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No.: ICC-02/11-01/11
Date: 18 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
URGENT**

Request to access documents related to the “Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut ” filed by the Defence on 15 February 2013

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 an arrest warrant for Mr. Laurent Gbagbo,¹ who was surrendered to the Court on 30 November 2011. During the first appearance of Mr. Gbagbo, on 5 December 2011, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.²

2. On 24 January 2012, the Single Judge of Pre-Trial Chamber I (the “Single Judge”) issued the “Decision establishing a disclosure system and a calendar for disclosure”,³ setting out, *inter alia*, the system governing disclosure for the purpose of the confirmation of charges hearing.

3. On 4 June 2012, the Single Judge issued a “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”⁴ by which she granted 139 victims the right to participate at the confirmation of charges hearing and in related proceedings.⁵ Furthermore, the Single Judge appointed a counsel from the Office of Public Counsel for Victims (the “Office”) as the Common legal representative of all the victims admitted to participate in the proceedings (the “Common Legal Representative”).⁶

4. 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”,⁷ in which it argued

¹ See the “Warrant of Arrest For Laurent Gbagbo” (Pre-Trial Chamber III), No. ICC-02/11-01/11-1, 23 November 2011.

² See the transcripts of the hearing of 5 December 2011, No. ICC-02/11-01/11-T-1-ENG, p. 8.

³ See the “Decision establishing a disclosure system and a calendar for disclosure” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-30, 24 January 2012.

⁴ 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.

⁵ *Idem.*, p. 25.

⁶ *Ibid.*, p. 26.

⁷ See the “Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012”, No. ICC-02/11-01/11-140-Red2, 5 June 2012.

that the confirmation hearing scheduled for 18 June 2012 should be postponed, *inter alia*, because Mr Gbagbo's state of health made him unfit to stand trial.⁸

5. 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 2012.⁹

6. On 3 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”,¹⁰ 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*”.¹¹

7. On 2 November 2012, the Chamber issued the “Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court” finding that Mr Gbagbo is fit to take part in the proceedings before this Court.¹²

8. 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)”¹³ which was rejected by the Chamber on 30 November 2012.¹⁴

⁸ *Idem*, paras. 21 to 60.

⁹ 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), No. ICC-02/11-01/11-152-Red, 12 June 2012.

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), No. ICC-02/11-01/11-201, 3 August 2012 (dated 2 August 2012).

¹¹ *Idem*, p. 8.

¹² See the “Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court” (Pre-Trial Chamber I), No. ICC-02/11-01/11-286-Red, 2 November 2012.

¹³ See 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)”, No. ICC-02/11-01/11-292-Corr-Red, 12 November 2012.

¹⁴ See “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012).

9. On 17 December 2012, the Chamber issued the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto” deciding that the confirmation of charges hearing shall commence on 19 February 2013.¹⁵

10. On the same day, the Defence submitted its “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)’”.¹⁶

11. On 24 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”¹⁷ which was rejected by the Chamber on 14 January 2013.¹⁸

12. On 1st February 2013, the Defence submitted its list of evidence, contained in a confidential annex.¹⁹

13. On 6 February 2013, the Single Judge issued the “Second decision on victims’ participation at the confirmation of charges hearing and in the related

¹⁵ See the “Decision on the date of the confirmation of charges hearing and proceedings leading thereto” (Pre-Trial Chamber I), No. ICC-02/11-01/11-325, 17 December 2012 (dated 14 December 2012).

¹⁶ 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)”, No. ICC-02/01-11/01-318-Red, 17 December 2012.

¹⁷ 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)”, No. ICC-02/11-01/11-342, 24 December 2012.

¹⁸ 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-02/11-01/11-325)’” (Pre-Trial Chamber I, Single Judge), 14 January 2013.

¹⁹ See the “Communication de l’inventaire des éléments de preuve à décharge de la Défense”, No. ICC-02/11-01/11-381, 1st February 2013.

proceedings”²⁰ by which she granted 60 victims the right to participate at the confirmation of charges hearing and in related proceedings. She also reiterated the right for the Common Legal Representative to make brief opening and closing statements at the confirmation of charges hearing and ordered the Registrar to provide the Common Legal representative with access to the public record of the case, including public evidence disclosed by the parties.²¹

14. On 14 February 2013, the Chamber rejected the request to postpone the confirmation of the charges hearing filed by the Defence on 7 February 2013.²²

15. On 15 February 2013, the Defence submitted a redacted version of its “Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut”, challenging the admissibility of the case (the “Defence’s Application”).²³

16. The Common Legal Representative has been notified only of the redacted version of the Defence’s Application and of the public Annexes thereto. The Common Legal Representative respectfully requests the Pre-Trial Chamber to grant her access to the unredacted version of the Defence’s Application and to the Confidential Annexes in order to be able to represent the interests of victims. Considering that the confirmation of charges hearing is scheduled to start on 19 February 2013 and that the issue of the admissibility is included in the agenda of said hearing,²⁴ the Common

²⁰ See 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, 6 February 2013.

²¹ *Idem*, p. 23.

²² See the “Decision on the “Requête de la Défense en report de l’audience de conformation des charges prévue le 19 février 2013” (Pre-Trial Chamber I), No. ICC-02/11-01/11-403, 14 February 2013 and the “Requête de la Défense en report de l’audience de conformation des charges prévue le 19 février 2013”, No. ICC-02/11-01/11-390, 7 February 2013.

²³ See the “Requête relative à la recevabilité de l’affaire en vertu des Articles 19 et 17 du Statut”, No. ICC-02/11-01/11-404-Red, 15 February 2013.

²⁴ See the “Decision on the schedule for the confirmation of charges hearing” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-397, 13 February 2013 (dated 12 February 2013); and the Annex to the “Decision on the schedule for the confirmation of charges hearing”, No. ICC-02/11-01/11-397-Anx, 13 February 2013 (dated 12 February 2013), p. 2.

Legal Representative respectfully requests the Chamber to treat this request on an urgent basis.

II. REQUEST TO ACCESS CONFIDENTIAL DOCUMENTS

17. As a preliminary remark, the Common Legal Representative notes that the Defence does not provide any explanations or reasons why the original Application has been filed as confidential.

18. In this regard, the Common Legal Representative notes that in the recent ruling on access to confidential material in the *Gaddafi and Al-Senussi* case, this Chamber has ruled that *“in accordance with rule 59 of the Rules and as determined by the Chamber, the OPCV, acting on behalf of the victims having communicated with the Court in relation to the case, is entitled to make observations on the Admissibility Challenge. Therefore, in the absence of a proper reason justifying the contrary, the OPCV should in principle be given access to the relevant material”*.²⁵

19. The Common Legal Representative submits that the redacted version of the Defence’s Application under articles 17 and 19 of the Rome Statute and its public annexes do not enable her to identify the grounds justifying the Admissibility Challenge.

20. Rule 59(1) and (3) of the Rules of Procedure and Evidence (the “Rules”) allows victims who have already communicated with the Court or their legal representatives to be notified of the “summary of the grounds” on which the admissibility of the case is being challenged.

²⁵ See the “Public Redacted Decision on the “Libyan Government’s proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4,5,6,7,15,16 and 17” (Pre-Trial Chamber I), No. ICC-01/11-01/11-271-Red, 7 February 2013, par. 17.

21. The redacted parts of the Defence's Application concern the description of proceedings allegedly conducted in Côte d'Ivoire against Mr. Gbagbo. The Common Legal Representative therefore contends that without having access to such critical information, victims cannot be said to have been notified of the "summary of the grounds" upon which the Defence Challenge is being made, as required under rule 59 of the Rules. The Common Legal Representative's capacity to properly prepare for the proceedings is consequently significantly impaired and victims will not be able to enjoy fully their rights provided for in article 19 of the Rome Statute and rule 59 of the Rules.

22. In this regard, the Common Legal Representative notes incidentally that the Chamber has already determined that she can intervene on matters related to the admissibility of the case and the proper conduct of the proceedings, as clearly indicated in the Agenda for the confirmation of the charges hearing.²⁶

23. As also already indicated in the submissions filed by the Common Legal Representative on the previous challenge by the Defence, providing victims with the possibility to enjoy fully their rights under article 19 of the Rome Statute and rule 59 of the Rules complies with the ambit of well-established right of victims to truth.²⁷ Moreover, victims have a vital interest in ensuring that those responsible for the crimes are put on trial and ultimately convicted. Victims' views on whether Mr. Gbagbo could be tried effectively in Côte d'Ivoire will largely depend on whether proceedings at the national level are feasible or underway and on whether said proceedings are genuine. The genuineness of national judicial proceedings can only be assessed in light of the specific steps and actions taken by the national authorities, if any. It is therefore essential that the Common Legal Representative is granted access to said information.

²⁶ See the Annex to the "Decision on the schedule for the confirmation of charges hearing", No. ICC-02/11-01/11-397-Anx, 13 February 2013 (dated 12 February 2013), p. 2.

²⁷ See the "Request to access documents in relation to the Defence Challenge to the Jurisdiction of the Court", No. ICC-02/11-01/11-155, 18 June 2012, paras. 8 and 9.

24. The Common Legal Representative will be able to represent the interests of victims only if she is fully acquainted with the exact nature of the proceedings allegedly undertaken by the Ivorian authorities. Furthermore, there is a need for the victims to be able to discern the actual scope of national proceedings and to understand what types of material have been collected or adduced, if any, in order for them to form their own opinion.

25. The Common Legal Representative emphasises that the documents requested relate to issues specific to the interests and rights of victims and thus, access to this material is necessary to ensure the effective and meaningful participation of victims in article 19 proceedings.

26. In this regard, the Common Legal Representative notes the jurisprudence of the various Chambers of the Court, which have systematically granted access to the OPCV – in its capacity of legal representative of victims for the purposes of article 19 proceedings – to documents pertaining to admissibility challenges, including documents classified confidential, when relevant.²⁸

27. Moreover, due to the fact that the Common Legal Representative has had, to date, no access to an index of the record of the case, she is not in a position to identify all documents which may be of interest for the fulfilment of her mandate on behalf of victims in relation to article 19 proceedings. The Common Legal Representative, therefore, leaves it to the determination of the Chamber to appreciate whether other

²⁸ See, *inter alia*, Trial Chamber III's Oral Decision, No. ICC-01/05-01/08-T-20-Red-ENG WT2, 8 March 2010, pp. 5-6, as well as the "Decision Prescribing the Procedure to be Followed Under Article 19 of the Statute (Rule 58 of the Rules of Procedure and Evidence)" (Trial Chamber II), No. ICC-01/04-01/07-943-Conf-tENG, 5 March 2009. See also the recent decisions of this same Chamber in the Gaddafi proceedings, "Decision on the OPCV "Request to access documents in relation to the Challenge to the Jurisdiction of the Court by the Government of Libya" (Pre-Trial Chamber I), No. ICC-01/11-01/11-147, 15 May 2012 and "Public Redacted Decision on the "Libyan Government's proposed redactions to ICC-01/01-01/11-258-Conf-Exp and Annexes 4,5,6,7,15,16 and 17", *supra* note 25.

documents in the record of the case might affect the interests of victims for the purpose of article 19 proceedings.

28. In this regard, the Common Legal Representative submits that in her recent decision, the Single Judge considered that *“it appropriate that the list of evidence filed by the Defence in the record of the case be communicated to the Common Legal Representative, containing such redactions to the titles of confidential items of evidence that are necessary to preserve the confidentiality of these documents”*,²⁹ and stressed that *“access to the list itself, even if in redacted form, may be of assistance to the Common Legal Representative in following the discussion on the evidence at the hearing, which may include confidential evidence”*.³⁰

29. Finally, considering that access to confidential documents by victims in this case is an ongoing issue, the Common Legal Representative respectfully requests the Chamber to order that all documents filed confidentially by either party in relation to the admissibility challenge be systematically notified to her, considering that the personal interests of victims are affected by the proceedings under article 19 of the Statute.

²⁹ 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. 20.

³⁰ *Idem*.

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

- a) To order the notification to the OPCV of the unredacted version of the Defence's Application;
- b) To order the notification to the OPCV of the confidential annexes to the Defence's Application;
- c) To order the notification to the OPCV of any other document filed confidential in the record of the case which the Chamber might identified as relevant to article 19 proceedings;
- d) To order to systematically notify the OPCV with any document submitted by the parties related to Admissibility Challenge and which might be classified confidential – on the same basis as the other parties in the article 19 proceedings.



Paolina Massidda
Principal Counsel

Dated this 18th day of February 2013

At The Hague, The Netherlands