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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

Prosecution's Response to the Defence « Demande d'autorisation d'interjeter appel de la « Decision on the « Requête de la défense en report de l'audience portant sur le quatrième réexamen des conditions de maintien en détention fixée par la Chambre Préliminaire au 9 octobre 2013 dans son ordonnance du 26 septembre 2013 (ICC-02/11-01/11-512) » »

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Introduction

1. On 3 October 2013, the Single Judge of Pre-Trial Chamber I ("the Single Judge") issued the Decision on the "Requête de la défense en report de l'audience portant sur le quatrième réexamen des conditions de maintien en détention fixée par la Chambre Préliminaire au 9 octobre 2013 dans son ordonnance du 26 septembre 2013 (ICC-02/11-01/11-512)" (the "Decision")¹ wherein the Single Judge rejected the Defence for Mr Gbagbo ("Defence")'s request to postpone the upcoming review of his detention on the grounds that the applicable law does not allow for such suspension.
2. On 4 October 2013 the Defence sought leave to appeal the Decision (the "Application").²
3. The Prosecution requests that the Application be rejected as the issue as framed by the Defence does not arise out of the Decision. Even if it did, the issue does not meet the criteria for leave to appeal pursuant to Article 82(1) (d).

Procedural History

4. On 11 July 2013, the Chamber issued the "Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute" (the "Third Review Decision"), deciding that Laurent Gbagbo ("Mr Gbagbo") should remain in detention.³ On 19 July 2013, the Defence appealed the Third Review Decision.⁴ The appeal is currently pending before the Appeals Chamber.
5. On 26 September 2013, the Single Judge issued the "Order scheduling a hearing pursuant to Rule 118(3) of the Rules of Procedure and Evidence" (the "Scheduling

¹ ICC-02/11-01/11-522.

² ICC-02/11-01/11-525.

³ ICC-02/11-01/11-454.

⁴ CC-02/11-01/11-459-Conf. A public redacted version is also available, see ICC-02/11-01/11-459-Red.

Order"), deciding that a hearing under rule 118(3) of the Rules of Procedure and Evidence (the "Rules") would be held on Wednesday, 9 October 2013 before the full Chamber.⁵

6. On 30 September 2013, the Defence filed a request ("Defence Request"), asking the Chamber to postpone the hearing to a date at least one week after the determination by the Appeals Chamber of the appeal of the Defence against the Decision of 11 July 2013, but no later than 11 November 2013.⁶ On 2 October 2013, the Prosecution responded to the Defence Request.⁷
7. On 3 October 2013, the Single Judge issued the Decision.⁸ The Single Judge noted that although it would be beneficial to conduct the review of Mr Gbagbo's detention in cognizance of the upcoming Appeals Chamber's Judgment, the applicable law, namely Article 60(3) and Rules 118(2) and (3), does not allow for suspension of the periodic review of detention.⁹ Further, it would be of no tangible benefit to reschedule the hearing while the date of issuance of the impending judgment of the Appeals Chamber is unknown.¹⁰ The Single Judge however noted that, should the Appeals Chamber rule on the appeal before 11 November 2013, it would determine whether further submissions from parties and participants are necessary and appropriate.¹¹

⁵ ICC-02/11-01/11-512.

⁶ Request, p. 8.

⁷ ICC-02/11-01/11-519.

⁸ ICC-02/11-01/11-522.

⁹ Decision, paras.11-12.

¹⁰ Decision, para.12.

¹¹ Decision, para.13.

Submissions

The Issue does not arise from the Decision.

8. The Issue raised by the Defence is

est-il possible à la Chambre préliminaire de se prononcer sur la question du maintien en détention sans savoir quelle est la situation juridique de la personne et s'il y a maintien en détention; ou bien : est-il possible aux parties de discuter d'une question aussi essentielle que celle de la liberté d'un homme sans disposer des éléments permettant une telle discussion ;ou bien encore : les parties peuvent-elles discuter d'un éventuel changement de circonstances et la Chambre préliminaire prendre une décision sur cet éventuel changement de circonstances en ignorant tout des circonstances qui auront été considérées comme pertinentes par la Chambre d'Appel et qui seules pourront dessiner le cadre de la discussion pouvant être tenue devant la Chambre préliminaire ? (the « Issue »)¹²

9. The Prosecution submits that the above issue is not clearly formulated. It is a lengthy combination of three overlapping questions. The Defence does not identify any particular aspect of the Decision that it wishes to have reviewed. Leave to appeal has been refused in similar circumstances where there is a “lack of clarity of the Defence in formulating the issue at stake”¹³ and where “the Defence failed in articulating clearly what the issue at stake actually is”.¹⁴

10. Even if an issue could be identified, the Issue does not arise from the Decision. The Single Judge did not indicate that the parties can discuss “la liberté d'un homme” in the absence of relevant elements for such a discussion;¹⁵ or that the Pre-Trial Chamber can rule on the issue of detention without knowing the “situation juridique” of Mr Gbagbo¹⁶ or “en ignorant tout des circonstances qui auront été considérées comme pertinentes par la Chambre d'Appel”.¹⁷ To the contrary, in the Decision, the Single Judge found that, although it would be

¹² Application, p. 9.

¹³ ICC-02/11-01/11-99-Conf, para 14.

¹⁴ ICC-02/11-01/11-99-Conf, para 15. ICC-01/05-01/08-2800, paras.15,17.

¹⁵ Application, p. 9.

¹⁶ Application, p. 9.

¹⁷ *Ibid*, page 9.

desirable to conduct the review of Mr Gbagbo in cognizance of the Appeals Chamber's Judgment, the applicable law, namely Article 60(3) and Rules 118(2) and (3), does not allow for a suspension of the period review of detention.¹⁸

11. Further, the Single Judge indicated that "should the Appeals Chamber rule on the appeal before 11 November 2013, the Chamber will determine, in light of the content of the Appeals Chamber's judgment, whether it is necessary and appropriate to accord the parties and participants an opportunity to make additional submissions".¹⁹ Hence, and contrary to the Defence's third characterization of the Issue,²⁰ the Pre-Trial Chamber will not ignore the Appeals Chamber's Judgment if it is issued within the statutory time frame for the Pre-Trial Chamber to review Mr Gbagbo's detention.

12. Further, and while the Defence does make submissions elsewhere regarding the interpretation of Rule 118(2) and (3) – essentially arguing that their plain language should be ignored²¹ - the issue identified by the Defence makes no mention of this provision. In such circumstances, where the party seeking leave cites various alleged errors but "...does not explain their relationship with the issue as defined in the application...",²² Chambers have previously rejected the relevant application.²³

13. In light of the above, since the Issue does not relate to any of the findings of the Decision, the Issue is not a "subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".²⁴

¹⁸ Decision, para.11.

¹⁹ Decision, para.13.

²⁰ In particular: "[...] les parties peuvent-elles discuter d'un éventuel changement de circonstances et la Chambre préliminaire prendre une décision sur cet éventuel changement de circonstances en ignorant tout des circonstances qui auront été considérées comme pertinentes par la Chambre d'Appel et qui seules pourront dessiner le cadre de la discussion pouvant être tenue devant la Chambre préliminaire." Application, p.9.

²¹ Application, paras.43-47.

²² ICC-02/11-01/11-307, para.72.

²³ ICC-02/11-01/11-307, para.72.

²⁴ ICC-01/04-168 OA3, para.9; ICC-02/11-01/11-307, para.70; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para. 7.

The Issue does not significantly affect the fair conduct of proceedings.

14. The Defence does not make detailed arguments in the context of fairness. It simply claims that the Issue “porte sur le respect des droits de la défense, plus particulièrement sur la possibilité pour la défense de présenter ses arguments de manière effective ainsi que sur le droit à un procès équitable elle-même”.²⁵ However, the Defence does not explain *how* its ability to present its case will be affected by the Decision. The Applicant cannot speculate in the abstract that the Decision causes a prejudice to the rights of the Accused in order to invoke that the fairness of the proceedings are affected.²⁶ As Chambers of this Court have indicated, a purely general complaint does not suffice.²⁷
15. Further, the arguments made elsewhere in the Application are equally irrelevant to the fair conduct of proceedings. Firstly, the Defence claims that “[l]a réponse qui sera apportée à chacune des questions précitées par la Chambre d’Appel aura nécessairement un impact sur la façon dont les Juges de la Chambre Préliminaire devront, à l’avenir et notamment lors de leur quatrième examen, déterminer sous l’angle de l’article 58(1) du Statut si les conditions du maintien en détention sont réunies ou pas [...]”.²⁸
16. This argument is speculative as the impact of the Appeals Chamber’s Judgment on the Decision, if any, is unknown.²⁹ Moreover, the Single Judge has already made provision for the possibility that the Appeals Chamber’s Judgment may impact the current detention review. She indicated that if the Appeals Chamber rules before 11 November 2013, she will determine whether further submissions

²⁵ Application, paras.68-69.

²⁶ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

²⁷ ICC-01/04-01/07-2463, para. 31.

²⁸ ICC-02/11-01/11-525, para.52.

²⁹ It is settled law that the Defence cannot speculate in the abstract that the Decision causes prejudice to the rights of the Accused in order to invoke that the fairness of the proceedings are affected . See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

are necessary. Moreover, the Defence may always request the Chamber to review its prior ruling on detention on the grounds of new and relevant Appeals Chamber's jurisprudence pursuant to Article 60(3) "at any time". The Decision does not *preclude* or *prejudice* in any way a future challenge regarding the detention of Mr. Gbagbo.

17. The Defence dismisses the above precautions taken by the Single Judge claiming that "la possibilité pour les parties de faire des observations supplémentaires dépend du pouvoir discrétionnaire de la Chambre qui, seule, semble pouvoir juger opportunes de telles observations."³⁰ This argument is also speculative and premised on the assumption that the Chamber will unreasonably exercise its discretion.
18. Secondly, the Defence argues that if Mr. Gbagbo's detention is reviewed once more before the Appeals Chamber issues a ruling "cela risquerait d'aboutir à l'existence de décisions incompatibles".³¹ This argument is again speculative. Further, if new jurisprudence from the Appeals Chamber impacts on a prior decision of the Pre-Trial Chamber, the Chamber may always review that prior ruling *proprio motu* or may do so upon request of the Defence pursuant to Article 60(3).
19. Thirdly, the Defence claims that "[d]ans ces conditions, il paraîtrait logique que le Juge unique fixe l'audience à la date la plus tardive possible, soit le 29 octobre 2013, puisque dans l'intervalle la Chambre d'Appel se sera peut-être prononcée".³² This argument is based on the speculative assumption that the Appeals Chamber will rule prior to the 29th of October. In any case, *if* the Appeals Chamber rules prior to the 29th of October, or even prior to the 11th of November, the Single Judge has made it clear that she will call for additional submissions if

³⁰ Application, para.63.

³¹ Application, para.58.

³² Application, para.33.

the Appeals Chamber makes findings that render additional submissions necessary.

20. Fourthly, the Defence proposes as an alternative approach to the Decision that “l’audience pourrait se tenir dans les dix jours du rendu de la décision de la Chambre d’Appel, pourvu que la Chambre d’Appel accepte de se prononcer avant la fin du mois de novembre 2013”.³³ However, this proposal is both flawed and speculative as it ignores a statutory time-limit and is based on the assumption that the Appeals Chamber will rule in the month of November.
21. Finally, the Defence also argues that the Single Judge “n’aurait pas dû mettre en balance les droits les plus fondamentaux de la défense avec le « workload of Court »”.³⁴ The Single Judge’s reference to the “workload of the court”³⁵ was made in passing.³⁶ The Single Judge found, separately, that it would be of no tangible benefit to reschedule the hearing in the hope of a resolution of the appeal in the meantime – since the date of issuance of the impending Appeals ruling is unknown and unpredictable.³⁷ Hence, the reference to the workload of the court was not determinative regarding the substantive findings in the Impugned Decision. Consequently, even if the issue of workload was in some way linked to the Issue in the Application, the question would not have an impact on the Decision – and hence on the fair conduct of proceedings.
22. For all the foregoing, the Defence has failed to show how the Issue significantly affects the fairness of the proceedings.

The Issue does not significantly affect the expeditious conduct of proceedings.

23. The Defence claims, without detailed explanation, that “il n’est pas souhaitable qu’existent deux jurisprudences contradictoires portant sur une même question

³³ Application, para.59.

³⁴ Application, para.67.

³⁵ Decision, para.12.

³⁶ *Ibid.*

³⁷ *Ibid.*

dans une même affaire car cela obligerait les parties à engager une nouvelle procédure afin de voir harmoniser ces deux jurisprudences. ”³⁸

24. This argument is again speculative. Firstly, it is unknown whether the Judgment of the Appeals Chamber will have any impact on the upcoming decision on detention. Secondly and as noted, if the Appeals Chamber issues a decision in the future that justifies the provisional release of Mr. Gbagbo, the Defence can immediately make an application for the same or the Chamber may review its decision *proprio motu*. Thirdly, triggering *another* appeal at this point - while there is already an appeal pending - will result in extensive delay, with no appreciable advantage gained from the exercise. Hence, the purported Issue does not significantly affect the expeditiousness of the proceedings.

Immediate Resolution of the Issue will not materially advance the proceedings.

25. The Defence claims, without explanation, that a resolution of the above issue will materially advance the proceedings. The only discernible argument advanced by the Defence is that “si la décision rendue par la Juge Unique conduisait à aboutir à une contradiction de jurisprudence entre la Chambre d’Appel et la Chambre Préliminaire, il en résulterait un préjudice important, non seulement pour les parties qui pourraient être obligées d’interjeter appel de la décision de la Chambre Préliminaire mais pour la Chambre Préliminaire elle-même qui pourrait se retrouver en porte-à-faux par rapport à la jurisprudence de la Chambre d’Appel.”³⁹ The Defence does not explain the nature of this “préjudice important”. As noted above, this argument is speculative and grounded on the assumption that the Appeals Chamber’s Judgment will necessarily overrule the Third Review Decision, and possibly the upcoming ruling from the Pre-Trial Chamber. Further, and as noted previously, if the Appeals Chamber issues a decision in the future that justifies the provisional release of Mr. Gbagbo, the Defence can immediately make an application for the same.

³⁸ Application, para.70.

³⁹ Application, para.76.

26. Moreover, the Prosecution notes that if leave to appeal is granted, it is likely that the Appeals Chamber will rule on it *after* the pending Judgment is issued. Hence, there is the possibility that the purported Issue raised in the Defence's Application will be rendered moot. The resolution of such an issue would not advance the proceedings.

27. Moreover, claiming that "une telle question n'a semble-t-il jamais été soulevée par devant l'une ou l'autre des chambres de la Cour"⁴⁰ is not a justification for immediate resolution of an issue by the Appeals Chamber. The Appeals Chamber does not have a general advisory function regarding hypothetical questions of academic importance.⁴¹

Conclusion

28. In light of the above, the Prosecution requests that the Defence's Application be rejected.



Fatou Bensouda, Prosecutor

Dated this 7th day of October 2013

At The Hague, The Netherlands

⁴⁰ Application, para.77.

⁴¹ ICC-01/05-01/08-532, para.17, ICC-01/05-01/08-75, paras.11, ICC-02/04-01/05-367, paras. 22; ICC-01/09-01/11-260, ICC-01/09-01/11-301, para. 34, ICC-01/09-02/11-406, paras. 50 and 61.