Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/11-01/11**
Date: **14 December 2012**

PRE-TRIAL CHAMBER I

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

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

Public document

Decision on the date of the confirmation of charges hearing and proceedings leading thereto

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

The Office of the Prosecutor
Fatou Bensouda

Counsel for the Defence
Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia
Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Pre-Trial Chamber I (the "Chamber") of the International Criminal Court (the "Court") hereby issues the decision on the date of the confirmation of charges hearing and proceedings leading thereto.

1. On 5 December 2011, the first appearance of Laurent Gbagbo ("Mr Gbagbo") before the Court took place. During that hearing, Pre-Trial Chamber III scheduled the commencement of the confirmation of charges hearing for 18 June 2012.[1]

2. On 24 January 2012, the Single Judge issued the "Decision establishing a disclosure system and a calendar for disclosure" (the "Decision on Disclosure"), setting out, *inter alia,* the system governing disclosure for the purposes of the confirmation of charges hearing in the present case.[2]

3. On 5 April 2012, the Single Judge issued the "Second decision on issues related to the victims' application process".[3]

4. On 16 April 2012, the Registrar filed in the record of the case the Victims and Witnesses Unit's "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony" (the "VWU Protocol").[4]

5. On 5 June 2012, the Defence filed the "*Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012*", in which it argued that the confirmation hearing scheduled for 18 June 2012[5] should be

[1] ICC-02/11-01/11-T-1-ENG, p. 8.
[2] ICC-02/11-01/11-30.
[3] ICC-02/11-01/11-86.
[4] ICC-02/11-01/11-93-Anx1.
[5] ICC-02/11-01/11-T-l-ENG, p. 8.

postponed, *inter alia*, because Mr Gbagbo's state of health made him unfit to stand trial.[6]

6. On 12 June 2012, the Single Judge issued the "Decision on the '*Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012*'", postponing the confirmation of charges hearing to 13 August 2012.[7]

7. On 19 June 2012, the Defence submitted its "Defence application for additional medical and psychological evaluation of President Gbagbo".[8]

8. On 26 June 2012, the Single Judge issued the "Order to conduct a medical examination", whereby she appointed medical experts in order to conduct medical, psychological and psychiatric examinations of Mr Gbagbo, with a view to determining whether he is fit to take part in the proceedings against him.[9]

9. On 2 August 2012, the Single Judge issued the "Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing", in which it was decided that the "commencement of the confirmation of charges hearing is postponed until the issue of Mr Gbagbo's fitness to take part in the proceedings against him is resolved".[10]

10. On 2 November 2012, the Chamber issued the "Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court"

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[6] ICC-02/11-01/11-140-Conf, paras 21-60. A public redacted version is also available, see ICC-02/11-01/11-140-Red2.
[7] ICC-02/11-01/11-152-Red, p. 14.
[8] ICC-02/11-01/11-158-Conf-Exp-tENG and annexes. Confidential redacted version is also available, see ICC-02/11-01/11-158-Conf-Red2.
[9] ICC-02/11-01/11-164-Conf-tENG.
[10] ICC-02/11-01/11-201, p. 8.

(the "Fitness Decision"), finding that Mr Gbagbo is fit to take part in the proceedings before this Court.[11]

11. On 12 November 2012, the Defence filed the "*Demande d'autorisation d'interjeter appel de la « Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court » (ICC-02/11-01/11-286-Conf)*".[12]

12. On 13 November 2012, the Single Judge issued the "Decision on the 'Prosecution's Request pursuant to Regulation 35 for variation of time limit to disclose incriminating evidence and modify the list of evidence for the confirmation hearing, and Request for redactions'".[13]

13. On 29 November 2012, the Chamber rejected the Defence application for leave to appeal the Fitness Decision.[14]

14. On 4 December 2012, the Registry filed in the record of the case three applications by victims for participation in the proceedings.[15]

15. On 11 December 2012, a status conference was held before the Single Judge, for the purpose of discussing issues related to the continuation of the proceedings leading to the hearing on the confirmation of charges.[16]

16. The Chamber notes articles 61, 67 and 68(3) of the Rome Statute (the "Statute"), rules 79, 81, 89 and 121 of the Rules of Procedure and Evidence (the "Rules") and regulations 37 and 52 of the Regulations of the Court (the "Regulations").

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[11] ICC-02/11-01/11-286-Conf. A public redacted version has been filed simultaneously.
[12] ICC-02/11-01/11-292-Conf. A corrigendum and public redacted version thereof were filed on 15 November 2012, see ICC-02/11-01/11-292-Conf-Corr and ICC-02/11-01/11-292-Corr-Red.
[13] ICC-02/11-01/11-294, p. 7.
[14] ICC-02/11-01/11-307.
[15] ICC-02/11-01/11-309 and annexes. See also ICC-02/11-01-11-310 and annex, ICC-02/11-01/11-311 and annexes.
[16] ICC-02/11-01/11-T-11-CONF-ENG and ICC-02/11-01/11-T-12-CONF-ENG.

Date of the commencement of the confirmation of charges hearing

17. As indicated by the Single Judge during the status conference of 11 December 2012,[17] the Chamber is of the view that having decided that Mr Gbagbo is fit to take part in the proceedings before the Court, a date for the commencement of the confirmation of charges hearing must be set as soon as possible. The Single Judge recalled in this regard that the procedure had been considerably delayed and emphasised that the hearing had to take place as soon as possible as the parties had had enough time to prepare and no further delays could be justified.[18] She preliminarily indicated the Chamber's opinion that the confirmation of charges hearing could be held in February 2013.[19]

18. The Prosecutor endorsed the Chamber's preliminary view, and indicated that she would be ready to file the document containing the charges and the list of evidence on 21 January 2013, thereby making possible the commencement of the confirmation of charges hearing in February 2013.[20] The Defence raised a number of issues which, in its view, should be considered when setting the date for the confirmation of charges hearing. In particular, the Defence referred, *inter alia,* to the need to: (i) receive information from the Prosecutor on the process followed to obtain statements from certain witnesses; (ii) establish a proper way to contact certain prosecution witnesses; and (iii) conduct a number of investigative activities.

19. The Chamber recalls that, before the postponement of the hearing for the determination of fitness of Mr Gbagbo, the Prosecutor had already finalised her disclosure and presented her document containing the charges, and the

[17] ICC-02/11-01/11-T-11-CONF-ENG, p. 3, lines 5 to 7.
[18] ICC-02/11-01/11-T-11-CONF-ENG, p. 3, lines 23 to 25.
[19] ICC-02/11-01/11-T-11-CONF-ENG, p. 4, lines 4 to 6.
[20] ICC-02/11-01/11-T-11-CONF-ENG, p. 5, lines 4 to 6.

Defence had already submitted its list of evidence under rule 121(6) of the Rules.

20. Accordingly, had proceedings for the determination of Mr Gbagbo's fitness not been undertaken, the Defence would have been expected to be ready to proceed to the confirmation of charges hearing scheduled for 13 August 2012. Following the Chamber's finding that Mr Gbagbo is fit to participate in the proceedings before this Court, further proceedings leading to the confirmation of charges hearing in this case shall thus be limited to ensure disclosure between the parties of additional evidence not previously included in their respective lists of evidence and the related presentation of a new document containing the charges by the Prosecutor.

21. In this regard, the Chamber notes that the Defence requests more time before the hearing in order to conclude a number of investigative activities that it has initiated almost one year after Mr Gbagbo's initial appearance before the Court and several months after the Prosecutor's disclosure of the bulk of her evidence for the confirmation of charges hearing. In these circumstances, the Chamber is of the view that, without prejudice to the possibility for the Defence to rely on further evidence that may be obtained before the expiration of the time limit under rule 121(6) of the Rules, the conclusion of such tardy investigative activities cannot constitute a pre-condition to hold the confirmation of charges hearing.

22. In setting the date of the confirmation of charges hearing, the Chamber must take into account the delays that have already taken place since the first appearance of Mr Gbagbo and the limited scope and purpose of the confirmation of charges hearing in accordance with the Court's statutory regime.[21] As reiterated at the status conference,[22] the confirmation of charges

[21] ICC-02/11-01/11-107, para. 10, and ICC-02/11-01/11-186, para. 12.

hearing is not intended to be a "mini trial" or a trial before the trial. Furthermore, the Chamber needs to take into account its obligation to conduct proceedings expeditiously in accordance with Mr Gbagbo's right under article 67(1)(c) of the Statute to be tried without undue delay. Finally, the Chamber must ensure that the date of the confirmation hearing allows for the respect of the time limits set out in rule 121(3) and (6) of the Rules.

23. In view of these considerations, and in light of the submissions advanced by the parties at the status conference, the Chamber considers it appropriate to set the date for the commencement of the confirmation of charges hearing at Tuesday, 19 February 2013. A detailed schedule for the hearing will be issued in due course.

Document containing the charges and lists of evidence

24. In light of the date of the confirmation of charges hearing and in accordance with rule 121(3) and (6) of the Rules, time limits must be set for the provision of the Prosecutor's document containing the charges (the "DCC") and list of evidence as well as for the submission by the Defence of its list of evidence.

25. With respect to the DCC to be submitted by the Prosecutor, the Chamber observes that a "charge" is composed of the facts underlying the alleged crime as well as of their legal characterization.[23]

26. In this regard, the Chamber recalls that, under article 67(1)(a) of the Statute, the suspect has the right "[t]o be informed promptly and in detail of the nature, cause and content of the charge[s]" against him. To give effect to

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[22] ICC-02/11-01/11-T-11-CONF-ENG, p. 3, lines 9 to 22.

[23] Pre-Trial Chamber II, "*Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*", ICC-01/09-02/11-328-Red, para 56. See also Trial Chamber II, "*Decision on the Filing of a Summary of the Charged by the Prosecutor*", ICC-01/04-01/07-1547-tEng, para. 10 ("a 'charge' must be understood [...] as statement of the facts including the time and place of the alleged crimes; and a legal characterization of the facts [...]").

this right in the context of the confirmation of charges proceedings, rule 121(3) of the Rules mandates the Prosecutor to provide the suspect with a "detailed description of the charges", and regulation 52(b) of the Regulations further indicates that the document containing the charges shall include, *inter alia*, "[a] statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial".

27. Furthermore, the Chamber observes that one of the core purposes of confirmation of charges is to fix and delimit the factual scope of trial. In this regard, article 74 of the Statute states that "the decision at trial shall not exceed the facts and circumstances described in the charges and any amendment to the charges". Accordingly, in the event that any charges are confirmed, the factual parameters of the case at trial are determined by the charges as presented by the Prosecutor, to the extent confirmed by the Pre-Trial Chamber. Such delimiting effect can only be ascribed to those facts and circumstances which underlie the charges and must be described therein ("material facts"). Conversely, no constraining power is attributed to those factual allegations presented by the Prosecutor in the DCC, or at the confirmation of charges hearing, with a view to demonstrating or supporting the existence of material facts ("subsidiary facts"). Such subsidiary facts may be analysed by the Pre-Trial Chamber insofar as relevant to determine the existence of material facts, but are not themselves part of the charges and are not subject to confirmation by the Pre-Trial Chamber under article 61(7) of the Statute.[24]

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[24] See Pre-Trial Chamber I "*Corrigendum of the 'Decision on the Confirmation of Charges'*", ICC-02/05-03/09-121-Red-Corr, paras 36 to 38; Pre-Trial Chamber II, "*Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*", ICC-01/09-02/11-328-Red, paras 56 to 60.

28. In view of these considerations, and bearing in mind the recent developments in other cases at trial stage,[25] the Chamber is of the view that it is of paramount importance that, in the DCC, the material facts underlying the charges on which the Prosecutor seeks to bring the person to trial be clearly and comprehensively identified and distinguished from those facts of a mere subsidiary nature. In this regard, the Chamber is of the view that the Prosecutor shall identify, and present separately for each count, the charges brought against Mr Gbagbo clearly setting out all the material facts.

29. As recalled above, together with a clear identification of the material facts underlying the charge, a "charge" also includes the legal characterisation of such material facts. In this regard, the Chamber notes that regulation 52 of the Regulations specifies that the DCC shall include "[a] legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28". With respect to the legal characterisation of the facts as subsumed within a form of individual criminal responsibility under article 25(3) or 28 of the Statute, the Prosecutor shall identify the form or forms of individual criminal responsibility which would accord to the set of material facts alleged.

30. The Chamber notes that, during the status conference, the Prosecutor requested an extension of page limit for the DCC in accordance with regulation 37(2) of the Regulations.[26] In particular, the Prosecutor requests that the page limit for the DCC be extended from 50 pages – which were previously authorised by the Single Judge[27] – to 65 pages, given the need to include specific submissions related to an additional form of criminal

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[25] See Trial Chamber V, "*Order for the prosecution to file an updated document containing the charges*", ICC-01/09-02/11-450, para 9; "*Order regarding the content of the charges*", ICC-01/09-02/11-536, paras 7 to 15.
[26] ICC-02/11-01/11-T-11-CONF-ENG, p. 6, lines 13 to 17.
[27] ICC-02/11-01-11-112.

responsibility under which the Prosecutor intends to charge Mr Gbagbo.[28] The Chamber is of the view that the reasons provided by the Prosecutor justify the increase of the page limit for the DCC. The Prosecutor's request can therefore be granted.

Disclosure of evidence

31. The Single Judge recently held that "the parties shall be allowed to rely at the confirmation of charges hearing on additional evidence not previously included in their respective lists of evidence".[29] This includes all additional evidence regardless of the time when it was collected. This additional evidence, if any, must be disclosed between the parties, and communicated to the Chamber, in accordance with the system governing disclosure in the present case as set out in the Decision on Disclosure.[30] Also, the Chamber considers it necessary to establish appropriate time limits for disclosure between the parties in light of the date hereby established for the commencement of the confirmation of charges hearing.

32. Similarly, following submissions in this respect at the status conference of 11 December 2012 and considering the date of the confirmation of charges hearing, the Chamber deems it appropriate to establish time limits for the submission by the parties of any additional requests for redactions under rule 81 of the Rules, in order to ensure timely disclosure of all evidence that the parties wish to rely upon at the confirmation of charges hearing. In this regard, the Chamber notes that at the status conference of 11 December 2012, the Prosecutor indicated that her final request for redactions would be submitted to the Chamber by Friday, 21 December 2012.[31]

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[28] ICC-02/11-01/11-T-11-CONF-ENG, p. 6, lines 13 to 17.
[29] ICC-02/11-01/11-294, p. 7.
[30] ICC-02/11-01/11-30.
[31] ICC-02/11-01/11-T-11-CONF-ENG, p. 7, lines 3 to 4.

Live witnesses

33. At the status conference of 11 December 2012, the Prosecutor indicated her intention not to rely on any *viva voce* witness at the confirmation of charges hearing.[32] The Defence stated that it was not in a position to make any determination in this respect pending completion of its ongoing investigative activities.[33]

34. The Chamber recalls that, as held by the Single Judge, it "expects that oral testimony at the hearing, if any, will be narrowly relied on and only to the extent that it cannot be properly substituted by documentary evidence or a written statement".[34]

35. The Chamber further recalls the VWU Protocol filed in the record of the case, according to which any party that intends to call viva voce witnesses shall timely submit to the Victims and Witnesses Unit (the "VWU") a "Witness Information Form", providing a number of relevant information.[35] Therefore, should the Defence decide to rely on *viva voce* witnesses, it shall promptly contact the VWU in order to identify and timely carry out those logistical arrangements that would be necessary to permit those live witnesses to appear before the Chamber in time for the confirmation of charges hearing.

36. The Chamber finds it necessary, with the view to a proper and timely organisation of the confirmation of charges hearing, that the Defence informs the Chamber, as soon as practicable and no later than 22 January 2013, on:

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[32] ICC-02/11-01/11-T-11-CONF-ENG, p. 8, lines 3 to 4.
[33] ICC-02/11-01/11-T-11-CONF-ENG, p. 12, lines 8 to 10, and p. 13, line 22, to p. 14, line 3.
[34] ICC-02/11-01/11-107, para. 11. See also Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing", ICC-01/09-02/11-181, paras 8 and 9.
[35] ICC-02/11-01/11-93-Anx1, paras 13 and 14.

(i) whether it intends to call *viva voce* witnesses at the hearing; and, if so, (ii) the estimated number of the prospective live witnesses.

37. The names of the *viva voce* witnesses, if any, together with an indication of the scope and subject-matter of the proposed questioning for each of them, must then be filed in the record of the case as part of the Defence list of evidence and within the same time limit in accordance with rule 121(6) of the Rules.

Victims' participation

38. The Chamber notes that the Registry has filed in the record of the case three victims' applications for participation, which were previously rejected or deferred and have been supplemented in the meantime. These applications will be considered by the Chamber. Accordingly, a time limit for the parties' observations under rule 89 of the Rules must be established.

39. In addition, should the Registry receive further victims' applications to participate at the confirmation of charges hearing, the Registry is instructed to transmit them to the Chamber and the parties in accordance with the "Second decision on issues related to the victims' application process",[36] by Friday, 18 January 2013. The parties must be allowed to submit their observations on those victims' applications, if any, by Friday, 25 January 2013.

[36] ICC-02/11-01/11-86.

FOR THESE REASONS, THE CHAMBER

DECIDES that the hearing on the confirmation of charges shall commence on Tuesday, 19 February 2013;

ORDERS the Prosecutor to file in the record of the case by Thursday, 17 January 2013 the new document containing the charges against Mr Gbagbo and the list of evidence;

GRANTS the Prosecutor up to 65 pages for the new document containing the charges;

ORDERS the Prosecutor to submit by Friday, 21 December 2012, any request for redactions, under rule 81 of the Rules, to evidence on which she intends to rely at the confirmation of charges hearing;

ORDERS the Prosecutor to disclose to the Defence by Thursday, 17 January 2013 any additional evidence on which she intends to rely at the confirmation of charges hearing, and for which no redaction is requested;

ORDERS the Defence to file in the record of the case by Friday, 1 February 2013 its new list of evidence;

ORDERS the Defence to submit by Friday, 18 January 2013, any request for redactions, under rule 81 of the Rules, to evidence on which it intends to rely at the confirmation of charges hearing;

ORDERS the Defence to disclose to the Prosecutor by Friday, 1 February 2013 any additional evidence on which it intends to rely at the confirmation of charges hearing, and for which no redaction is requested;

ORDERS the Defence, in the event it intends to raise the existence of an alibi or to raise a ground for excluding criminal responsibility pursuant to rule 79 of the Rules, to notify the Prosecutor no later than Friday, 1 February 2013;

ORDERS the Defence to inform the Chamber, as soon as practicable and no later than Tuesday, 22 January 2013, on whether it intends to call *viva voce* witnesses at the confirmation of charges hearing, and, if so, on the estimated number of the prospective *viva voce* witnesses;

ORDERS the Prosecutor and the Defence to submit, should they wish to do so, their observations on the three pending victims' applications for participation no later than Monday, 21 January 2013;

ORDERS the Registry to file any further complete victims' applications for participation no later than Friday, 18 January 2013;

ORDERS the Prosecutor and the Defence to submit their observations, if any, on further victims' applications no later than Friday, 25 January 2013;

ORDERS the Registrar to liaise with the Defence in order to discuss the practical arrangements for Mr Gbagbo's attendance of the confirmation of charges hearing, including the possibility of video-link from the detention centre, and to submit a report to the Chamber on those practical arrangements by Monday, 21 January 2013.

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

Judge Silvia Fernández de Gurmendi
Presiding Judge

Judge Hans-Peter Kaul **Judge Christine Van den Wyngaert**

Dated this 14 December 2012

At The Hague, The Netherlands