

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/11-01/11**

Date: **13 February 2013**

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

**Response of the Common Legal Representative of Victims to the “*Requête de la
Défense du 7 février 2013 en report de l’audience de confirmation des charges*”**

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

1. On 23 November 2011, Pre-Trial Chamber III issued a warrant of arrest for Mr Laurent Gbagbo,¹ who was transferred to the Court on 30 November 2011. During Mr Gbagbo's initial appearance on 5 December 2011, the Chamber scheduled 18 June 2012 as the date for commencement of the confirmation of charges hearing.²

2. On 4 June 2012, the Single Judge of Pre-Trial Chamber I delivered a "Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings",³ in which she authorised 139 victims to participate in the confirmation of charges hearing and in the related proceedings.⁴ Furthermore, the Single Judge appointed a counsel from the Office of Public Counsel for Victims (the "OPCV" or the "Office") as the Common Legal Representative of all the victims admitted to participate in the proceedings⁵ (the "Legal Representative").

3. On 12 June 2012, the Defence filed the public redacted version of its application ICC-02/11-01/11-140-Conf for postponement of the confirmation of charges hearing scheduled for 18 June 2012,⁶ in which it cited, as justification for postponement of the hearing, the need to ensure the suspect's right to participate in the hearing as well as his right to have the necessary time and resources to prepare his defence.⁷

¹ See the "Warrant Of Arrest For Laurent Koudou Gbagbo" (Pre-Trial Chamber III), ICC-02/11-01/11-1, 23 November 2011.

² See the transcript of the hearing of 5 December 2011, ICC-02/11-01/11-T-1-FRA-ET WT, p. 9, lines 14-16.

³ 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), ICC-02/11-01/11-138, 4 June 2012.

⁴ *Idem*, p. 25.

⁵ *Idem*, p. 26.

⁶ See the "*Version publique expurgée de la requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012 (ICC-02/11-01/11-140-Conf)*", ICC-02/11-01/11-140-Red2, 12 June 2012.

⁷ *Idem*, para. 37.

4. On 12 June 2012, the Single Judge of Pre-Trial Chamber I partially granted said Defence application and decided to postpone the confirmation of charges hearing until 13 August 2012.⁸
5. In July 2012, the Defence filed a confidential application in which it alleged that Mr Gbagbo was unfit to participate in the proceedings against him and once again requested a postponement of the confirmation of charges hearing.⁹
6. On 3 August 2012, the Single Judge of Pre-Trial Chamber I decided to postpone the confirmation of charges hearing until the issue of Mr Gbagbo's fitness to take part in the proceedings against him was resolved.¹⁰
7. On 2 November 2012, the Single Judge of Pre-Trial Chamber I issued a public version of the "Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court",¹¹ in which she confirmed that Mr Gbagbo "is able to meaningfully exercise his fair trial rights" and "is fit to take part in the proceedings against him".¹² Furthermore, the Single Judge indicated that the date for the confirmation of charges hearing would be set shortly in a separate decision.¹³
8. On 4 December 2012, the Single Judge of Pre-Trial Chamber I scheduled 11 December 2012 as the date for the status conference to hear the submissions of

⁸ See the "Decision on the 'Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012'" (Pre-Trial Chamber I, Single Judge), ICC-02/11-01/11-152-Red, 12 June 2012, p. 12.

⁹ The Legal Representative notes that she has not been notified of this application.

¹⁰ See 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" (Pre-Trial Chamber I, Single Judge), ICC-02/11-01/11-201, 3 August 2012 (dated 2 August 2012), para. 22.

¹¹ See the "Public redacted version – Decision on the OPCV's 'Request in relation to the "Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court"'" (Pre-Trial Chamber I, Single Judge), ICC-02/11-01/11-286-Red, 2 November 2012.

¹² *Idem*, para. 101.

¹³ *Ibid.*

the parties and participants on the questions relating to the date of and preparations for the confirmation of charges hearing.¹⁴

9. On 11 December 2012, a status conference was held before Pre-Trial Chamber I.¹⁵
10. On 17 December 2012, the Single Judge of Pre-Trial Chamber I issued a “Decision on the date of the confirmation of charges hearing and proceedings leading thereto”,¹⁶ in which she scheduled 19 February 2013 as the date for commencement of the confirmation of charges hearing.¹⁷
11. On 27 December 2012, the Defence filed an application for leave to appeal the decision on the date of the confirmation of charges hearing and proceedings leading thereto.¹⁸
12. On 31 December 2012, the Prosecution filed a response to said Defence application.¹⁹
13. On 14 January 2013, Pre-Trial Chamber I rejected the Defence application for leave to appeal the decision on the date of the confirmation of charges hearing and proceedings leading thereto.²⁰

¹⁴ See the “Order scheduling a status conference” (Pre-Trial Chamber I, Single Judge), ICC-02/11-01/11-308, 4 December 2012.

¹⁵ See the transcript of the hearing of 11 December 2012, ICC-02/11-01/11-T-11-CONF-FRA RT.

¹⁶ See the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto” (Pre-Trial Chamber I, Single Judge), ICC-02/11-01/11-325, 17 December 2012 (dated 14 December 2012).

¹⁷ *Idem*, p. 14.

¹⁸ See the “*Demande d’autorisation d’interjeter appel de la décision de la Chambre Préliminaire du 14 décembre 2012* ‘on the date of the confirmation of charges hearing and proceedings leading thereto’ (ICC-02/11-01/11-325)”, ICC-02/11-01/11-342, 27 December 2012 (dated 24 December 2012).

¹⁹ See the “Prosecution Response to the Defence Application for Leave to Appeal the ‘Decision on the date of the confirmation of charges hearing and proceedings leading thereto (ICC-02/11-01/11-325)’”, ICC-02/11-01/11-343, 31 December 2012.

²⁰ See the “Decision on the ‘*Demande d’autorisation d’interjeter appel de la décision de la Chambre Préliminaire du 14 décembre 2012* ‘on the date of the confirmation of charges hearing and proceedings leading thereto’ (ICC-02/1101/11-325)’” (Pre-Trial Chamber I), ICC-02/11-01/11-350, 14 January 2013.

14. On 6 February 2013, the Single Judge of Pre-Trial Chamber I issued a “Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings”,²¹ in which she (i) authorised 60 victims to participate in the confirmation of charges hearing and in the related proceedings, (ii) confirmed the appointment of the Office as the Common Legal Representative of all the victims authorised to participate in the confirmation of charges proceedings and (iii) reiterated the modalities for the Legal Representative’s participation in the confirmation of charges hearing.²²
15. On 7 February 2013, the Defence filed a “*Requête [...] en report de l’audience de confirmation des charges prévue pour le 19 février 2013*”²³ (the “Defence Application”).
16. On 8 February 2013, the Single Judge of Pre-Trial Chamber I invited the Legal Representative to file a response to the Defence Application by 13 February 2013 at the latest.²⁴
17. On 12 February 2013, the Prosecution responded to the Defence Application.²⁵
18. Accordingly, the Legal Representative submits the following response to the Defence Application.

²¹ See the “Second decision on victims’ participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber I, Single Judge), ICC-02/11-01/11-384, 6 February 2013.

²² *Idem*, pp. 22-23.

²³ See the “*Requête de la Défense en report de l’audience de confirmation des charges prévue le 19 février 2013*”, ICC-02/11-01/11-390, 7 February 2013 (the “Defence Application”).

²⁴ See the e-mail entitled “Time limit for response to document ICC-02/11-01/11-390” sent by the Pre-Trial Chamber on 8 February 2013 at 12.26 p.m.

²⁵ See the “Prosecution’s response to ‘*Requête de la Défense en report de l’audience de confirmation des charges prévue le 19 février 2013*’”, ICC-02/11-01/11-396, 12 February 2013.

II. OBSERVATIONS OF THE LEGAL REPRESENTATIVE

19. In its Application, the Defence claimed that, owing to the Prosecution's late disclosure of a large number of documents, it was unable to prepare adequately for the confirmation of charges hearing due to be held from 19 February next and accordingly requested the Chamber to postpone the said hearing.²⁶

A. In the main

20. At the status conference held on 11 December 2012 the Single Judge emphasised that "[TRANSLATION] [t]he parties have had adequate time to prepare [for the confirmation of charges hearing] and no additional delay would be justified".²⁷ During the said hearing, the Defence nevertheless raised a number of issues and factors which, in its opinion, affected its preparation and consequently the commencement of the confirmation of charges hearing; these included the issue of the incomplete and late disclosure of certain documents by the Prosecution.²⁸
21. In its decision of 17 December 2012²⁹ the Single Judge examined all of the issues and factors which, according to the Defence, affected the commencement of the confirmation of charges hearing, including the issue of disclosure.³⁰ In particular, the Single Judge held 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 Defence had already submitted its list of evidence under rule 121(6) of the Rules

and consequently

²⁶ See the Defence Application, *supra*, footnote 23, paras. 21-38.

²⁷ See the transcript of the hearing of 11 December 2012, ICC-02/11-01-11-T-11-CONF-FRA RT, p. 4, lines 11-13.

²⁸ *Idem*, p. 11, line 28, to p. 13, line 1.

²⁹ See the "Decision on the date of the confirmation of charges hearing and proceedings leading thereto", *supra*, footnote 16.

³⁰ *Idem*, paras. 17-23.

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 2012.³¹

She also held that:

[f]ollowing 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.³²

Finally, the Single Judge rejected the Defence Application to be granted more time to continue its investigative activities, considering in particular that:

[w]ithout 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 precondition to hold the confirmation of charges hearing.³³

Consequently, the Single Judge scheduled 19 February 2013 as the date for commencement of the confirmation of charges hearing,³⁴ and ordered the Prosecution to disclose "any additional evidence" to the Defence by 17 January 2013.³⁵

22. In its application of 27 December 2012,³⁶ the Defence again submitted, *inter alia*, the question of the Prosecution's incomplete and late disclosure of certain documents³⁷ and, in this respect, sought leave to appeal the decision on the date of the confirmation of charges hearing.³⁸

³¹ *Ibid.*, para. 20.

³² *Ibid.*

³³ *Ibid.*, para. 21.

³⁴ *Ibid.*, para. 23.

³⁵ *Idem*, p. 14.

³⁶ See the "*Demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire du 14 décembre 2012 'on the date of the confirmation of charges hearing and proceedings leading thereto' (ICC-02/11-01/11-325)*", *supra*, footnote 18.

³⁷ *Idem*, paras. 34-40.

³⁸ *Idem*, p. 22.

23. In its decision of 14 January 2013,³⁹ Pre-Trial Chamber I re-examined each of the issues and factors which, according to the Defence, were of such a nature as to affect its preparation and consequently the commencement of the confirmation of charges hearing. Regarding, in particular, the issues of the Prosecution's incomplete and late disclosure of documents and the Defence's alleged difficulties in preparation, the Chamber considered that "[t]he Defence merely repeats the same submissions advanced at the status conference of 11 December 2012" and the Defence Application constituted "[a] mere reiteration of prior arguments and an expression of disagreement with the analysis and conclusion made by the Chamber".⁴⁰ Furthermore, the Chamber emphasised that:

[t]he date for the confirmation of charges hearing was thus established taking into account the need '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', and in light of the time frame provided for by rule 121 of the Rules.⁴¹

24. The Legal Representative submits, in the main, that since the Defence is again raising the issue of the Prosecution's incomplete and late disclosure of certain documents, which has already been considered, reconsidered and decided upon by Pre-Trial Chamber I, its Application is tantamount to a request for reconsideration of the decisions issued by the Chamber on 17 December 2012 and 14 January 2013.

25. In this respect, the Legal Representative recalls that the different Chambers of the Court have systematically rejected all applications, irrespective of their form, which are in essence seeking a review of prior decisions; this is because such applications have no legal basis in the statutes and regulations of the Court.⁴²

³⁹ See the "Decision on the '*Demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire du 14 décembre 2012* 'on the date of the confirmation of charges hearing and proceedings leading thereto' (ICC-02/1101/11-325)", *supra*, footnote 20.

⁴⁰ *Idem*, para. 40.

⁴¹ *Ibid.*, para. 41.

⁴² The Legal Representative notes that the jurisprudence of the Court contains a single exception on this issue. See the "Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010" (Trial Chamber I), ICC-01/04-01/06-2705, 30 March 2011.

In particular, the Chambers concerned have repeatedly held that “[i]n principle, the statutory framework set out by the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Pre-Trial Chamber or the single judge”⁴³, and that “[r]eview of decisions by the Court is only allowed under specific circumstances, explicitly provided in the Statute and the Rules”⁴⁴ and any application seeking a review is, in principle, contrary to the principles of legal certainty and finality in judicial decisions which serve important purposes in achieving the orderly administration of justice.⁴⁵

26. The Legal Representative therefore submits that, since the Defence Application is seeking a reconsideration of Pre-Trial Chamber I’s prior decisions, it must be rejected *in limine*.

⁴³ See the “Decision on the ‘Demande du BCPV d’accéder au document confidentiel déposé par le Conseil de direction du Fonds d’affectation spéciale au profit des victimes le 7 février 2008’” (Pre-Trial Chamber I), 18 February 2008, ICC-01/04-456, p. 4. See also the “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute” (Pre-Trial Chamber II), ICC-01/09-02/11-96, 30 May 2011, para. 38; the “Decision on the ‘Prosecution’s Application for Extension of Time Limit for Disclosure’” (Pre-Trial Chamber II), ICC-01/09-01/11-82, 10 May 2011, para. 11; the “Decision on the Defence for Mathieu Ngudjolo Chui’s Request concerning translation of documents” (Pre-Trial Chamber I), ICC-01/04-01/07-477, 15 May 2008, p. 5; the “Decision On The Prosecution Motion For Reconsideration And, In The Alternative, Leave To Appeal” (Pre-Trial Chamber I, Single Judge), 23 June 2006, ICC-01/04-01/06-166, para. 10; the “Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification” (Pre-Trial Chamber II), 28 October 2005, ICC-02/04-01/05-60, para. 18.

⁴⁴ See the “Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from Warrants of Arrest, Motion for Reconsideration and Motion for Clarification” (Pre-Trial Chamber II), 28 October 2005, ICC-02/04-01/05-60, para. 18. See also, *inter alia*, the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), ICC-01/04-168 OA3, 31 July 2006, paras. 36-42; the “Decision on the ‘Requête de la Défense aux fins d’obtenir de la Chambre de première instance III des décisions appropriées avant l’ouverture du procès prévue pour le 22 novembre 2010’” (Trial Chamber III), ICC-01/05-01/08-1010, 16 November 2010, paras. 9 and 10. Finally, in this respect, see the “Separate Opinion of Judge René Blattmann to the Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010”, ICC-01/04-01/06-2707, 30 March 2011.

⁴⁵ See the “Decision on ‘Second Defence request for interim release’” (Pre-Trial Chamber I, Single Judge), ICC-01/04-01/10-319, 28 July 2011, p. 6.

27. With respect to the documents disclosed to the Defence between 15 January and 7 February 2013, the Legal Representative notes, incidentally, that the Defence has itself admitted⁴⁶ that the majority of the documents, 893 documents in total,⁴⁷ were disclosed to it by the Prosecution before expiry of the deadline set by the Chamber for this purpose. Hence, the Defence received only a very limited number of documents after this date, i.e. 94 documents in total.⁴⁸
28. In this respect, the Legal Representative submits that, irrespective of the number of documents that have been recently disclosed to the Defence, this should not in any way affect the date of the confirmation of charges hearing scheduled for 19 February next, in view of the fact that they consist only of additional evidence defined by the Chamber as “[a]dditional evidence not previously included in their respective lists of evidence and the related presentation of a new document containing the charges by the Prosecutor”,⁴⁹ whereas the Defence has already received the evidence relating to the amended document containing the charges presented by the Prosecution,⁵⁰ i.e. the evidence that is necessary for the Defence to prepare properly for the confirmation of charges hearing.

B. In the alternative

29. In the alternative, the Legal Representative submits the following observations.

⁴⁶ See the Defence Application, *supra*, footnote 23, para. 21.

⁴⁷ See the “Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 17 January 2013”, ICC-02/11-01/11-359, 17 January 2013; and the “Prosecution’s Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 17 January 2013”, ICC-02/11-01/11-360, 17 January 2013.

⁴⁸ See the “Prosecution’s Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 22 January 2013”, ICC-02/11-01/11-375, 23 January 2013; the “Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 6 February 2013”, ICC-02/11-01/11-386, 7 February 2013; and the “Prosecution’s Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 6 February 2013”, ICC-02/11-01/11-387, 7 February 2013.

⁴⁹ See the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto”, *supra*, footnote 16, para. 20.

⁵⁰ *Idem*. See also the “Decision on the ‘Demande d’autorisation d’interjeter appel de la décision de la Chambre Préliminaire du 14 décembre 2012 “on the date of the confirmation of charges hearing and proceedings leading thereto” (ICC-02/11-01/11-325)”, *supra*, footnote 20, para. 41.

30. The Legal Representative has already submitted⁵¹ and reiterates that it is in the best interests of all the victims involved in the present case that the confirmation of charges hearing against Mr Gbagbo be held as soon as possible. In this respect, the Legal Representative notes that all of the victims who she is currently called upon to represent are emphasising the importance of the imminent confirmation of charges hearing.
31. This wish on the part of the victims is also in line with the suspect's fundamental right to have his cause heard as soon as possible and without excessive delay. In this respect, the Legal Representative submits that the Defence does not appear to be concerned that the proceedings in the instant case should take place as soon as possible and without excessive delay. Indeed, despite its concern, demonstrated in the Defence Application, for preserving the equality of arms as a fundamental element of the right to a fair trial,⁵² the strategy adopted by the Defence in the instant case is merely intended to disrupt the proceedings or, as a minimum, to slow them down significantly.
32. The Legal Representative has repeatedly drawn the attention of both Pre-Trial Chamber I and the Appeals Chamber to the said Defence strategy, which is of such nature as to affect the fairness, integrity and speed of the proceedings.⁵³ The Legal Representative has also drawn the Appeals Chamber's attention to the

⁵¹ See the transcript of the hearing of 11 December 2012, ICC-02/11-01/11-T-11-CONF-FRA RT, p. 10, lines 14-23.

⁵² See the Defence Application, *supra*, footnote 23, paras. 11-20.

⁵³ See the "Observations on the legal principles applicable to the determination of a suspect's fitness", ICC-02/11-01/11-228-Corr, 24 August 2012, para. 18; the "*Réponse du Représentant légal commun des victimes à la Requête de la Défense du 21 août 2012*", ICC-02/11-01/11-230, 24 August 2012, para. 33; and the "*Réponse du Représentant légal commun des victimes à la Requête de la Défense du 15 novembre 2012 aux fins d'autorisation d'interjeter appel de la Décision sur l'aptitude de M. Gbagbo à prendre part à la procédure à son encontre*", ICC-02/11-01/11-298, 19 November 2012, para. 35. See also the "Observations on behalf of victims on the Defence's document in support of the appeal against Pre-Trial Chamber I's Decision on the Defence Challenge to the Jurisdiction of the Court", ICC-02/11-01/11-259 OA2, 8 October 2012, para. 17.

fact that the strategy of the Defence has consisted “[i]n avoiding any kind of litigation on the merits of the case, multiplying the procedural incidents”.⁵⁴

33. In this respect, the Legal Representative also wishes to draw the Chamber’s attention to the following circumstances.
34. The Defence has requested the postponement of the confirmation of charges hearing on two occasions, pleading in particular the need to properly prepare and also Mr Gbagbo’s unfitness to take part in the proceedings against him.⁵⁵ The Chamber granted these requests. In the meantime, the Defence requested a postponement of the fitness hearing for Mr Gbagbo that was scheduled for 24 and 25 September 2012⁵⁶ and the hearing on the continued detention of the suspect scheduled for 30 October 2012,⁵⁷ but the Pre-Trial Chamber rejected the said requests as it considered that the Defence had had adequate time to prepare for these hearings.⁵⁸ Between August 2012 and today, the Defence has filed five applications for leave to appeal the decisions of Pre-Trial Chamber I,⁵⁹ and

⁵⁴ See the “Observations on behalf of victims on the Defence’s document in support of the appeal against Pre-Trial Chamber I’s Decision on the Defence Challenge to the Jurisdiction of the Court”, *supra*, footnote 53, para. 17.

⁵⁵ See the “Version publique expurgée de la requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012 (ICC-02/11-01/11-140-Conf)”, ICC-02/11-01/11-140-Red2, 12 June 2012. See also the “Requête aux fins d’extension du nombre de page autorisé”, ICC-02/11-01/11-199-Conf, 31 July 2012. The Legal Representative notes that she has not been notified of the said second application.

⁵⁶ See the “Demande de report de l’audience de ‘fitness hearing’ prévue pour les 24 et 25 septembre 2012 (ICC-02/11-01/11-241)”, ICC-02/11-01/11-243, 14 September 2012.

⁵⁷ See the “Requête de la Défense en report de l’audience fixée par la Chambre Préliminaire dans son ordonnance du 19 octobre 2012 (ICC-02/11-01/11-270) au 30 octobre 2012”, ICC-02/11-01/11-277, 25 October 2012.

⁵⁸ See the “Decision on issues related to the hearing on Mr Gbagbo’s fitness to take part in the proceedings against him” (Pre-Trial Chamber I, Single Judge), ICC-02/11-01/11-249, 20 September 2012, paras. 20 and 21. See also the “Decision on two Defence requests in relation to the hearing scheduled for 30 October 2012” (Pre-Trial Chamber I, Single Judge), ICC-02/11-01/11-280, 26 October 2012, para. 14.

⁵⁹ See the “Demande d’autorisation d’interjeter appel de la décision de la Juge unique portant sur la question de la participation des victimes à la procédure relative à l’état de santé du Président Gbagbo et à son aptitude à être jugé (ICC-02/11-01/11-211)”, ICC-02/11-01/11-222, 21 August 2012; the “Version publique expurgée du corrigendum de la 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)”, ICC-02/11-01/11-292-Corr-Red, 15 November 2012; the “Version publique expurgée de la demande d’autorisation d’interjeter appel de la décision de la Chambre Préliminaire I ‘on three applications for leave to appeal’ (ICC-02/11-01/11-307) et plus précisément de la décision de refus d’autoriser la défense à 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)”, ICC-02/11-

two appeals directly to the Appeals Chamber,⁶⁰ yet none of these applications were successful. Since then, the Defence has filed several requests for an extension of the deadlines for filing its submissions before Pre-Trial Chamber I.⁶¹

35. The Legal Representative considers that these said circumstances categorically demonstrate that the strategy of the Defence is of such nature as to affect the fairness, integrity and speed of the proceedings and they must be taken into account by the Pre-Trial Chamber.
36. In this respect, the Legal Representative submits that the concept of “integrity of the proceedings” is much broader than the concept of “fairness of the proceedings” with respect to the suspect,⁶² to which the Defence refers,⁶³ as it is

01/11-318-Red, 17 December 2012; the “*Demande d’autorisation d’interjeter appel de la décision de la Chambre Préliminaire du 14 décembre 2012 ‘on the date of the confirmation of charges hearing and proceedings leading thereto’* (ICC-02/11-01/11-325)”, ICC-02/11-01/11-342, 24 December 2012. See also the confidential Defence application which was not notified to the Common Legal Representative: ICC-02/11-01/11-331-Conf of 19 December 2012.

⁶⁰ See “Defence appeal against Pre-Trial Chamber I’s Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-212)’”, ICC-02/11-01/11-225-tENG, 21 August 2012; the “Document in support of the appeal against the ‘Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo’” (ICC-02/11-01/11-212)”, ICC-02/11-01/11-240-tENG, 6 September 2012; the “*Version publique expurgée de l’Acte d’appel de la Défense relatif à la Décision de la Chambre préliminaire I rejetant la demande de mise en liberté provisoire du Président Gbagbo*”, ICC-02/11-01/11-193-Red, 1 November 2012; and the “*Version publique expurgée du Document déposé à l’appui de l’appel de la Défense relatif à la Décision de la Juge unique rejetant la demande de mise en liberté provisoire du Président Gbagbo*”, ICC-02/11-01/11-210-Red, 1 November 2012.

⁶¹ See the “*Requête de la Défense du Président Gbagbo en vue d’une prorogation de délais pour la soumission d’informations relatives à la présentation de témoignages viva voce lors de l’audience de confirmation des charges*”, ICC-02/11-01/11-114, 14 May 2012; the “*Requête de la Défense du Président Gbagbo relative à la prorogation du délai accordé par la Chambre pour demander des mesures de protection*”, ICC-02/11-01/11-172, 5 July 2012; the “*Requête de la Défense du Président Gbagbo relative à la prorogation du délai accordé par la Chambre pour demander des mesures d’expurgations*”, ICC-02/11-01/11-178, 12 July 2012; the “*Requête aux fins de prorogation des délais de dépôt des demandes d’expurgations, de soumission d’informations relatives à la présentation de témoignages viva voce et de dépôt de la liste amendée de preuves*”, ICC-02/11-01/11-355, 17 January 2013; and the “*Demande aux fins de prorogation du délai fixé pour le dépôt par la défense d’observations concernant les demandes de participation des victimes transmises par le Greffe le 18 janvier 2013*”, ICC-02/11-01/11-368, 21 January 2013.

⁶² See ICTY, *Prosecutor v. Zejnil Delalić*, Case no. IT-96-21-T, “Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence”, 2 September 1997, paras. 43-44 and 55. See also ICTY, *Prosecutor v. Radoslav Brjdanin*, Case no. IT-00-36-T, “Decision on the Defence ‘Objection to Intercept Evidence’”, 3 October 2003, para. 63. Finally see ICTR, *The Prosecutor v. Edouard Karemera et al.*, Case no. ICTR-98-44-T, “Decision on

not solely intended to preserve the suspect's rights, but also all of the essential values laid down in the Rome Statute⁶⁴ such as, *inter alia*, the protection of witnesses and victims, the sovereignty of States⁶⁵ and the participation of the victims in proceedings before the Court.⁶⁶ Furthermore, the requirements of the integrity of the administration of Justice shall always take precedence over the specific interests of the parties,⁶⁷ including the Defence. Finally, the guarantees of a fair trial do not apply solely to the suspect but also to all of the parties and participants in the proceedings before the Court.⁶⁸

37. Furthermore, in the light of the consistent jurisprudence of the Court as established by the Appeals Chamber:

[a] party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber [...] to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness.⁶⁹

the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nairorera and Mathieu Ngirumpatse", 2 November 2007, para. 25.

⁶³ See the Defence Application, *supra*, footnote 23, paras. 11-20.

⁶⁴ The preamble to the Rome Statute expressly mentions the interests of the victims of atrocities, the interests of the international community and the necessity to put an end to impunity for the perpetrators of the most serious international crimes among the essential values which guide the States Parties to the Rome Statute. See the Preamble to the Rome Statute, adopted by the Assembly of States Parties on 17 July 1998, UN Doc. A/CONF.183/9, 17 July 1998.

⁶⁵ See the "Decision on the admission of material from the 'bar table'" (Trial Chamber I), ICC-01/04-01/06-1981, 24 June 2009, para. 42. See also in this respect, TRAPP (K.), *Excluding Evidence: The Timing of a Remedy*, unpublished manuscript (1998), Faculty of Law, McGill University, Canada, p. 21; cited in TRIFFTERER (O.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, Verlag C.H Beck, Munich, 2008, p. 1335, footnote 139.

⁶⁶ See in this respect PIRAGOFF (D.), "Article 69. Evidence", in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, Verlag C.H Beck, Munich, 2008, p. 1335.

⁶⁷ See SCSL, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of *Nullum Crimen Sine Lege* and Non-Retroactivity as to Several Counts, Case no. SCSL-04-16-PT, 31 March 2004, para. 26.

⁶⁸ See the "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4 and VPRS 5" (Pre-Trial Chamber I), ICC-01/04-135-tENG, 31 March 2006, para. 38.

⁶⁹ See the "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'" (Appeals Chamber), ICC-01/04-01-07-2259-tENG OA10, 12 July 2010, para. 54.

On the basis of this jurisprudence, Pre-Trial Chamber I heavily criticised the conduct of the Defence in the case of *The Prosecutor v. Callixte Mbarushimana*, for having “bombarded” it with filings “[o]n a series of issues that can mostly be considered minor in comparison with the fact that the Defence has not been able to appropriately process thousands of pages of important information”.⁷⁰ With respect to the said conduct of the Defence, the Chamber considered that “[t]he Defence failed to exercise due diligence in asserting its right to receive witnesses’ statements in a language which the suspect fully understands and speaks.”⁷¹

38. The Legal Representative submits that the said jurisprudence of the Court must apply *mutatis mutandis* to the instant case.
39. Indeed, while criticising the Prosecution for “[TRANSLATION] ‘drowning’ the defence” with an “[TRANSLATION] immense mass of documents” and thus “[TRANSLATION] preventing it from responding” and claiming “[TRANSLATION] about fifty days” to “[TRANSLATION] read and analyse these documents”,⁷² the Defence, instead of concentrating on the substance of the matter, seems to prefer to submit numerous repetitive and totally unfounded procedural applications to Pre-Trial Chamber I,⁷³ even going so far as to request leave to appeal a decision by which the Chamber refused its application to appeal its previous decision.⁷⁴
40. Accordingly, the Legal Representative submits that instead of bombarding the Pre-Trial Chamber with multiple requests, the Defence could and should have acted with more “diligence” by concentrating fully on the substance of the case

⁷⁰ See the “Decision on ‘Defence request to deny the use of certain incriminating evidence at the confirmation hearing’ and postponement of confirmation hearing” (Pre-Trial Chamber I), ICC-01/04-01/10-378, 12 September 2011 (dated 16 August 2011) (emphasis added).

⁷¹ *Idem*, para. 19.

⁷² See the Defence Application, *supra* footnote 23, paras. 21-33.

⁷³ See, *supra*, para. 34.

⁷⁴ See the “Version publique expurgée de la demande d’autorisation d’interjeter appel de la décision de la Chambre Préliminaire I ‘on three applications for leave to appeal’ (ICC-02/11-01/11-307) et plus précisément de la décision de refus d’autoriser la défense à 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)”, ICC-02/11-01/11-318-Red, 17 December 2012.

and its preparations for the confirmation of charges hearing, a task which hardly seems impossible in view of the fact that the date of the hearing has twice been postponed for the benefit of the Defence.

41. By acting in this manner and once again requesting a postponement of the confirmation of charges hearing, the Defence is preventing the Chamber from determining “[w]hether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”⁷⁵ in order to “[t]o protect the rights of the Defence against wrongful and wholly unfounded charges”.⁷⁶ Furthermore, in doing so, the Defence is seriously prejudicing the victims’ right to the truth⁷⁷ as well as their right to see justice done.⁷⁸

⁷⁵ See article 61(7) of the Rome Statute.

⁷⁶ See the “Decision on the confirmation of charges” (Pre-Trial Chamber I), ICC-01/04-01/07-717-Corr, 30 September 2008, para. 63. See also the “Decision on the confirmation of charges” (Pre-Trial Chamber I), ICC-01/04-01/06-803-Corr-tENG, 29 January 2007, para. 37.

⁷⁷ See in this respect: IACHR, *Almohacid-Arellano et al v. Chile*, Judgment of 26 September 2006, Series C, no. 154, paras. 148 *et seq.*; *Masacre de Mapampân v. Colombia*, Judgment of 15 September 2005, Series C, no. 134, para. 297; *Barrios Altos v. Peru*, Judgment of 14 March 2001, Series C, no. 75, para. 48; and *Bàmaca-Velasquez v. Guatemala*, Judgment of 25 November 2000, Series C, no. 70, para. 201. See also: ECHR, *Hugh Jordan v. The United Kingdom*, Application no. 24746/94, 4 May 2001, para. 93.

See also the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I), ICC-01/04-01/07-474, 13 May 2008, paras. 31-36.

Lastly in this respect, see: NAQVI (Y.), *The Right to the Truth in International Law Fact or Fiction* 9, ICRC International Review, 2006, no. 88, pp. 267 and 268; MENDEZ (J.), *The Right to Truth*, in JOYNER (Ch.) (dir. pub.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights’ Proceedings of the Siracuse Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257 *et seq.*; and AMBOS (K.), *El Marco Jurídico de la Justicia de Transición*, Tenus, Bogota, 2008, pp. 42-44.

⁷⁸ See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I), *supra*, footnote 77, paras. 37-44. See also in this respect: NAQVI (Y.), *op. cit.*, *supra*, footnote 77, pp. 267 and 268; MENDEZ (J.), *The Right to Truth*, *op. cit.*, *supra*, footnote 77, pp. 257 *et seq.*; and AMBOS (K.), *op. cit.*, *supra*, footnote 77, pp. 42-44. Finally in this respect see: IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, No. 162, para. 222; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, No. 155, paras. 153 *et seq.*; *Almohacid-Arellano et al v. Chile*, Judgment of 26 September 2006, Series C, No. 154, para. 148; *Comunidad Monviana v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, para. 204; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162-166 and 174. See also ECHR, *Hugh Jordan v. The United Kingdom*, Application no. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application no. 25803/94, 28 July 1999, para. 79; *Kurt v. Turkey*, Application no. 24276/94, 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, Application no. 23184/94, 24 April 1998, para. 96; *Aydin v. Turkey*, Application no. 23178/94, 25 September 1997, para. 103; and *Aksoy v. Turkey*, Application no. 21987/93, 18 December 1996, para. 98.

42. Finally, the Defence Application which has no specific basis in relation to the arguments which have already been considered, reconsidered and decided upon by Pre-Trial Chamber I, appears to be clearly in line with the Defence's strategy and can only confirm that the Defence's one and only objective is to delay the confirmation of charges hearing.

Therefore, the Legal Representative respectfully requests the Pre-Trial Chamber:

- In the main, to reject the Defence Application *in limine*.
- In the alternative, to reject the Defence Application as unfounded.

[signed]

Paolina Massidda

Lead Counsel

Dated this 13 February 2013

At The Hague (The Netherlands) and at Abidjan (Côte d'Ivoire)