



Original: English

No.: ICC-02/11-01/11
Date: 11 September 2014

PRE-TRIAL CHAMBER I

**Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekaterina Trendafilova
Judge Christine Van den Wyngaert**

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

Public

**Decision on the Defence request for leave to appeal the "Decision on the
Confirmation of Charges against Laurent Gbagbo"**

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart

Counsel for the Defence

Emmanuel Altit
Agathe Bahi Baroan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) hereby issues the decision on the “*Demande d’autorisation d’interjeter appel de la « Décision relative à la confirmation des charges » du 12 juin 2014 (ICC-02/11-01/11-656-Conf-tFRA)*” (the “Request”).¹

I. Procedural history

1. On 12 June 2014, the Chamber issued the “Decision on the confirmation of charges against Laurent Gbagbo” (the “Decision”).²
2. On 16 June 2014, Single Judge Silvia Fernández de Gurmendi,³ following a Defence request,⁴ extended the time limit for the submission by the Defence of any application for leave to appeal the Decision to five days following notification of the official French translation of the Decision.⁵
3. On 18 July 2014, the Registry filed the official French translation of the Decision.⁶
4. On 18 July 2014, the Single Judge, at the request of the Defence,⁷ granted the Defence up to 50 pages for its request for leave to appeal the Decision.⁸
5. On 29 July 2014, the Defence filed the Request.

¹ ICC-02/11-01/11-676-Conf. On 30 July 2014, the Registrar, on instruction of the Single Judge, notified the Request to the OPCV. A public redacted version of the Request is also available, see ICC-02/11-01/11-676-Red.

² ICC-02/11-01/11-656-Conf. A public redacted version is also available, see ICC-02/11-01/11-656-Red.

³ “*Décision portant désignation d’un juge unique*”, 16 March 2012, ICC-02/11-01/11-61.

⁴ ICC-02/11-01/11-657.

⁵ “Decision on the ‘Requête urgente de la défense portant sur la détermination de la date à partir de laquelle courent les délais fixés pour qu’elle puisse déposer une éventuelle demande d’autorisation d’interjeter appel de la « Decision on the confirmation of charges against Laurent Gbagbo » (ICC-02/11-01/11-656-Conf) et/ou pour qu’elle puisse déposer une éventuelle réponse à une éventuelle demande d’autorisation d’interjeter appel déposée par le Procureur”, ICC-02/11-01/11-658.

⁶ ICC-02/11-01/11-656-Conf-tFRA.

⁷ ICC-02/11-01/11-672.

⁸ “Decision on Defence request to extend page limit pursuant to regulation 37(2) of the Regulations of the Court”, ICC-02/11-01/11-673.

6. On 29 July 2014, the Single Judge, at the request of the Prosecutor,⁹ granted up to 40 pages for her response to the Request.

7. On 4 August 2014, the Office of Public Counsel for victims (the “OPCV”), acting as common legal representative for the victims participating in the proceedings,¹⁰ and the Prosecutor¹¹ responded to the Request.

II. Applicable law

8. 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”). The Chamber also notes the established jurisprudence of the Court regarding the interpretation of the criteria for granting leave to appeal, as concerns what constitutes an “issue” within the meaning of article 82(1)(d) of the Statute¹² as well as with respect to the other requirements under that provision.¹³

III. Analysis

9. The Defence alleges that a large number of issues meet the criteria of article 82(1)(d) of the Statute and should be certified for appeal. The issues are laid out in the Request in varying degrees of detail, and with considerable overlap. In addition, the Defence does not make specific submissions on the criteria of article 82(1)(d) of the Statute, and limits itself to stating generally at the end of the submission that all issues raised need to be resolved

⁹ ICC-02/11-01/11-674.

¹⁰ ICC-02/11-01/11-678 (the “OPCV Response”).

¹¹ ICC-02/11-01/11-679 (the “Prosecutor’s Response”).

¹² 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.

¹³ *Ibid.*, paras 10, 13, 14, 18.

immediately and they have the potential to affect fairness or the outcome of the trial.¹⁴

10. Nevertheless, the Chamber has, to the extent possible, sought to give the Defence submissions an effective interpretation, rather than rejecting proposed issues for incompleteness of argument. The Chamber has concluded that none of the issues identified by the Defence meet the criteria of article 82(1)(d) of the Statute. As further developed below, the Chamber has reached this conclusion mainly for the following reasons: (i) some issues proposed by the Defence are in fact extraneous to the Decision; (ii) other issues misrepresent the Decision or involve various disagreements with the Decision with no identifiable impact on the confirmation of charges against Laurent Gbagbo; (iii) other issues arise out of the Decision but, in the conclusion of the Chamber, do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

A. Issues extraneous to the Decision

11. It follows from the jurisprudence of the Appeals Chamber that the Chamber can only certify interlocutory appeal with respect to issues that are “essential for the determination of matters arising in the judicial cause under examination”.¹⁵ Accordingly, any issues which, if decided otherwise, would have no impact on whether and what charges against Laurent Gbagbo would be confirmed, do not arise from the Decision for the purposes of article 82(1)(d) of the Statute.

12. Thus, the Chamber takes the view that the two issues raised by the Defence in relation to the alleged failure of the Chamber to consider the

¹⁴ Request, para. 156.

¹⁵ 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.

inappropriate actions of the common legal representative of the victims participating in the proceedings¹⁶ and the alleged failure of the Chamber to rule on the Defence submissions in relation to violation of the page limits for the victims' final submissions,¹⁷ cannot be considered for appeal. Indeed, the Defence does not explain how the confirmation of charges against Laurent Gbagbo would have been different had these purported issues been decided otherwise by the Chamber.

13. Equally, the Chamber is of the view that the issue in relation to the application of allegedly contradictory criteria to the determination of Defence requests for leave to appeal certain decisions taken during the pre-trial proceedings¹⁸ is not linked to, and *a fortiori* not essential for, the determination of the confirmation of charges against Laurent Gbagbo.

14. The Defence also alleges that the Chamber erred by refusing to examine the consequences of the fact that the Prosecutor has not investigated exonerating circumstances.¹⁹ However, the Defence does not identify a concrete issue arising from the Decision that could have had an essential impact on the determination by the Chamber that there are substantial grounds to believe that Laurent Gbagbo committed the crimes charged. Rather, the argument appears to reflect a broad disagreement with the manner in which the Prosecutor conducted the investigation and the Chamber exercised its oversight role under the Statute. Therefore, an issue within the meaning of article 82(1)(d) of the Statute does not arise from the Decision and leave to appeal cannot be granted.

¹⁶ Request, paras 17-23.

¹⁷ *Ibid.*, paras 45-50.

¹⁸ *Ibid.*, paras 24-31.

¹⁹ *Ibid.*, paras 37-39.

15. The Defence also raises three issues related to the relationship between the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (the “Adjournment Decision”),²⁰ and the impugned Decision, in particular as concerns: (i) the evidence relied upon by the Chamber for its findings in relation to contextual elements of crimes against humanity;²¹ (ii) the acceptance by the Chamber of the fact that the Prosecutor did not respond in the document containing the charges (the “DCC”) to the questions in the Adjournment Decision and responded only partly in the annexes, without providing the exculpatory evidence to which reference was made;²² and (iii) the alleged confirmation of charges on the basis of considerations not respecting the minimum standards established in the Adjournment Decision.²³ The Chamber is of the view that such matters related to an alleged inconsistency with the previous Adjournment Decision are irrelevant to the substantial findings arising out of the Decision, namely that the Prosecutor presented sufficient evidence to provide substantial grounds to believe that Laurent Gbagbo committed each of the crimes charged.

16. Finally, the Defence raises matters pertaining to the relationship between the present case and the case against Charles Blé Goudé and questions whether the Chamber may base its conclusions on the presumed culpability of Charles Blé Goudé, in respect of whom pre-trial proceedings are still pending.²⁴ The Chamber notes that for the purposes of the confirmation of charges against Laurent Gbagbo, it analysed evidence concerning the actions of alleged members of his inner circle, including Charles Blé Goudé. The findings related to Laurent Gbagbo are, however, not contingent on the

²⁰ Pre-Trial Chamber I, 3 June 2013, ICC-02/11-01/11-432 and Annex.

²¹ Request, p. 25, heading 3, paras 83-85.

²² *Ibid.*, paras 118-120.

²³ *Ibid.*, paras. 121-122.

²⁴ Request, p. 31.

outcome of proceedings against Charles Blé Goudé, which are being conducted separately before this Chamber. Therefore, there is no issue of the kind advanced by the Defence arising from the Decision within the meaning of article 82(1)(d) of the Statute.

B. Issues premised on a misrepresentation of the Decision or other disagreements with no identifiable impact on the Decision

17. The Defence argues that the absence of an oral hearing following the adjournment of the confirmation of charges hearing compromised the integrity of the proceedings.²⁵

18. The Chamber notes that the essential element for the positive determination that the above constitutes an issue arising from the Decision – namely how the Decision would have been different if an oral hearing had been held – is missing from the Defence submissions.

19. In addition, the Chamber recalls that before the issuance of the Decision, the Defence itself did not consider the continuation of the proceedings by way of oral hearings to be essential. At the time, the Defence submitted that its ability to present its arguments adequately would also be safeguarded by way of an extension of the page limit for its written submissions.²⁶ Such an extension was granted by the Chamber,²⁷ and another extension to a total of 400 pages was subsequently granted.²⁸

²⁵ *Ibid.*, paras 32-36.

²⁶ ICC-02/11-01/11-607, para. 56.

²⁷ “Decision on Defence requests related to the continuation of the confirmation proceedings” (the “Decision of 14 February 2014”), 14 February 2014, ICC-02/11-01/11-619, para. 31.

²⁸ 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))*’” (the “Decision of 13 March 2014”), 13 March 2014, ICC-02/11-01/11-636, para. 9.

20. Accordingly, the question whether the Chamber properly decided not to hold oral hearings is not an issue arising out of the Decision, within the meaning of article 82(1)(d) of the Statute.

21. With respect to the content of the Decision, the Defence raises three purportedly related issues: (i) whether the Chamber may accept as true witness statements without critically examining them;²⁹ (ii) whether the Chamber may presume the authenticity of certain documents relied upon by the Prosecutor;³⁰ and (iii) whether the presumption of credibility of the evidence presented by the Prosecutor on the part of the Chamber did not amount to a reversal of the burden of proof.³¹

22. The Defence raises these issues in general terms, and refers on several occasions to “examples” illustrating the issue, without elaborating. Most importantly, the Defence does not point to any distinct part of the Decision to justify its interpretation that the Chamber presumed the credibility of all or certain evidence submitted by the Prosecutor. Indeed, the Decision states explicitly that the Chamber assessed the probative value of all relevant evidence, to the extent that this is required and possible at the stage of confirmation of charges, and in accordance with the Appeals Chamber’s guidance to the effect that the Chamber should take great care in finding that a witness is or is not credible.³² Accordingly, the Defence merely disagrees with the result of the Chamber’s assessment of the evidence, and the issue of whether such assessment was conducted at all does not arise from the Decision.

²⁹ Request, paras 56-65.

³⁰ *Ibid.*, para. 66.

³¹ *Ibid.*, paras 67-70.

³² Decision, para. 21.

23. In relation to the issue of whether the Chamber may make a finding without taking into account exculpatory evidence,³³ the Defence refers to specific findings of the Chamber, as follows.

24. The Defence alleges that it is not explained why the Chamber rejected its arguments related to the speech of Laurent Gbagbo at Divo on 27 August 2010.³⁴ However, the arguments put forward by the Defence represent a mere disagreement with the Chamber as the paragraph referred to by the Defence does contain reasons for the findings of the Chamber.

25. Similarly, the Defence argues that the Chamber ignored the exculpatory evidence relevant to its finding that the presence of organised resistance groups in Abobo on 17 March 2011 does not deny that shelling of the area took place on that day, or that the shelling targeted the civilian population.³⁵ However, the Decision explicitly refers to the evidence in question, and provides detailed reasoning for the conclusion now challenged by the Defence.³⁶ Therefore, the Chamber considers that the assertions of the Defence in this regard again represent a mere disagreement with the analysis of the Chamber.

26. The Defence also contests the reliance of the Chamber on the statement of Witness P-230 in relation to an event during the march on the RTI building on 16 December 2010.³⁷ However, the Defence does not explain how the confirmation of charges against Laurent Gbagbo would have been different without that statement, taking into account that it was not the sole basis relied upon for the relevant findings in relation to the repression of the march on the RTI building between 16 and 19 December 2010.

³³ Request, paras 71-74.

³⁴ Request, para. 74, referring to Decision, para. 112.

³⁵ *Ibid.*, para. 71, referring to Decision, para. 40.

³⁶ Decision, paras 62-63.

³⁷ Request, para. 72, referring to Decision, para. 31.

27. The Defence also states generally that the Chamber “systematically” ignored contemporary FDS reports whenever they failed to support the allegations of the Prosecutor.³⁸ However, the Defence refers only to one such report, without explaining its relevance for the findings of the Chamber.

28. Next, the Defence raises the issue of whether the Chamber may reinterpret the evidence, in particular by referring to a “blurred” concept of “other evidence”.³⁹ The Defence indicates two particular instances, in relation to the promotions of FDS officers in July and August 2010,⁴⁰ and the Chamber’s interpretation of the evidence of radio orders given to FDS units on the ground during the march on the RTI building on 16 December 2010.⁴¹ However, the Chamber notes that the reference to “the totality of the evidence” at paragraph 125 of the Decision is not undefined as it can only reasonably be understood as a reference to the evidence discussed at that and the preceding paragraph. Similarly, the reference to “other evidence” at paragraph 40 of the Decision can only reasonably be understood as a reference to the evidence referred to in the Decision in the same context. Therefore, the Chamber takes the view that this issue does not arise out of the Decision.

29. The Defence also argues that the Chamber should have declared inadmissible those items of evidence for which the chain of custody was not clear.⁴² The Defence states that the Chamber ignored its previous submission that “*un certain nombre de pièces utilisées par le Procureur étaient douteuses*”,⁴³ but does not specify which findings of the Decision are affected by this alleged error. The only finding specifically mentioned by the Defence relates to the

³⁸ Request, para. 73 (footnote omitted).

³⁹ *Ibid.*, paras 75-76.

⁴⁰ *Ibid.*, para. 75, referring to Decision, para. 125.

⁴¹ Request, para. 76, referring to Decision, para. 40.

⁴² Request, paras 77-78.

⁴³ *Ibid.*, para. 77, referring to ICC-02/11-01/11-637-Conf-Anx2-Corr2, paras “78, 80, etc”.

authenticity of certain videos related to the women's march in Abobo on 3 March 2011.⁴⁴ However, even in this respect, the Defence has not demonstrated how the purported issue affects the Chamber's findings in relation to the march, which are based on several pieces of evidence, considered together, and not only on the videos in question. In consequence, the Defence has not put forward any issue that was essential for the Decision.

30. Further, the Defence proposes to appeal the issue of whether the Chamber may systematically prefer the allegations of the Prosecutor even when contradictory or disproved by facts.⁴⁵ The Defence argues that the Chamber relied on contradictory allegations when finding that the repression of the demonstration on 16 December 2010 was planned and coordinated,⁴⁶ and that it accepted allegations disproved by facts, in particular when finding that the FDS attacked unarmed civilians on 16 December 2010.⁴⁷ In addition, the Defence submits again that the Chamber utilised blurred notions such as "the totality of the evidence" or "other evidence" "*lorsqu'il s'agit de contourner l'existence d'éléments de preuve démenant le narratif du Procureur*".⁴⁸

31. The Chamber takes the view that those instances mentioned by the Defence actually refer to positions taken by the Chamber on the basis of the evidence before it, considered as a whole, as part of its assessment of the relevant facts. The fact that the Defence reiterates an alternative assessment of the same evidence does not mean that it has raised an appealable issue, but merely a disagreement on its part with the factual findings of the Chamber.

⁴⁴ Request, para. 78.

⁴⁵ *Ibid.*, paras 79-81.

⁴⁶ *Ibid.*, para. 79, referring to Decision, para. 40.

⁴⁷ Request, para. 80, referring to Decision, para. 29.

⁴⁸ Request, para. 81, referring to Decision, paras 148, 158, 75(iv) and 76(iii).

32. The Defence also raises the issue of whether the Chamber can accept blurred and imprecise allegations.⁴⁹ It appears that the Defence challenges specifically the Chamber's finding at paragraph 65 of the Decision that "[a]s the submissions of the Prosecutor and the evidence presented relate to a clearly defined event, the Chamber is not persuaded by the arguments of the Defence that the Prosecutor's allegations are not specific".⁵⁰

33. The Chamber notes that this argument is one which the Defence put forward unsuccessfully in the context of the confirmation of charges hearing.⁵¹ As the Defence merely repeats previous unsuccessful submissions and, in particular, does not explain how the criteria of article 82(1)(d) of the Statute are met, the Chamber is of the view that the issue cannot be considered for certification.

34. Further, the Defence makes submissions in the Request in relation to an alleged semantic bias on the part of the Chamber, on the basis of the use in the Decision of the expression "organised resistance groups" "*comme s'il était agi de groupes de civils spontanément constitués pour résister à des attaques lancées de manière indiscriminée contre la population civile*".⁵² In the view of the Chamber, the Defence is attributing a meaning to the Decision that it does not have. The Decision at paragraph 62, referred to by the Defence, and at paragraph 172, referred to in that paragraph, does not discuss spontaneous, but, indeed, organised resistance to the FDS, and in this sense accepts the argument of the Defence made in the course of the proceedings leading up to the Decision.⁵³ For this reason, the Chamber considers that the submissions of the Defence in

⁴⁹ Request, paras 82-85.

⁵⁰ Decision, para. 65.

⁵¹ See ICC-02/11-01/11-637-Conf-Anx2-Corr2, paras 769-806.

⁵² Request, para. 86, referring to Decision, para. 62.

⁵³ See ICC-02/11-01/11-637-Conf-Anx2-Corr2, paras 488-521.

this respect constitute a misrepresentation of the Decision and warrant no further consideration.

35. Under the heading of issues related to an alleged lack of reasoning in the Decision, the Defence first argues that the Decision involves the issue of whether the Chamber may make findings of fact referring to “other evidence” which is not specified.⁵⁴ Specifically, the Defence refers to two findings of the Chamber concerning: (i) the interpretation of the evidence of radio orders given to FDS units on the ground during the march on the RTI building on 16 December 2010;⁵⁵ and (ii) Laurent Gbagbo’s inner circle.⁵⁶ With respect to the former, the Chamber considers, as stated above, that the reference to “other evidence” at paragraph 40 of the Decision can only reasonably be understood as a reference to the evidence referred to in the Decision in the same context. With respect to the latter, the Chamber only notes that the evidence referred to by the Chamber is specified in the Decision. Consequently, the Defence submissions represent a misrepresentation of the Decision and do not raise an appealable issue.

36. Also under the heading of alleged lack of reasoning, the Defence raises the issue of whether the Chamber may adopt a position favourable to the Prosecutor without referring to any evidence in support of its finding.⁵⁷ In fact, the Defence contests two specific findings of the Chamber concerning whether pro-Ouattara armed forces participated in the march on the RTI building on 16 December 2010,⁵⁸ and concerning the interpretation of the promotions of FDS officers in July and August 2010.⁵⁹ However, contrary to the Defence submissions, the findings of the Chamber in relation to these two issues are

⁵⁴ Request, paras 89-91.

⁵⁵ *Ibid.*, para. 89; referring to Decision, para. 40.

⁵⁶ Request, para. 90, referring to Decision, para. 158.

⁵⁷ Request, paras 92-93.

⁵⁸ *Ibid.*, para. 92, referring to Decision, para. 39.

⁵⁹ Request, para. 93, referring to Decision, para. 125.

reasoned and include references to the evidence relied upon. Accordingly, there is no purpose to further considering the certification of the issue as presented by the Defence.

37. The Chamber now turns to the Defence submissions under the heading of issues related to an alleged wrong interpretation of the role assigned to the Judges by the Statute. Under this heading, the Defence, first, raises the issue of whether the Chamber may add to the allegations of the Prosecutor, referring to three particular instances: (i) the Chamber's finding that the persons buried in mass graves in Yopougon were victims of the pro-Gbagbo forces' attack in Doukouré and Mami Faitai on or around 12 April 2011;⁶⁰ (ii) the Chamber's reference to evidence establishing that on 4 and 8 March 2011 armed pro-Gbagbo youth killed several persons in Yopougon;⁶¹ and (iii) the Chamber's finding that members of communities identified at the rallies as pro-Ouattara were openly threatened with death.⁶² Second, the Defence raises the related issue of whether the Chamber may refer to items of evidence not referred to in the DCC to construct reasoning which the Prosecutor has not put forward in the DCC.⁶³ The instances referred to by the Defence are: (i) the use by the Chamber of evidence not referenced by the Prosecutor for the finding that there existed a direct link between Simone Gbagbo and youth organisations and militias;⁶⁴ the analysis of the pro-Gbagbo forces in the Decision;⁶⁵ and the analysis of militia, youth organisations and mercenaries.⁶⁶ The Defence also asserts that there are many other similar examples in the Decision, and declares that it would present them on appeal.⁶⁷ Third and finally in this

⁶⁰ Request, para. 94, referring to Decision, para. 66.

⁶¹ Request, para. 95, referring to para. 77(xii) of the Decision.

⁶² Request, para. 96, referring to para. 118 of the Decision.

⁶³ Request, paras 98-101.

⁶⁴ *Ibid.*, para. 98, referring to Decision, para. 82.

⁶⁵ Request, para. 99, referring to Decision, paras 87-109, 134.

⁶⁶ Request, para. 100, referring to Decision, paras 100-109.

⁶⁷ Request, para. 101.

context, the Defence argues that the Decision involves the issue of whether the Chamber may recharacterise the allegations of the Prosecutor and transform them without giving the suspect the possibility of being heard on the matter.⁶⁸ Specifically, the Defence states that the Chamber's assessment of Laurent Gbagbo's and Charles Blé Goudé's visits to Yopougon and reference to certain meetings of Laurent Gbagbo with his inner circle were improper.⁶⁹

38. In the view of the Chamber, the Defence fails to identify an appealable issue. The facts and circumstances of the charges as confirmed by the Chamber are found at paragraphs 267-277 of the Decision. None of the examples given by the Defence purport that the Chamber confirmed facts and circumstances not described in the charges presented by the Prosecutor. The Request concerns the analysis of the Chamber of the evidence submitted by the parties, in Section 2 of the Decision. As explained in the Decision, the Chamber's determination was based on an assessment of the evidence relied upon by the Prosecutor and the Defence – and included for this purpose in their respective lists of evidence pursuant to rule 121(3) and (6) of the Rules – taking into account the oral and written submissions advanced by the parties as well as the legal representative of the victims admitted to participate at the confirmation of charges hearing.⁷⁰ The Defence now identifies certain specific points where the Chamber's independent assessment of the evidence does not correspond entirely to the argument of the Prosecutor. However, since this analysis of evidence did not result in confirmation of charges other than those presented by the Prosecutor, no issue of the type alleged by the Defence arises from the Decision.

⁶⁸ *Ibid.*, paras 102-105.

⁶⁹ *Ibid.*, paras 103-104, referring to Decision, paras 70, 152, 154, 156.

⁷⁰ Decision, para. 20.

39. The Defence also raises three issues related to the Chamber's findings concerning contextual or specific elements of crimes against humanity.

40. First, the Defence proposes appeal on the question whether the Chamber was permitted to make a finding on the existence of an organisation within the meaning of article 7(2)(a) of the Statute without first addressing its constituent elements and making a finding on the applicable law.⁷¹ In particular, the Defence contests that the Chamber noted two different views with respect to the proper interpretation of what constitutes an "organisation" within the meaning of article 7(2)(a) of the Statute and that without choosing one found that, in light of the facts at hand, either definition of "organisation" was met in the present case.⁷² However, precisely because the Chamber stated that the requirements of article 7(2)(a) of the Statute were met regardless of which view is applied, the Chamber considers that this issue is without impact on the Decision, and therefore cannot be certified for appeal under article 82(1)(d) of the Statute.

41. Second, the Defence raises the issue of whether the Chamber erred in fact in finding the existence of a policy of a State or organisation in the sense of article 7(2)(a) of the Statute.⁷³ The Defence alleges that the Chamber did not base its finding on any probative evidence at all concerning the adoption or implementation of the policy and that there exists no evidence which would constitute an indication of the existence of a policy to attack a civilian population.⁷⁴

42. The Defence presents as an issue its wholesale disagreement with the Chamber's finding of a policy of a State or organisation for the purpose of the

⁷¹ Request, paras 124-126.

⁷² Decision, para. 217.

⁷³ Request, paras 127-129.

⁷⁴ *Ibid.*, para. 127.

determination of the contextual elements of crimes against humanity under article 7 of the Statute. The Chamber notes that the relevant finding of the Chamber is reasoned, including by reference to in-depth analysis of evidence.⁷⁵ In these circumstances, the allegations of the Defence, which do not refer to the relevant aspects of the Decision do not warrant further consideration under article 82(1)(d) of the Statute.

43. Third, the Defence submits that the Decision involves the issue of whether the Chamber committed errors of law in confirming the charges under article 7(1)(k) of the Statute, in particular by not engaging in an analysis of fact to determine whether the charged acts were of a similar character to any other act referred to in article 7(1) of the Statute,⁷⁶ and by not making a distinction between suffering which was intended as such and suffering which was a consequence of attempts of murder.⁷⁷

44. As concerns the former, the Chamber notes that the Defence does not allege that the acts qualified by the Chamber as other inhumane acts under article 7(1)(k) do not constitute acts of a character similar to any other act referred to in article 7(1) of the Statute. The alleged error concerns the brevity, rather than the factual and legal soundness, of the Chamber's conclusions. As such, the Chamber considers that it has no impact on the Decision and is therefore not appealable under article 82(1)(d) of the Statute.

45. As concerns the latter alleged error, the Chamber notes that the charges of other inhumane acts under article 7(1)(k) of the Statute and attempted murder under articles 7(1)(a) and 25(3)(f) of the Statute were confirmed in the alternative. Therefore, the Chamber did not attempt to resolve the question

⁷⁵ Decision, para. 218, referring to the analysis of evidence at paras 87-109, 111-112, 123-149, 150-192.

⁷⁶ Request, para. 131.

⁷⁷ *Ibid.*, paras 132-133.

whether the facts fit under one or other of the legal characterisation proposed by the Prosecutor, and no issue in this regard arises from the Decision.

46. Finally, the Defence raises, under one sub-heading, a series of alleged errors in the Decision related to modes of liability: (i) an error of fact in finding the existence of a common plan on the basis of insufficient evidence presented by the Prosecutor;⁷⁸ (ii) an error of law in not distinguishing between “ordering”, “soliciting” and “inducing” as regulated by article 25(3)(b) of the Statute;⁷⁹ (iii) a number of errors of fact in confirming the charges under article 25(3)(b) of the Statute in the absence of any evidence proving that Laurent Gbagbo ordered, incited or solicited the commission of crimes within the jurisdiction of the Court;⁸⁰ (iv) an error of fact in considering that the “group of persons acting with a common purpose” , within the meaning of article 25(3)(d) of the Statute, included Laurent Gbagbo;⁸¹ and (v) an error of law in confirming the charge of attempted murder in spite of imprecision in the DCC in this regard.⁸²

47. The Chamber observes that the submissions of the Defence in relation to this issue, or group of issues, are do not go beyond asserting in the most general terms an error on the part of the Chamber. As concerns sub-issues (i) and (iii), the Defence assertion of an error of fact on the part of the Chamber is unspecified, and the Chamber does not consider it appropriate to address it further. With respect to the other sub-issues, the Chamber observes that the Defence does not explain how they materially affect the confirmation of charges against Laurent Gbagbo. Therefore, they are not issues arising out of the Decision.

⁷⁸ *Ibid.*, para. 150.

⁷⁹ *Ibid.*, para. 151.

⁸⁰ *Ibid.*, para. 152.

⁸¹ *Ibid.*, para. 153.

⁸² *Ibid.*, paras 154-155.

C. Issues which do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

48. The Defence seeks leave to appeal the issue of whether the addition of modes of liability by the Prosecutor affected the integrity of the proceedings.⁸³ The Chamber notes that this issue stems from the fact that the Prosecutor included in the amended DCC filed on 17 January 2014, on the basis of the same facts and circumstances as previously alleged, charges under articles 25(3)(b) and 28 of the Statute,⁸⁴ which were not included in the DCC filed before the commencement of the confirmation of charges hearing. To the extent that charges against Laurent Gbagbo were confirmed, in the alternative, also under article 25(3)(b) of the Statute, the Chamber is indeed of the view that this issue arises out of the Decision.⁸⁵

49. Similarly, the Defence raises the issue of whether the Chamber committed an error of law in confirming cumulatively several modes of liability.⁸⁶

50. Considering that the Chamber confirmed, on the basis of the same facts and circumstances, charges under several alternative modes of liability, the Chamber accepts that the issue of the permissibility of confirming alternative charges arises out of the Decision.⁸⁷

⁸³ *Ibid.*, paras 40-43.

⁸⁴ ICC-02/11-01/11-592-Anx1; ICC-02/11-02/11-592-Conf-Anx2-Corr2.

⁸⁵ ICC-02/11-01/11-357-Anx1-Conf. A public redacted version is also available, see ICC-02/11-01/11-357-Anx1-Red.

⁸⁶ Request, paras 135-148.

⁸⁷ The Chamber notes that the Defence refers to the concept as “cumulative charging” but is of the view that this terminology is ambiguous, as it suggests that at trial, a cumulative conviction will be possible under several modes of liability for the same fact – something which does not arise from the Chamber’s decision to accept the Prosecutor’s claim that the crimes charged may fall alternatively under more than one mode of liability.

51. Notwithstanding the above, the Chamber considers that leave to appeal cannot be granted with respect to either of these issues as they do not affect either the fair and expeditious conduct of the proceedings, or the outcome of the trial. As to the former requirement, the Chamber considers it particularly relevant that in the proceedings leading up to the Decision, the Defence submitted that an extension of the page limit for its written submissions following the adjournment of the confirmation hearing would enable it to properly present its argument in relation to all the modes of liability proposed for confirmation.⁸⁸ In light of this request, the Chamber granted an extension of the page limit to 300 pages,⁸⁹ and finally to 400 pages.⁹⁰ The Chamber is thus satisfied that the Defence was able to properly defend itself against the charges brought by the Prosecutor. The Chamber therefore considers that the issue of whether the adding to the charges, in the alternative, of the legal qualification of article 25(3)(b) of the Statute, on the basis of the same facts and circumstances, as well as the issue of permissibility of confirmation of charges with alternative legal qualification, based on the same facts and circumstances, do not significantly affect the fair and expeditious conduct of the proceedings. On the contrary, as stated in the Decision, confirmation of alternative charges may better preserve the interests of the Defence in that it provides early notification of potential alternatives and thus reduces the need to resort to regulation 55 of the Regulations, which may come at a considerable cost to the expeditiousness of the proceedings.⁹¹

52. Likewise, the Chamber does not consider that these issues have any impact on the outcome of the trial. Under the statutory legal framework, confirmation of charges under one mode of liability does not preclude the

⁸⁸ See ICC-02/11-01/11-607, para. 22; ICC-02/11-01/11-634, paras 24-27.

⁸⁹ Decision of 14 February 2014, para. 31.

⁹⁰ Decision of 13 March 2014, para. 9.

⁹¹ Decision, para. 228.

trial from proceeding or a conviction from being entered under another mode of liability based on the same facts and circumstances. Indeed, in accordance with regulation 55 of the Regulations “[i]n its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges”. This regulation provides for a procedure of notification to the Defence prior to this course being taken. Recent cases demonstrate that such a notification may be given not only at the conclusion of the proceedings but also immediately after the end of the confirmation process, shortly after commencement of the trial.⁹²

IV. Transmission of the Decision and the record of the proceedings to the Presidency

53. The present decision concludes the proceedings in the case before this Chamber. Accordingly, the Registrar shall, in accordance with rule 129 of the Rules, transmit the Decision and the record of the proceedings of the Pre-Trial Chamber to the Presidency for constitution of a Trial Chamber under article 61(11) of the Statute.

⁹² Trial Chamber II, “*Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés*”, 21 November 2012, ICC-01/04-01/07-3319, see also Appeals Chamber, “*Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’*”, 27 March 2013, ICC-01/04-01/07-3363; Trial Chamber III, “*Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*”, 21 September 2012, ICC-01/05-01/08-2324; Trial Chamber V(a), “*Decision on Applications for Notice of Possibility of Variation of Legal Characterisation*”, 12 December 2013, ICC-01/09-01/11-1122 and annex.

FOR THESE REASONS, THE CHAMBER

REJECTS the Request; and

ORDERS the Registrar to transmit the Decision and the record of the proceedings of the Chamber to the Presidency.

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



Judge Silvia Fernández de Gurmendi
Presiding Judge



Judge Ekaterina Trendafilova



Judge Christine Van den Wyngaert

Dated this 11 September 2014

At The Hague, The Netherlands