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Date: **21 March 2014**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN CÔTE D'IVOIRE**

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

**Public Document**

**Request for re-classification and extension of time  
to file the final written submissions**

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

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

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## I. PROCEDURAL BACKGROUND

1. On 3 June 2013, the majority of Pre-Trial Chamber I (the “Chamber”), Judge Fernández de Gurmendi dissenting,<sup>1</sup> issued the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Adjournment Decision”), whereby they decided to adjourn the confirmation of charges hearing and requested the Prosecutor to consider providing further evidence or conducting further investigation with respect to all charges.<sup>2</sup> The Chamber also ordered the Prosecutor to submit by no later than 15 November 2013 an amended document containing the charges, an amended list of evidence and an updated consolidated Element Based Chart.<sup>3</sup> The Office of Public Counsel for Victims (the “Office” or “OPCV”) was granted the possibility to file final written submissions in response to the Defence’s observations on the Prosecutor’s evidence by 24 January 2014.<sup>4</sup>

2. On 8 November 2013, the Chamber suspended the calendar established in the Adjournment Decision considering the significance of the Prosecutor’s appeal against the Adjournment Decision pending at that time.<sup>5</sup>

3. On 16 December 2013, the Appeals Chamber dismissed the Prosecutor’s appeal against the Adjournment Decision, confirming the latter.<sup>6</sup>

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

<sup>2</sup> See the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (Pre-Trial Chamber I), No. ICC-02/11-01/11-432, 3 June 2013 (the “Adjournment Decision”), p. 22.

<sup>3</sup> *Idem*, p. 23.

<sup>4</sup> *Ibid.*, p. 24.

<sup>5</sup> See the “Decision on the ‘Prosecution’s request pursuant to Regulation 35 for variation of time limit to file updated document containing the charges, list of evidence and consolidated elements-based chart’” (Pre-Trial Chamber I), No. ICC-02/11-01/11-557, 8 November 2013, paras. 12-13.

<sup>6</sup> See the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’” (Appeals Chamber), No. ICC-02/11-01/11-572 OA5, 16 December 2013.

4. On 17 December 2013, the Chamber ordered the Prosecutor to submit by 13 January 2014 an amended document containing the charges, an amended list of evidence and an updated consolidated element based chart.<sup>7</sup> The OPCV on behalf of the victims participating in the proceedings was granted the possibility to file final written submissions in response to the Defence's observations on the Prosecutor's evidence by 27 February 2014.<sup>8</sup>

5. On 13 January 2014, the Prosecution filed its *Document amendé de notification des charges*, the *Inventaire amendé des éléments de preuve à charge*, and the *Tableau amendé des éléments constitutifs des crimes*, together with four additional annexes.<sup>9</sup>

6. On 20 January 2014, the Prosecutor filed a corrected version of the *Document amendé de notification des charges* (the "Amended DCC").<sup>10</sup>

7. On 10 February 2014, in order to allow proper disposal of several pending Defence requests, the Single Judge suspended the time limit set out *inter alia* for the Defence to submit its observations on the Prosecutor's evidence.<sup>11</sup>

8. On 14 February 2014, the Chamber issued its "Decision on Defence requests related to the continuation of the confirmation proceedings" (the "Decision on Defence Requests"),<sup>12</sup> authorising *inter alia* the OPCV to file final written submissions

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<sup>7</sup> See the "Decision establishing a calendar for further proceedings" (Pre-Trial Chamber I), No. ICC-02/11-01/11-576, 17 December 2013, p. 6.

<sup>8</sup> *Idem*.

<sup>9</sup> See the "Prosecution's Submission of *Document amendé de notification des charges*, *l'Inventaire amendé des éléments de preuve à charge*, and *le Tableau amendé des éléments constitutifs des crimes*, and Response to issues raised by Pre-Trial Chamber I", No. ICC-02/11-01/11-592, 13 January 2014.

<sup>10</sup> See the « Annexe 2 - Version publique expurgée de ICC-02/11-01/11-592-Conf-Anx2-Corr2 : Document amendé de notification des charges avec notes de bas de page », No. ICC-02/11-01/11-592-Anx2-Corr2-Red, 4 February 2014 (the "Amended DCC").

<sup>11</sup> See the "Decision suspending the time limit for the Defence submission of its observations on the Prosecutor's evidence and disclosure to the Prosecutor of the evidence it intends to present, if any, and filing of its amended list of evidence" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-614, 10 February 2014.

<sup>12</sup> See the "Decision on Defence requests related to the continuation of the confirmation proceedings" (Pre-Trial Chamber I), No. ICC-02/11-01/11-619, 14 February 2014 (the "Decision on Defence Requests").

on behalf of the victims participating in the proceedings in response to the Defence's observations on the Prosecutor's evidence by 31 March 2014.<sup>13</sup>

9. On 13 March 2014, the Chamber granted the Defence up to 400 pages for its observations on the Prosecutor's evidence and rejected the Defence's request for an extension of time to file said observations.<sup>14</sup>

10. On 17 March 2014, the Defence filed its observations on the Prosecutor's additional evidence (the "Defence's Observations"),<sup>15</sup> with three confidential annexes not notified to the OPCV. No public redacted version of the Defence's Observations has been filed to date.

11. On 18 March 2014, the Principal Counsel of the OPCV, acting as Common Legal Representative of Victims (the "Common Legal Representative")<sup>16</sup> requested the Chamber by e-mail to be notified of the confidential annexes.<sup>17</sup>

12. Pursuant to Regulations 23*bis* and 35 of the Regulations of the Court, the Common Legal Representative, hereby files a request for re-classification of the annexes to the Defence's Observations and for an extension of time to file her submissions in response to the Defence's Observations.

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<sup>13</sup> *Idem*, par. 25, p. 24.

<sup>14</sup> See the "Decision on the 'Requête urgente aux fins de prorogation du délai donné par la Chambre le 1<sup>er</sup> février 2014 à la défense pour qu'elle dépose le 17 mars 2014 des observations écrites sur la preuve du Procureur et Requête urgente aux fins d'augmentation du nombre de pages autorisé en vue du dépôt par la défense de ses observations écrites sur la preuve du Procureur (Norme 37(1))'" (Pre-Trial Chamber I), No. ICC-02/11-01/11-636, 13 March 2014, p. 6.

<sup>15</sup> See the « Soumissions par la défense de ses observations écrites sur la preuve du Procureur et soumission par la défense de l'Inventaire amendé des éléments de preuve à décharge », No. ICC-02/11-01/11-637, 17 March 2014 (the "Defence's Observations").

<sup>16</sup> See the "Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012, pp. 25-26. See also the "Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384-Corr, 6 February 2013, pp. 22-23.

<sup>17</sup> See the e-mail sent to the Senior Legal Advisor of the Pre-Trial Division on 18 March 2014 at 09.12.

## II. COMMON LEGAL REPRESENTATIVE'S REQUESTS

### 1. Request for re-classification

13. Pursuant to regulation 23*bis* (3) of the Regulations of the Court, the Common Legal Representative reiterates her request that the three annexes to the Defence's Observations be reclassified as confidential available to the Common Legal Representative and therefore be notified to her.

14. The Common Legal Representative notes that the Defence argues that the annexes « [s]ont déposées à titre confidentiel en vertu de la norme 23(2) bis du Règlement de la Cour puisque qu'elles font référence à des éléments de preuve, tant du Procureur que de la défense, classés confidentiels ».<sup>18</sup> However, this statement disregards the fact that the Common Legal Representative participated in the oral phase of the confirmation of charges hearing, including in the parts held in closed session, and thereby has knowledge of all matters discussed during said hearing.

15. Moreover, the Common Legal Representative has access to the Prosecutor's evidence,<sup>19</sup> and to the confidential version of the Defence's final written submissions filed after the conclusion of the oral phase of the confirmation of charges hearing,<sup>20</sup> wherein confidential evidence filed by the Defence is discussed. Accordingly, the Common Legal Representative submits that there is no legal basis for the annexes to the Defence's Observations not to be transmitted to her.

16. In fact, prior decisions of this Chamber show that whenever a participant has been privy to confidential litigation in a phase of the proceedings, subsequent but

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<sup>18</sup> See the Defence's Observations, *supra* note 15, p. 3.

<sup>19</sup> See the "Information as to the agreement between the Common Legal Representative and the Prosecution on access to documents and Requests in relation to the schedule of the confirmation of the charges hearing", No. ICC-02/11-01/11-143, 7 June 2012, pp. 7-8.

<sup>20</sup> See the « Version publique expurgée des soumissions écrites de la défense portant sur un certain nombre de questions discutées lors de l'audience de confirmation des charges », No. ICC-02/11-01/11-429-Red, 3 April 2013.

related confidential filings in the same phase of the proceedings must also be communicated to said participant.<sup>21</sup>

17. The Common Legal Representative regrets to notice that this is not the first instance where the Defence opposes the transmission of its filings to the Common Legal Representative without articulating a valid legal reason to do so. In fact, a significant number of confidential filings submitted by the Defence have been re-classified by the Chamber from confidential to public and/or have been ordered to be notified to the Common Legal Representative several days after they were filed confidentially by the Defence.<sup>22</sup>

18. In these instances, the Common Legal Representative has constantly been obliged to request the notification of the documents. This practice is clearly prejudicial to victims participating in the proceedings, who are deprived of their right to respond in a full and timely manner to documents submitted by the parties in the proceedings in which they are participating, in accordance with regulation 24(2) of the Regulations of the Court.

19. The Common Legal Representative can understand that the Defence may not be comfortable with the views and concerns that victims may put forward in these proceedings. However, under the Statute and the Rules of Procedure and Evidence

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<sup>21</sup> See for instance 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, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, par. 132; the “Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-537, 30 May 2008, p. 12; and the “Decision on OPCV requests for access to confidential documents in the record of the case” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-166, 27 June 2012, paras. 14-15 and p. 10.

<sup>22</sup> See for instance No. ICC-02/11-01/11-473-Conf (filed by the Defence on 12 August 2013 as confidential not available to the Common Legal Representative, the document being reclassified as public and notified to the Common Legal Representative on 16 August 2013); No. ICC-02/11-01/11-598-Conf-Corr (filed by the Defence as confidential not available to the Common Legal Representative on 31 January 2014, the Common Legal Representative only being granted access to it upon request on 3 February 2014); No. ICC-02/11-01/11-602-Conf (filed by the Defence as confidential not available to the Common Legal Representative on 4 February 2014, the Common Legal Representative only being granted access to it upon request on 5 February 2014); and No. ICC-02/11-01/11-631-Conf (filed by the Defence as confidential not available to the Common Legal Representative on 5 March 2014, the Common Legal Representative only being granted access to it upon request on 18 March 2014).

victims are entitled to present their views and concerns so that they can have a substantial impact in the proceedings.<sup>23</sup>

20. The Defence cannot unilaterally decide whether victims can or cannot express their views and concerns by failing to notify its filings to participating victims. Decisions on the scope of participation of victims fall exclusively upon the Chambers, and Pre-Trial Chamber I has clearly authorised the participation of victims in the confirmation of charges hearing and all related proceedings in this case.<sup>24</sup>

21. In particular, the Chamber authorised participating victims to file submissions in response to the Defence's Observations by 31 March 2014.<sup>25</sup> The Defence cannot be allowed to nullify said decision by classifying as confidential not available to the Common Legal Representative the filing to which victims are entitled to respond within a short deadline, and adding injury to insult with the indication of its intention to file a public redacted version at an undefined date.

22. The Common Legal Representative therefore requests the Chamber that the annexes to the Defence's Observations be immediately reclassified as confidential available to all parties and participants in order for the Common Legal Representative to be able to respond to the Defence's Observations on behalf of the victims participating in the proceedings.

23. Finally, in relation to Annex 3 to the Defence's Observations containing the list of evidence of the Defence, the Common Legal Representative notes that the Single Judge of the Chamber already ruled that "*contrary to the arguments of the Defence,*

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<sup>23</sup> See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", *supra* note 21, par. 157

<sup>24</sup> See *supra* note 16.

<sup>25</sup> See *supra* note 13.



*granting access to the Defence list of evidence does not amount to providing the Common Legal Representative with automatic access to all confidential material listed therein".*<sup>26</sup>

## **2. Request for extension of time**

24. Pursuant to regulation 35 of the Regulations of the Court, the Common Legal Representative requests that the time granted by the Chamber to file her response to the Defence's Observations effectively starts to run from the moment the Common Legal Representative is notified of the annexes to the Defence's Observations, and that it thereby be extended beyond the 31 March 2004 deadline established by the Chamber in the Decision on Defence Requests.

25. The Common Legal Representative notes that the Chamber decided that the Defence would have until 17 March 2014 to provide its written response to the Amended DCC, and that "[t]he OPCV on behalf of the victims participating the proceedings may file final written submissions in response to the Defence by Monday, 31 March 2014".<sup>27</sup>

26. As indicated above, the Defence's Observations were filed on 17 March 2014 but their confidential annexes have not been transmitted to the Common Legal Representative yet. Moreover, the Defence's Observations indicate that « [l]a défense en déposera une version publique expurgée », <sup>28</sup> but said public redacted version has not been filed yet.

27. In these circumstances, the Common Legal Representative requests the Chamber an extension of the 31 March 2014 original deadline to file her submissions in response to the Defence's Observations.

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<sup>26</sup> See the "Decision on the OPCV's "Requests to receive information and access documents for the effective participation of victims at the confirmation of charges hearing"" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-400, 13 February 2013, par. 19.

<sup>27</sup> See the Decision on Defence Requests, *supra* note 12, par. 24

<sup>28</sup> See the Defence's Observations, *supra* note 15, p. 3.

28. The Common Legal Representative submits that the “good cause” to extend the 31 March 2014 deadline lies with the fact that the Common Legal Representative’s lack of access to the annexes to the Defence’s Observations “[o]bjectively provide[s] justification for the inability of a party to comply with his/her obligations [to conform to the applicable procedural rule or regulation or the directions of the Court]”<sup>29</sup> because said annexes contain the observations to which the Common Legal Representative is entitled to respond.<sup>30</sup>

29. In other words, the Common Legal Representative is unable to meet the original deadline set by the Chamber because the document she is entitled to respond to –a document for which the Defence has been granted an extension of up to 400 pages–<sup>31</sup> was not notified to her by the date originally established by the Chamber.<sup>32</sup>

30. Following the example of the Chamber’s latest decision extending time limits, the Common Legal Representative suggests that the extension of the deadline to file her submissions in response to the Defence’s Observations “[m]aintain[s] the same time periods between the different submissions”.<sup>33</sup> Accordingly, the Common Legal Representative requests that the extended deadline to file her response to the Defence’s Observations be fourteen days following the notification to the Common Legal Representative of the confidential annexes to the Defence’s Observations.

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<sup>29</sup> See the “Reasons for the “Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007” issued on the 16 February 2007” (Appeals Chamber), No. ICC-01/04-01/06-834 OA8, 21 February 2007, par. 7; and the “Reasons for the “Decision on the ‘Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor’s Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation’” (Appeals Chamber), No. ICC-01/04-01/07-653 OA7, 27 June 2008, par. 5

<sup>30</sup> See the Defence’s Observations, *supra* note 15, par. 4.

<sup>31</sup> See *supra* note 14.

<sup>32</sup> Conversely, for the extension of the time limit because the Chamber had extended the time limit for a party to file a document on which the legal representatives of victims sought to provide observations, see the “Decision on ‘Requête urgente en prorogation de délai et en levée de l’ex parte touchant au mémoire d’appel du Procureur’” (Appeals Chamber), No. ICC-01/04-02/12-71 A, 16 May 2013, par. 12

<sup>33</sup> See the Decision on Defence Requests, *supra* note 12, par. 25.

31. Lastly, considering that the Defence has systematically denied notification to the Common Legal Representative of filings having a clear impact on the personal interests of the victims she represents<sup>34</sup> and that she has access to all confidential information discussed during the confirmation of the charges hearing,<sup>35</sup> the Common Legal Representative requests the Chamber to remind the Defence of its obligations towards participating victims.

32. The Common Legal Representative respectfully requests the Chamber to consider these submissions on an urgent basis considering the interest of victims to have the finalisation of the confirmation of the charges phase concluded as soon as possible.

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<sup>34</sup> See *supra* note 22.

<sup>35</sup> See *supra* notes 19-20.

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

- Grant the Common Legal Representative access to the confidential annexes to the Defence's Observations;
- Extend the time available to the Common Legal Representative to file final written submissions in response to the Defence's Observations until at least two weeks after the Common Legal Representative is granted access to the confidential annexes to said observations;
- Remind the Defence of its obligations towards victims admitted to participate in the proceedings; and
- **In the alternative**, for Annex 3 to the Defence's Observations, be granted access to a redacted version of the Defence's list of evidence in accordance with guidelines issued by the Chamber for appropriate redactions to said document.



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

Dated this 21<sup>st</sup> day of March 2014

At The Hague, The Netherlands