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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 the "Demande d'autorisation d'interjeter appel de la 'Decision on
Defence requests related to the continuation of the confirmation
proceedings' du 14 février 2014 (ICC-02/11-01/11-619)"**

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

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Other

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) hereby issues this decision on the “Demande d’autorisation d’interjeter appel de la ‘Decision on Defence requests related to the continuation of the confirmation proceedings’ du 14 février 2014 (ICC-02/11-01/11-619)” (the “Application”) filed by the Defence of Laurent Gbagbo (“Mr Gbagbo”).¹

1. On 14 February 2014, the Chamber issued the “Decision on Defence requests related to the continuation of the confirmation proceedings” (the “Decision”),² whereby it disposed of a number of Defence requests related to the unfolding of the confirmation proceedings in the present case.³
2. On 24 February 2014, the Defence filed the Application, whereby it seeks leave to appeal the Decision with respect to eight different issues.⁴
3. On 27 February 2014, the Prosecutor and the Office of Public Counsel for victims (the “OPCV”), acting as legal representative of the victims admitted to participate in the confirmation proceedings, filed their respective responses to the Application (the “Prosecutor’s Response”⁵ and the “OPCV Response”⁶).
4. The Chamber notes article 82(1)(d) of the Rome Statute (the “Statute”), rule 155 of the Rules of Procedure and Evidence (the “Rules”) and regulation 65 of the Regulations of the Court (the “Regulations”).
5. Article 82(1)(d) of the Statute provides that either party may appeal:

¹ ICC-02/11-01/11-620.

² ICC-02/11-01/11-619.

³ More specifically, the Chamber disposed of the Defence requests advanced in filings: ICC-02/11-01/11-598-Conf-Corr; ICC-02/11-01/11-599; ICC-02/11-01/11-600-Conf; ICC-02/11-01/11-602-Conf; ICC-02/11-01/11-603; and ICC-02/11-01/11-607.

⁴ ICC-02/11-01/11-620.

⁵ ICC-02/11-01/11-628.

⁶ ICC-02/11-01/11-630.

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, as opposed to a hypothetical concern or an abstract legal question or a question over which there is a mere disagreement or conflicting opinion. An “issue” is constituted by a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.⁷

7. Furthermore, for leave to appeal to be granted, article 82(1)(d) of the Statute requires that the “issue” identified by the party would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial. In order to assess whether the issue would indeed significantly affect one of the “elements of justice” mentioned in article 82(1)(d) of the Statute, the Chamber “must ponder the implications of a given issue being wrongly decided” on the fairness and expeditiousness of the proceedings or the outcome of the trial, performing an “exercise [that] involves a forecast of the consequences of such an occurrence”.⁸

8. Finally, it is necessary that, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. As held by the Appeals Chamber, “the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the

⁷ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

⁸ *Ibid.*, paras 10 and 13.

proceedings or mar the outcome of the trial”.⁹ In this regard, “advancing the proceedings” has been identified by the Appeals Chamber as “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines” and the term “immediate” has been defined as “underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal”.¹⁰

9. Accordingly, “[p]ut in a nutshell, the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹¹

10. The Chamber will address in turn each of the eight issues in respect of which the Defence requests leave to appeal the Decision.

I. The First Issue

11. The first issue is phrased as follows: “*la Chambre n’a-t-elle pas commis une erreur de droit en considérant que les « faits et circonstances » sous-tendant les charges n’avaient pas été modifiés par le Procureur, sans jamais s’expliquer, ni motiver cette prise de position ?*” (the “First Issue”).¹²

12. In respect of this issue, the Defence makes reference to the part of the Decision in which the Chamber considered that, contrary to the Defence assertion, the facts and circumstances underpinning the contextual elements of the crimes charged as described in the charges in the amended document containing the charges presented by the Prosecutor on 13 January 2014 (the “Amended DCC”) do not exceed the facts and circumstances alleged to the

⁹ *Ibid.*, para. 14.

¹⁰ *Ibid.*, para. 18.

¹¹ *Ibid.*, para. 19.

¹² Application, p. 6.

same effect in the original document containing the charges (the “DCC”) filed by the Prosecutor on 17 January 2013.¹³

13. As recalled above, with its First Issue, the Defence seeks leave to appeal the Decision on the issue of whether the Chamber committed an error of law by failing to explain or giving reasoning for taking the position that the facts and circumstances underlying the charges have not been amended by the Prosecutor in an impermissible manner. Both the Prosecutor and the OPCV aver that the First Issue does not arise from the Decision as it results from a misreading of the Decision on the part of the Defence.¹⁴

14. The Chamber observes that the relevant Defence submission in the Application is entirely predicated on an alleged lack of explanation of the Chamber’s findings in the Decision. However, contrary to the Defence submission, the Chamber did explain that its conclusion that the facts and circumstances had not changed in an impermissible way derived from the fact that “the factual parameters of the alleged widespread and systematic attack against the civilian population as part of which the charged crimes were allegedly committed by Mr Gbagbo as outlined in the Amended DCC remain the same as those shaping the attack described in the DCC of 17 January 2013”.¹⁵

15. In these circumstances, the question whether the Chamber committed an error of law by not explaining how it reached the conclusion that the facts and circumstances described in the charges were not amended by the Prosecutor does not arise from the Decision.

¹³ Decision, para. 16.

¹⁴ Prosecutor’s Response, paras 4 and 5; OPCV Response, para. 28.

¹⁵ Decision, para. 16.

II. The Second Issue

16. The second issue in respect of which the Defence requests leave to appeal the Decision is phrased as follows: “*la Chambre Préliminaire a-t-elle privé sa décision de toute base légale en autorisant le Procureur à ajouter trois modes de responsabilité dans son DCC modifié en ne se fondant que sur la notion des ‘intérêts de la justice’ ?*” (the “Second Issue”).¹⁶

17. The Defence challenges the Chamber’s finding in the Decision that “the inclusion of further modes of liability under which the Prosecutor seeks to bring Mr Gbagbo at trial, on the basis of the same facts and circumstances, would not warrant the dismissal *in limine* of the Amended DCC”.¹⁷

18. According to the Defence, the only basis invoked by the Chamber for its conclusion is the “interest of justice”. On this assumption, the Defence seeks leave to appeal the Decision with respect to the issue of whether the notion of “interest of justice” is sufficient in order to authorise the Prosecutor to add further modes of liability in the Amended DCC. The Prosecutor and the OPCV submit that the Second Issue does not arise from the Decision, since, contrary to the Defence assertion, the Chamber did not base its rejection of the Defence request to declare the Amended DCC inadmissible solely on the “interests of justice”.¹⁸

19. The Chamber is of the view that the Defence argument that the Decision is exclusively founded on the concept of “interests of justice” – on which the Second Issue entirely rests – is grounded on a misrepresentation of the Decision. Indeed, in the Decision, the Chamber provided a thorough indication of factors and provisions that were taken into account to reach its conclusion, in the absence of specific legal provisions explicitly addressing the

¹⁶ Application, p. 8.

¹⁷ Decision, para. 18.

¹⁸ Prosecutor’s Response, para. 7; OPCV Response, para. 30.

question whether, and to what extent, certain modifications to the legal characterisation of the facts can be made by the Prosecutor when the confirmation of charges hearing has been adjourned by the Chamber under article 61(7)(c)(i) of the Statute.¹⁹ More precisely, the Chamber referred to other modalities by which amendments to the facts and circumstances described in the charges and modifications of their legal characterisation can be made both before and after the confirmation of charges hearing, and noted that in any case such amendments or modifications are permissible provided that the suspect/accused is given reasonable notice thereof.²⁰ In this context, the Chamber considered several aspects in connection with the present case, most notably that the Defence had received disclosure of the additional evidence relied upon by the Prosecutor in consecutive batches, that it had been on notice of the facts which may equally give rise to the additional modes of liability included in the Amended DCC since 17 January 2013, and that the time limit for the Defence presentation of its list of evidence and written response to the Amended DCC – further extended by an additional 30 days in the Decision – by far exceeds the time limit provided by rule 121(3) and (6) of the Rules in relation to an initial document containing the charges.²¹

20. The Chamber also took into account the particular circumstances of the adjournment of the confirmation of charges hearing.²² It noted, in particular, that in light of the broad scope of the adjournment and the considerable amount of time given to the Prosecutor for her further investigation, it was “entirely foreseeable that the Prosecutor would undertake further investigative steps that could result in a considerable amount of additional

¹⁹ Decision, paras 21 to 25.

²⁰ *Ibid.*, para. 21.

²¹ *Ibid.*, para. 23.

²² *Ibid.*, para. 22.

evidence eventually leading to a different or amended legal characterisation of the same alleged facts and circumstances”.²³

21. Moreover, the Chamber considered that even if it were to dismiss *in limine* the Amended DCC, “a modification of the mode of liability could still be triggered by the Chamber, the Prosecutor or even by the Trial Chamber if the charges were to be confirmed”²⁴ and that, accordingly, “the issue of the legal characterisation could in any case be raised at a later stage”.²⁵ It is in this specific context that the Chamber referred also to the “interest of justice” – alongside the “interest of judicial economy” – as an additional consideration of relevance to the disposal of the matter.

22. Accordingly, the Defence assertion that the Chamber exclusively relied on the concept of “interest of justice” constitutes a misrepresentation of the Decision. Therefore, the Second Issue – which revolves around the question of whether the “interest of justice” is by itself a sufficient basis for the Chamber’s conclusion – does not arise from the Decision.

III. The Third Issue

23. The third issue in respect of which the Defence requests leave to appeal the Decision is phrased as follows: “*la notification à la défense de nouveaux éléments des charges et de nouveaux modes de responsabilité peut-elle ‘couvrir’ l’absence de base légale à la modification des charges d’une part ; est-elle trop tardive pour satisfaire aux exigences du Statut d’autre part ?*” (the “Third Issue”).²⁶

24. With respect to this issue, the Defence challenges the Chamber’s reliance also on the fact that the Defence has received reasonable notice of the additional modes of liability included in the Amended DCC and of the

²³ *Ibid.*, para. 19.

²⁴ *Ibid.*, para. 20.

²⁵ *Ibid.*, para. 22.

²⁶ Application, p. 11.

evidence relied upon by the Prosecutor in their support as a relevant factor to the determination of whether the addition of the further modes of liability would render the Amended DCC inadmissible.²⁷

25. The Prosecutor submits that the Third Issue does not arise from the Decision “because it is based on an apparent misunderstanding by the Defence of the relevant portion of the Decision”,²⁸ and, in any case, “is a mere disagreement by the Defence with the Pre-Trial Chamber’s conclusion”.²⁹ Furthermore, the Prosecutor avers that “the Decision does not cause unfair prejudice to the suspect”,³⁰ and therefore the Third Issue does not affect the fair conduct of the proceedings. The OPCV equally states that “the Third Issue does not arise from the Decision”³¹ and, in any case, does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial.³²

26. As recalled above, the Third Issue concerns the question whether notice to the Defence of the new facts and additional modes of liability can cure the absence of a legal basis for the amendment of the charges, and whether this notice was in any case provided too late to satisfy the statutory requirements.

27. The Chamber accepts that the Third Issue arises out of the Decision to the extent that it revolves around the question whether, in the present case, the notice provided to the Defence of the charges in the Amended DCC is relevant to the question whether amendments to those charges are permissible, and whether, in any case, such notice cannot but be considered tardy.

²⁷ See Decision, para. 23.

²⁸ Prosecutor’s Response, para. 9.

²⁹ *Ibid.*, para. 10.

³⁰ *Ibid.*, para. 15. See also paras 16 and 17.

³¹ OPCV Response, para. 32.

³² *Ibid.*, paras 43 to 48.

28. The Chamber is equally persuaded that, in principle, the Third Issue may significantly affect the fair and expeditious conduct of the present proceedings, given that it relates to the question whether the Defence has been put in a position to properly exercise its statutory rights, and, in particular, to satisfactorily respond to the Prosecutor's allegations that the facts with which Mr Gbagbo is charged may equally give rise to his responsibility under further modes of liability than those envisaged in the original DCC filed on 17 January 2013.

29. Nevertheless, the Chamber is not persuaded that in the present circumstances, "an immediate resolution [of the Third Issue] by the Appeals Chamber may materially advance the proceedings", as required by article 82(1)(d) of the Statute. The Chamber recalls that according to the Appeals Chamber this requirement, *inter alia*, "underlines the importance of avoiding errors [...] by the prompt reference of the issue to the court of appeal"³³ by "ridding [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial".³⁴

30. The Chamber considers that, even assuming that it erred by relying on the notion of notice of the charges as a relevant factor in accepting the addition of further modes of liability on the basis of the same facts and circumstances, and that such notice would in any case not be reasonable and adequate for the proper exercise of the rights of the defence, the ultimate effect of this error would be that the Chamber should not consider, for the purposes of its determination under article 61(7) of the Statute, these additional modes of liability presented by the Prosecutor in the Amended DCC. Accordingly, any prejudice arising from the alleged error mentioned in

³³ Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 18.

³⁴ *Ibid.*, para. 14.

the Third Issue would only materialise if the charges against Mr Gbagbo were eventually confirmed, in whole or in part, on the modes of liability that were added by the Prosecutor in her Amended DCC.

31. In these circumstances, and considering that the Chamber will render its decision under article 61(7) of the Statute soon, the Chamber is not persuaded that an interlocutory appeal at this stage of the proceedings in order to obtain immediate resolution of the Third Issue will materially advance the present confirmation proceedings, while it will necessarily cause a further significant delay.

IV. The Fourth, Fifth and Sixth Issue

32. The fourth, fifth and sixth issues in respect of which the Defence requests leave to appeal the Decision in essence concern the same matter, while being formulated differently and revolving around slightly distinct, although related, aspects. The Chamber will therefore address them together.

33. The fourth issue is phrased as follows: *“les Juges peuvent-ils se prononcer sur une demande qui n’est pas fondée sur une écriture régulièrement déposée sous forme de requête et qui n’est donc pas versée officiellement au dossier de l’affaire ?”* (the “Fourth Issue”).³⁵ The fifth issue reads: *“le Représentant légal des victimes peut-il bénéficier d’un régime dérogatoire par rapport aux parties, alors même qu’il n’est qu’un participant ?”* (the “Fifth Issue”).³⁶ Finally, the sixth issue is: *“la Chambre peut-elle prendre une décision accroissant le champ d’intervention des participants sans la motiver ?”* (the “Sixth Issue”).³⁷

34. With its Fourth, Fifth and Sixth Issue, the Defence challenges the part of the Decision in which the Chamber, noting that the OPCV had requested by

³⁵ Application, p. 13.

³⁶ *Ibid.*

³⁷ *Ibid.*

email that the page limit for its written submissions be extended from 20 to 40 pages, granted this extension in order to preserve the victims' right to participate fully.³⁸

35. According to the Defence, the Chamber has created a derogatory regime for the OPCV by allowing it to submit requests by email, rather than by formal filings, contrary to what is requested of the Prosecutor and the Defence,³⁹ and the Chamber extended the page limit for the OPCV written submissions without the OPCV having justified the existence of "exceptional circumstances" within the meaning of regulation 37(2) of the Regulations.⁴⁰

36. The Prosecutor states that the Fourth, Fifth and Sixth Issues are not appealable issues since "[i]n the context of the Decision, these questions are minor procedural matters".⁴¹ The OPCV argues that neither of the issues under consideration arises from the Decision as they all "result only from a misunderstanding of the Decision by the Defence",⁴² and that, in any case, they do not affect the fair and expeditious conduct of the proceedings or the outcome of the trial.⁴³

37. The Chamber finds it necessary to clarify that: (i) no "derogatory regime" has been adopted with respect to the OPCV in relation to the other parties, as in several other occasions the Chamber, as appropriate, has considered minor procedural requests advanced by both the Prosecutor and the Defence by email rather than by way of a formal filing; (ii) regulation 37(1) of the Regulations explicitly provides that an extension of page limit may even be decided *proprio motu* by the Chamber and, as such, it does not even

³⁸ Decision, para. 31.

³⁹ Application, para. 35.

⁴⁰ *Ibid.*, para. 36.

⁴¹ Prosecutor's Response, para. 11.

⁴² OPCV Response, para. 35.

⁴³ *Ibid.*, paras 49 to 53.

necessitate, in principle, a request from the concerned party or participant; and (iii) the Decision, contrary to the Defence argument in the Application that no explanation was provided by the Chamber for the extension of page limit for the OPCV submissions, clarified that this extension was warranted by the need “to preserve the victims’ right to participate fully”.⁴⁴

38. In any case, the Chamber is of the view that, even if the Defence were correct in its assumptions underlying the Fourth, Fifth and Sixth Issues, these issues concern minor procedural matters which do not amount to a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”,⁴⁵ and would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. These issues therefore do not constitute appealable issues within the meaning of article 82(1)(d) of the Statute.

V. The Seventh Issue

39. The seventh issue in respect of which the Defence requests leave to appeal the Decision is phrased as follows: “*la Chambre peut-elle se prononcer sur la confirmation des charges sans avoir tenu une audience orale, alors même que le Procureur a dépassé le cadre que les Juges avaient tracé le 3 juin 2013, qu’il a changé le substrat factuel des charges et ajouté des modes de responsabilité ?*” (the “Seventh Issue”).⁴⁶

40. In respect of this issue, the Defence challenges the part of the Decision in which the Chamber rejected the Defence request that the parties’ submissions in the further confirmation proceedings be presented orally rather than in

⁴⁴ Decision, para. 31.

⁴⁵ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

⁴⁶ Application, p. 14.

writing.⁴⁷ According to the Defence, “*la Chambre a commis une erreur de droit en ne considérant pas que l’audience orale était de droit dans le circonstances de l’espèce, au vu de l’ampleur des modifications apportées par le Procureur*”.⁴⁸

41. The Prosecutor argues that the Seventh Issue is not an appealable issue arising from the Decision given that: (i) “it is based on the erroneous assumption that the Amended DCC exceeded the scope of the Adjournment Decision and that the Prosecutor substantially amended the charges”;⁴⁹ and (ii) the issue “is not essential for the determination of matters arising in the judicial cause before the Chamber” since the Chamber granted the Defence alternative request to be allowed up to 300 pages to make its submissions if the confirmation proceedings were to continue in writing and “the Defence conceded that this approach would be sufficient to meet the requirements of fairness”.⁵⁰ The OPCV argues that the Seventh Issue does not arise from the Decision “but merely represents the Defence’s efforts to litigate *ex novo* before the Appeals Chamber the motion dismissed by the Chamber”.⁵¹ It further maintains that, in any case, the Seventh Issue does not affect the fairness of the proceedings as “the lack of oral arguments concerning the Amended DCC does not mean that the Defence will not be provided with a genuine opportunity to present its case”, as also recently confirmed by Pre-Trial Chamber II.⁵² It is argued that the Decision “places the Defence in equal conditions to comment on the observations and evidence submitted to the

⁴⁷ Decision, paras 26 to 32.

⁴⁸ Application, para. 45.

⁴⁹ Prosecutor’s Response, para. 12.

⁵⁰ *Ibid.*, para. 12.

⁵¹ OPCV Response, para. 39.

⁵² *Ibid.*, para. 54, with reference to Pre-Trial Chamber II, “Decision on the ‘Requête en autorisation d’appel (art. 82.1.d)’ submitted by the Defence for Mr Mangenda”, 14 January 2014, ICC-01/05-01/13-93, p. 6.

Chamber that might influence the eventual decision pursuant to article 61(7) of the Statute”.⁵³

42. The Chamber considers that the issue of whether it erred in deciding that, in the present circumstances, the confirmation proceedings would continue in writing is an issue arising from the Decision. Nevertheless, the Chamber is of the view that the Seventh Issue does not significantly affect the fair and expeditious conduct of the proceedings. In particular, the Chamber is not persuaded by the argument put forward by the Defence in order to demonstrate that the Seventh Issue meets this requirement under article 82(1)(d) of the Statute, *i.e.* that “*la question posée est celle de l’équité de la procédure et de son caractère contradictoire et transparent*”.⁵⁴

43. The Chamber recalls that, as noted in the Decision, “the Defence alternatively requested, in the case the Chamber confirms that the continuation of the confirmation proceedings will take place in writing, that the page limit for its written observations on the Prosecutor’s evidence be extended to 300 pages”.⁵⁵ This alternative request for extension of page limit, presented in case of rejection of the request for an oral hearing, was justified by the Defence in order to safeguard its fair trial rights. More precisely, the Defence submitted that the extension of page limit, in case of continuation in writing of the confirmation proceedings, was warranted “*pour pouvoir répondre au Procureur et exposer sa propre position. Il s’agit pour elle d’exercer les droits prévus à l’article 61 (6). Il s’agit aussi de permettre que se tienne un débat véritablement contradictoire. A défaut, le principe de l’égalité des armes ne serait pas respecté, les droits de la défense seraient bafoués et le caractère équitable de la présente*

⁵³ OPCV Response, para. 55.

⁵⁴ Application, para. 50.

⁵⁵ Decision, para. 26 with reference to the Defence filing ICC-02/11-01/11-607.

procédure mis en cause".⁵⁶ The Defence also argued that "[p]our articuler un raisonnement synthétique, convaincant et complet afin de démontrer qu'il n'y a pas de motifs substantiels de croire que le Président Gbagbo serait responsable des charges qui lui sont reprochées par le Procureur, la défense a besoin de pages additionnelles. En effet, la défense doit non seulement répondre aux points soulevés par le Procureur dans son DCC amendé mais encore discuter de la valeur probante des nouveaux éléments de preuve présentés. Il convient donc de lui accorder le nombre de pages nécessaires pour 'contester les éléments de preuve présentés par le Procureur', 'contester les charges' et 'présenter des éléments de preuve'. C'est là son droit le plus élémentaire garanti par l'article 61(6), le droit pour la défense de pouvoir exposer de la manière la plus complète et détaillée possible sa position".⁵⁷

44. In the Decision, the Chamber acceded to this alternative request by the Defence, which was advanced by the Defence as sufficient to meet the requirements of fairness in presence of further confirmation proceedings unfolding in writing. Accordingly, the Chamber granted the Defence as many pages as the Defence itself deemed necessary in order to present fully its arguments, by way of extending twice the relevant page limit for the Defence written submissions replacing an oral presentation of its arguments.⁵⁸ The Chamber also reiterates its position that the fact that the Defence submissions have been presented in writing rather than in the course of an oral hearing in no way prejudices the rights of the defence, as the Defence has been provided with a genuine opportunity to fully present its case and respond to the Prosecutor's evidence and submissions, and all the requirements of publicity

⁵⁶ ICC-02/11-01/11-607, para. 56.

⁵⁷ *Ibid.*, para. 75.

⁵⁸ Decision, para. 31 and p. 24; and "Decision on the 'Requête urgente aux fins de prorogation du délai donné par la Chambre le 14 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))'", 13 March 2014, ICC-02/11-01/11-636, p. 6.

of the proceedings and equality of arms are equally guaranteed in the instant written proceedings in the same way as they would have been in case of an oral hearing.

45. Accordingly, the issue of whether the Chamber erred by not convening an oral hearing to allow the parties to make oral submissions in relation to the confirmation of charges does not significantly affect the fair and expeditious conduct of the proceedings. The same conclusion must be reached with respect to the alternative requirement that a decision may be appealed also when the issue involved therein would significantly affect “the outcome of the trial” within the meaning of article 82(1)(d) of the Statute. In this regard, the Chamber indeed does not see how receiving the parties and participants’ arguments in writing rather than orally would significantly affect “the outcome of the trial”, and notes the absence of any argument to this effect in the Defence Application.

VI. The Eighth Issue

46. The eighth issue in respect of which the Defence requests leave to appeal the Decision is phrased as follows: “*la Chambre peut-elle refuser une audience orale sans motiver ce refus ?*” (the “Eighth Issue”).⁵⁹

47. The Eighth Issue relates to the same portion of the Decision to which the Seventh Issue relates, namely the Chamber’s rejection of the Defence request to have the parties’ submissions be presented orally rather in writing.⁶⁰

48. Both the Prosecutor and the OPCV argue that the Eighth Issue does not arise from the Decision,⁶¹ and, in any case, does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial.⁶²

⁵⁹ Application, p. 16.

⁶⁰ Decision, paras 26 to 32.

49. The Chamber notes that the Eighth Issue is entirely predicated on the Chamber's alleged failure to provide any reason for its decision to hold the further confirmation proceedings in writing. This assumption is however flawed. The Chamber indeed considered, *inter alia*, that: "[t]he adjournment decided by the Chamber, while broad in nature, should not be equated with a 'new' confirmation process requiring further oral submissions in the context of a hearing [...] and it is [...] for the Chamber to decide whether such a hearing would be necessary in the specific circumstances of the case";⁶³ "[a] thorough and substantive discussion [...] has taken place at the hearing already held";⁶⁴ "no prejudice to the fairness of the proceedings or interests of justice will occur if the parties and participants are required to provide their additional submissions in writing";⁶⁵ what is "fundamental" is that "the parties are given a meaningful opportunity to address fully all relevant aspects they intend to raise";⁶⁶ "conducting a further oral hearing has [no] tangible benefit for the current proceedings".⁶⁷

50. While the Defence may disagree with the Chamber's reasoning underlying the rejection of the Defence request for conducting a further oral hearing in the present case, the issue of whether the Chamber erred by not providing any reason in this respect does not arise from the Decision.

⁶¹ Prosecutor's Response, para. 12; OPCV Response, paras 39 to 40.

⁶² Prosecutor's Response, paras 17 to 19; OPCV Response, paras 54 to 57.

⁶³ Decision, para. 30.

⁶⁴ *Ibid.*, para. 31.

⁶⁵ *Ibid.*, para. 31.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, para. 32.

FOR THESE REASONS, THE CHAMBER

REJECTS the Application.

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 Friday, 9 May 2014

At The Hague, The Netherlands