her evidence or largely complete her investigation, following all relevant incriminating and exonerating lines of investigation in order to establish the truth.²⁷

It is evident here that although the Pre-Trial Chamber first noted the absence of any probative evidence from the Prosecutor to support her allegations, it raised the issue of the state of the investigation only to save the Prosecution from having the charges dismissed. In other words, these are two different stages of the Judges' reasoning: contrary to the Legal Representative's claims, at no time did the judges consider that *because* the Prosecutor did not complete her investigation or present the best evidence, the standard of proof was not met.

38. Second, it is important to recall that the real question in fact is whether or not the Prosecutor's case was persuasive, that is whether or not it was based on probative evidence. The Pre-Trial Chamber considered that the Prosecutor did not present any persuasive evidence to support her case. It should have drawn the conclusion therefrom and dismissed the charges. Indeed, it is interesting to note the logical contradiction in the Prosecutor's

²⁵ ICC-02/11-01/11-513, para. 25.

²⁶ ICC-02/11-01/11-513, para. 25.

²⁷ ICC-02/11-01/11-432, para. 37.

reasoning, followed by the Legal Representative: if the Prosecutor can conduct investigations in a manner she considers most appropriate, if she has the discretion to organise her evidence as she wishes, and if she considered that the evidence she presented to the Judges was persuasive, why does she not draw the consequences of this discretion and not acknowledge that the Chamber has the right to adjudge the relevance of her approach and the persuasive or unpersuasive nature of the evidence presented? In fact, the Prosecutor, followed by the Legal Representative, is attempting to sanction a form of irresponsibility; she rejects any criticism of her work by the Judges and in particular refuses to grant them the opportunity to validate or not validate her approach and adjudge the evidence she presented in support of her case. The Prosecutor is attempting to avoid the consequences of her failure to persuade them. It is worth noting that any demonstration of irresponsibility always comes at the expense of others. In this instance, the absolute lack of responsibility the Prosecutor is seeking comes at the expense of the Judges of the Pre-Trial Chamber, whose presence becomes insignificant and at the expense of the spirit of the Statute; and the partial irresponsibility accorded to the Prosecutor by the Judges of the Pre-Trial Chamber by their refusal to draw the logical consequences of her failure by refusing to dismiss the charges comes at President Gbagbo's expense.

3.2.2 *The Legal Representative's submissions wherein she considers that the Pre-Trial Chamber adopted a rigid approach concerning the value to attach to certain types of evidence*

39. The Legal Representative considers that the Pre-Trial Chamber erred 'in expressing its general disposition towards certain types of evidence', and announcing its preference for some types of evidence over others".²⁸ In an attempt to persuade, she refers to a number of decisions, both of the ICC and of the ad hoc tribunals whereby the Chambers accepted evidence based on reports from NGO's and UN agencies.²⁹

40. First, it should be noted once more³⁰ that in her desire to support the Prosecutor at any cost, the argument raised here by the Legal Representative has no connection to the Prosecutor's argument, as the Prosecutor did not rely on any jurisprudence of the Court concerning evidence to allege that the Pre-Trial Chamber had erred. The Appeals Chamber cannot substitute a new argument, that of the victims, for the appellant's, that is, the Prosecutor's. It is the appellant who, by the way he or she addresses the issue, provides the

²⁸ ICC-02/11-01/11-513, para. 30.

²⁹ ICC-02/11-01/11-513, paras. 32-40.

³⁰ Supra, section 2.3.

framework of the appeal, since the participants – especially the victims, who must show that a personal interest is at stake – cannot at their convenience transform the appeal hearing.

41. Second, the Defence recalls that the Pre-Trial Chamber's findings did not exclude a priori, any type of evidence, in particular, documentary evidence.³¹ The Judges simply recalled that it is always desirable to have direct evidence, which is more relevant than indirect evidence (hearsay), particularly, when the factual allegations, as is the case here, are essentially based on hearsay. In its written submissions during the confirmation of charges hearing and in its response to the Prosecution Appeal Brief, the Defence demonstrated that, absent any investigation, the Prosecution relied almost exclusively on uncorroborated second hand sources. The Prosecutor's submissions are based almost exclusively on this type of evidence regarding the existence and sequence of the incidents which she presented as illustrative of the existence of an "attack" within the meaning of article 7(2) of the Statute.³² In this regard, the Legal Representative adds nothing to the Prosecution argument based – let us remember – on the confusion between the form of the evidence (oral or documentary) and the substance of the evidence (direct or hearsay).³³ It should simply be noted that the Legal Representative here seems implicitly to be endorsing the Prosecutor's approach.

42. To invite the belief that the Judges of the Pre-Trial Chamber sought to dismiss the documentary evidence, the Legal Representative cites a long list of decisions whereby the Chambers took into account documentary evidence at the confirmation of charges stage. It is very interesting to read the decisions mentioned by the Legal Representative since it then seems that the Pre-Trial Chamber in this case did nothing more than concur with a standard practice of the Court: all the Chambers commenced their decisions with considerations of the probative value of certain types of evidence and all judiciously determined that hearsay and anonymous evidence must be given a lesser probative value.

43. Furthermore, in *Katanga and Chui*, the Pre-Trial Chamber stated that:

As previously indicated in the sub-section 'Items related to the deceased prosecution source referred to as Witness 167', the Chamber recalls that "as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence." The Chamber therefore decides that information based on anonymous hearsay within an item of evidence could affect the probative value of those portions of the evidence which are based only on anonymous hearsay. The Chamber reiterates that it will exercise caution in using such evidence in order to affirm or reject any assertion made by the Prosecution. Thus, in coming to its conclusions, the Chamber will not rely solely on anonymous hearsay evidence.³⁴

³¹ ICC-02/11-01/11-509, para. 118.

³² ICC-02/11-01/11-509-Anx.

³³ ICC-02/11-01/11-509, paras. 104-111.

³⁴ ICC-01/04-01/07-717, paras. 138-140.

44. In Bemba, the Pre-Trial Chamber held that:

As a general rule, a lower probative value will be attached to indirect evidence than to direct evidence. The Chamber does not disregard it, but is cautious in using it to support its findings. The Chamber highlights that, although indirect evidence is commonly accepted in jurisprudence, the decision of the Chamber on the confirmation of charges cannot be solely based on one such piece of evidence³⁵

45. The latter formulation was repeated verbatim in both confirmation of charges decisions in the situation of Kenya.³⁶ In *Kenyatta, Muthara and Ali*, the Pre-Trial Chamber ruled that:

The Chamber notes that the use of anonymous witness statements and summaries is permitted at the pre-trial stage pursuant to article 61(5) and 68(5) of the Statute and rule 81(4) of the Rules. However, the Chamber shares the view, adopted in other pre-trial decisions, that the use of evidence emanating from anonymous sources or from summaries of witnesses statements - regardless of its direct or indirect nature - may impact on the ability of the Defence to challenge the credibility of the source and the probative value of such evidence. Therefore, to counterbalance the disadvantage that this might cause to the Defence, such evidence is considered as having a lower probative value than that attached to the statements of witnesses whose identity is known to the Defence and for which a full statement has been made available to it. The Chamber will thus analyse anonymous witness statements and summaries on a case-by-case basis and evaluate them for the purposes of the present decision taking into account whether there is corroboration by other evidence.³⁷

46. The Legal Representative therefore advocates against the general practice of the Chambers of the Court. Even more, she seems surprised by a procedure which is after all usual in international legal practice: in their preliminary reasoning, the Judges always specify, their position on certain types of evidence. Hence, the fact that Pre-Trial Chambers have used their discretionary power to take into account NGO reports or reports from UN agencies in certain cases depending on specific circumstances is irrelevant in the context of the present appeal.

47. Indeed, the Legal Representative's observations demonstrate that she is personally of the view that the Prosecutor did not present any truly relevant evidence such as direct evidence. Thus, in keeping with the Prosecutor, she criticises the Pre-Trial Chamber for declining to accept only the use of hearsay and documentary evidence.

48. Nonetheless, one thing is certain: the Legal Representative's criticisms of the Pre-Trial Chamber for rejecting the Prosecutor's argument; she is therefore discussing the merits of the case, an argument which is premature. It is not necessary to dispute the Pre-Trial Chamber's findings, since the decision on adjournment is not a final decision on the charges, and accordingly, the Pre-Trial Chamber has not yet technically implemented the standard of proof

³⁵ ICC-01/05-01/08-424, para. 51.

³⁶ ICC-01/09-01/11-373, para. 74; ICC-01/09-02/11-382-Red, para.86.

³⁷ ICC-01/09-02/11-382-Red, para. 90.

applicable at the confirmation of charges hearing. Only at the conclusion of the present confirmation of charges hearing when the Pre-Trial Chamber has independently evaluated the evidence in the record in its entirety can the parties and participants challenge the Chamber's findings if they so wish. Authorising such a "line of reasoning" in the limited scope of the present appeal would be tantamount to authorising the Legal Representative to eschew the procedure.

4 Conclusion

49. The opportunity for victims to voice their views in an international judicial forum is one of the major achievements of the Rome Statute, allowing them to present their "views and concerns" relating to their "personal interests".

50. Victim participation, however, is not unfettered. It neither casts victims as "parties" in the proceedings nor as a second prosecutor. Victim participation should be in a manner that is "not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".³⁸

51. However, the practice followed to date by the Legal Representative of victims, which is explicitly based on an assumption - "victims' participation constitutes an integral part of the concept of fair and impartial proceedings [...]. It follows that the balance of the proceedings before the Court cannot be affected by the participation of victims"³⁹ - effectively upsets the balance of the proceedings, limits the rights of the Defence and breaches the fairness of the proceedings. In other words, the delicate balance between the Prosecution and the Defence is imperilled by the victims' avowed desire to carve an important and permanent status for themselves in the proceedings: the status of party or quasi-party. Here, the Legal Representative appears to conceive her role as one of informing the Bench of the applicable law, and of systematically supporting and even correcting the Prosecutor's legal arguments.

52. Most striking is the fact that this approach is taken at the expense of the victims who are never present in the Legal Representative's observations. Consequently, it is impossible to ascertain the nature of their personal interests, if any.

53. Finally, the Legal Representative of Victims' practice is *de facto* akin to the permanent intervention of amicus curiae vested with an automatic right to participation in all the legal discussions, to the detriment of the victims, whose voices may no longer be heard.

³⁸ Article 68(3) of the Statute.

³⁹ ICC-02/11-01/11-460, par. 40.

54. To afford the Legal Representative a status not bestowed by the Statute or the jurisprudence would jeopardise the entire fabric of the proceedings and affect its intrinsic balance by weakening the Defence vis-à-vis the Prosecution, thereby undermining the interests of the victims themselves.

55. For these reasons it is appropriate:

- 1) In the main, to declare the Legal Representative's observations inadmissible;
- 2) In the alternative, to find that the observations of the Legal Representative fall outside the authorised legal scope and should therefore be dismissed;
- 3) In the further alternative, to find that observations of the Legal Representative are legally unfounded and accordingly to dismiss them.

_____ [signed] _____

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 2 October 2013, at The Hague, The Netherlands