



Original: English

No.: ICC-02/11-01/11
Date: 7 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

Decision on the “*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)»*”

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

The Office of the Prosecutor
Fatou Bensouda

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 & Deputy Registrar
Silvana Arbia
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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”) issues the following decision on the Defence “*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)” (the “Application”).¹

I. Procedural history

1. On 2 November 2012, the Chamber issued the “Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court” (the “Decision of 2 November 2012”).²

2. 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)” (the “Application for Leave to Appeal the Decision of 2 November 2012”).³ Responses by the Prosecutor and the Office of Public Counsel for victims (the “OPCV”) were filed on 16 and 19 November 2012, respectively.⁴

3. On 29 November 2012, the Chamber issued the “Decision on three applications for leave to appeal” (the “Decision of 29 November 2012”), in which it, *inter alia*, rejected the Application for Leave to Appeal the Decision of 2 November 2012.⁵

¹ ICC-02/11-01/11-318-Conf.

² ICC-02/11-01/11-286-Conf. A public redacted version is also available, see ICC-02/11-01/11-286-Red.

³ ICC-02/11-01/11-292-Conf-Corr. A public redacted version is also available, see ICC-02/11-01/11-292-Corr-Red.

⁴ ICC-02/11-01/11-297, ICC-02/11-01/11-298.

⁵ ICC-02/11-01/11-307.

4. On 10 December 2012, the Defence filed the Application. A public redacted version thereof was filed on 17 December 2012.⁶

5. On 13 December 2012, the Prosecution filed the “Prosecution response to Defence application for leave to appeal the decision rejecting leave to appeal against the decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court” (the “Prosecutor’s Response”).⁷

6. On 17 December 2012, the Defence filed the “*Demande d’autorisation de répliquer à la « response to Defence application for leave to appeal the decision rejecting leave to appeal against the decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court » du Procureur (ICC-02/11-01/11-323-Conf)*” (the “Request for Leave to Reply”).⁸

7. On 19 December 2012, the OPCV filed the “Response to the ‘Version publique expurgée de la demande d’autorisation d’interjeter appel de la decision de la Chambre Préliminaire I ‘on three applications for leave to appeal’ (ICC-02/11-01/11-307) et plus précisément de la decision 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)’” (the “OPCV’s Response”).⁹

II. Background and submissions of the parties and participants

A. The Decision of 29 November 2012

8. In the Decision of 29 November 2012, the Chamber held:

69. It follows from the text of article 82(1)(d) of the Statute and the cited jurisprudence that the Chamber, when deciding whether to grant leave to appeal, must analyse the subject-matter of the prospective appeal. A decision granting leave to appeal sets the parameters of the ensuing interlocutory appeal by identifying not only the decision which can be appealed, but also the contours of the subject-matter which can be litigated by the parties on appeal.

⁶ ICC-02/11-01/11-318-Red.

⁷ ICC-02/11-01/11-323-Conf; reclassified as “public” on 17 December 2012.

⁸ ICC-02/11-01/11-328-Conf; reclassified as “public” on 21 December 2012.

⁹ ICC-02/11-01/11-330.

70. The Chamber is therefore of the view that it can exercise its power under article 82(1)(d) of the Statute only with respect to discrete legal or factual issues arising out of its decision. Leave to appeal cannot be granted if the party seeking to appeal, instead of identifying appealable issues, seeks leave to litigate *ex novo* before the Appeals Chamber the entire decision. Therefore, the Chamber considers that while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial.¹⁰

9. The Chamber considered that the Application for Leave to Appeal the Decision of 2 November 2012 did not “indicate any legal or factual error in the reasoning underpinning the Chamber’s overall conclusion”. It also found that the five “grounds of appeal” submitted by the Defence in its Application “whether treated as being subsumed within the proposed issue or as discrete issues themselves” did not meet the criteria of article 82(1)(d) of the Rome Statute (the “Statute”). Therefore, the Chamber considered that the Defence had failed to identify an appealable issue and rejected the Application for Leave to Appeal the Decision of 2 November 2012.¹¹

B. The Application

10. The Defence submits that the Appeals Chamber should intervene on the issue of “what constitutes an issue under Article 82(1)(d)” considering that:

1) la Chambre Préliminaire a commis une erreur de droit dans l’interprétation de ce qu’est une « appealable issue » au sens de l’Article 82(1)(d). 2) Cette erreur est de « nature à affecter de manière appréciable le déroulement équitable et rapide de la procédure ou l’issue du procès » et 3) requiert un règlement immédiat par la Chambre d’Appel.¹²

11. The Defence alleges that the Chamber erred in developing a test “*fondé sur la détermination de l’existence d’erreurs de fait ou de droit*” and argues that this test, which has no legal basis in the Statute or the jurisprudence of the Court,

¹⁰ Decision of 29 November 2012, paras 69-70.

¹¹ *Ibid.*, paras 71-72, 77.

¹² Application, paras 32 and 48.

creates judicial insecurity for the parties, as it compels them to detail their arguments on the merits of the appeal in their initial application for leave to appeal. The Defence argues that the Chamber confused the procedure for requests for leave to appeal and for the appeal itself, effectively shortening the time available to prepare for the latter.¹³

12. The Defence submits that this confusion is also reflected in a prejudicial translation error whereby the Chamber translated “*motifs d’appel*” into “grounds of appeal”. According to the Defence, ‘grounds of appeals’ refer to the French ‘*moyens d’appel*’, i.e. the factual or legal arguments supporting the merits of the appeal.¹⁴

13. The Defence is of the view that the issue proposed for appeal would significantly affect the fair and expeditious conduct of the proceedings, as the Chamber denied in the Decision of 29 November 2012 the possibility for the Defence to appeal a decision on fitness to stand trial, a crucial notion at the core of fair trial requirements.¹⁵

14. Finally, the Defence argues that an immediate resolution of the proposed issue by the Appeals Chamber may materially advance the proceedings as it would allow the Pre-Trial Chamber to immediately reconsider its decision denying leave to appeal the Decision on Fitness and would also ensure future decisions on leave to appeal are not based on a misinterpretation of article 82(1)(d) of the Statute and rendered void. In the submission of the Defence, immediate resolution of the proposed issue by the Appeals Chamber would

¹³ *Ibid.*, para. 34-45.

¹⁴ *Ibid.*, para. 47.

¹⁵ *Ibid.*, para. 49-50.

guarantee judicial security, as it would allow it to exercise its control over questions of interpretation of the Statute.¹⁶

C. *The Prosecutor's Response*

15. The Prosecutor argues that the Application should be dismissed for three reasons. First, the Prosecution submits that the Defence filed its Application out of time and did not provide any explanation for the delay of five days. Second, the Prosecutor considers the Application procedurally inadmissible as “[o]nly in the most extraordinary instance should a decision denying leave to appeal itself be appealable”.¹⁷

16. Third, the Prosecutor contends that the Defence Application does not comply with the requirements for leave to appeal under Article 82(1)(d). In particular, the Prosecutor is of the view that the Defence misrepresented the Decision of 29 November 2012 as requiring the Defence to argue the merits of its appeal. According to the Prosecutor, the decision “merely required the Defence to identify the issue with sufficient clarity”. On this basis, the Prosecutor contends that the issue as identified by the Defence does not arise from the Decision of 29 November. In addition, the Prosecutor argues that granting the Defence leave to appeal on this issue would not only fall short of the requirement to “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” but also cause “unnecessary delay”, and that there is no need for the Appeals Chamber to intervene on the matter as it has already defined the concept of “appealable issue”.¹⁸

D. *The Request for Leave to Reply*

17. The Defence requests authorisation to reply in relation to the submission in the Prosecutor's Response that the Application was filed out of time.

¹⁶ *Ibid.*, para. 54-55, 59-60.

¹⁷ Prosecutor's Response, paras 9-10.

¹⁸ *Ibid.*, para. 11.

Considering that it was notified of the Decision of 29 November 2012 on 30 November 2012, a Friday, and relying on rule 155(1) of the Rules of Procedure and Evidence (the “Rules”) and regulation 33(1) of the Regulations of the Court (the “Regulations”), the Defence contends that it acted properly in submitting its application on 10 December 2012, as this was the correct time limit for filing a request for leave to appeal.¹⁹

E. The OPCV’s Response

18. The OPCV submits that the Application should be denied as it relies on an incorrect legal basis. It argues that article 82(1)(d) of the Statute provides for interlocutory appeals ensuring immediate resolution of issues that may adversely impact the proceedings, instead of potentially protracting litigation *ad infinitum*, and cannot be the basis for requesting “leave to appeal a prior decision granting or denying leave to appeal”.²⁰

19. The OPCV also contends in the alternative that the Defence Application should be rejected because it relies on an erroneous reading of the Decision of 29 November 2012. According to the OPCV, the test used by the Chamber is correct as it was based on “the need for the party seeking leave to appeal to identify an ‘issue’”, something the Defence did not do as it simply “put forward a different opinion regarding Mr. Gbagbo’s fitness to stand trial”. Furthermore, when the Chamber referred to “a specific factual and/or legal error”, it did not, according to the OPCV, refer to arguments on the merits of the appeal, but rather highlighted the “undefined character of the ‘issue’ for which the Defence had sought leave to appeal”. Similarly, when referring to

¹⁹ Defence Request for Leave to Reply, para. 12-15.

²⁰ OPCV’s Response, para. 14-17.

the “grounds of appeal” submitted by the Defence, the Chamber was only seeking clarification on the “issue” identified by the Defence.²¹

20. Finally, the OPCV argues that the Defence’s arguments should have either been submitted with the original request for leave to appeal the Decision of 2 November 2012, or have already been addressed by the Chamber in the Decision of 29 November 2012. Therefore, in the submission of the OPCV, none of the other requirements of article 82(1)(d) of the Statute are met.²²

III. Analysis and conclusions of the Chamber

21. The Chamber notes article 82(1)(d) of the Statute, rule 155 of the Rules, and regulations 24(5), 33 and 65 of the Regulations.

22. Article 82(1)(d) of the Statute sets out the following prerequisites to the granting of a request for leave to appeal:

- (a) the decision involves an issue that would significantly affect (i) the fair and expeditious conduct of the proceedings, or (ii) the outcome of the trial; and
- (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

23. With respect to the particular question of the meaning of the term “issue” in the context of the first limb of the test under article 82(1)(d) of the Statute, the Appeals Chamber has stated:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of

²¹ *Ibid.*, paras 18-21.

²² *Ibid.*, para. 22.

which is essential for the determination of matters arising in the judicial cause under examination.²³

24. At the outset, the Chamber notes the Prosecutor's argument that the Application was filed out of time.²⁴ However, a correct reading of rule 155(1) of the Rules and regulation 33 of the Regulations leads to the conclusion that the time limit for any application for leave to appeal the Decision of 29 November 2012 was Monday 10 December 2012, and not 5 December 2012 as argued by the Prosecutor. This matter being resolved, the Chamber does not consider it necessary to grant the Defence Request for Leave to Reply, requested exclusively on this issue.

25. Further, the Chamber notes the OPCV's argument that article 82(1)(d) of the Statute cannot be the legal basis for "requests concerning decisions granting or denying leave to appeal previously issued pursuant to the same provision".²⁵ The text of article 82(1)(d) of the Statute, however, does not contain such restriction, and applies to any "decision". Accordingly, the Chamber will proceed to the analysis of the Application under article 82(1)(d) of the Statute.

26. The Chamber observes that the Application is premised on a claim that the Chamber has developed an erroneous definition of "appealable issue", which transforms an assessment under article 82(1)(d) of the Statute into a decision on the merits of the appeal, based on a determination by the Chamber of the existence of errors of law or fact in its own decision.

27. In the view of the Chamber, the issue identified by the Defence is founded on an erroneous understanding of the Decision of 29 November 2012.

²³ 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.

²⁴ Prosecutor's Response, para. 9.

²⁵ OPCV's Response, para.14.

28. In the Decision of 29 November 2012, the Chamber found that the Defence was required to “clearly identify an appealable issue, including by way of indicating a specific factual and/or legal error”. This requirement does not, as suggested by the Defence, engage the Chamber in a determination as to the existence of errors of law or fact in its own decision. If an appealable issue is not clearly identified, the Chamber will simply be unable to carry out an assessment under article 82(1)(d) of the Statute as to whether the issue, if wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial.²⁶

29. The Decision of 29 November 2012 did not, as suggested by the Defence, require it to argue the merits of its prospective appeal. Indeed, in that decision the Chamber emphasised that “an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber”. Contrary to the submissions of the Defence, the Chamber’s reference to the “*motifs d’appel*” as “grounds of appeal” cannot be understood as requiring the Defence to argue the merits of its appeal. The translation finds support in the corresponding French and English texts of Section 4, Subsection 1, of the Regulations, dealing with appeals. Furthermore, the five “grounds of appeal” discussed by the Defence were analysed by the Chamber in light of the requirements of article 82(1)(d) of the Statute and not on their merits.²⁷

30. In light of the above, the Chamber is of the view that the issue identified by the Defence does not arise from the Decision of 29 November 2012. Accordingly, the Application must be rejected.

²⁶ Decision of 29 November 2012, paras 68-70.

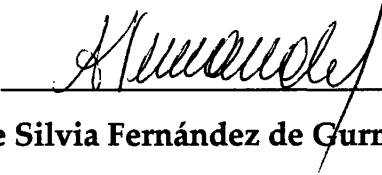
²⁷ *Ibid.*, paras 73-76.

FOR THESE REASONS, THE CHAMBER

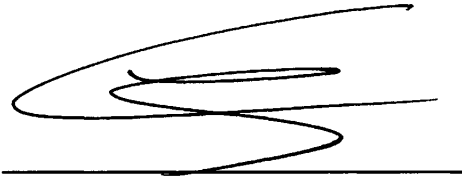
REJECTS the Application; and

REJECTS the Defence Request for Leave to Reply.

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 7 February 2013

At The Hague, The Netherlands