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No.: ICC-02/11-01/11
Date: 19 December 2012

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
URGENT**

Response to the “Version publique expurgée de la demande d’autorisation d’interjeter appel de la décision de la Chambre Préliminaire I ‘on three applications for leave to appeal’ (ICC-02/11-01/11-307) et plus précisément de la décision de refus d’autoriser la défense à interjeter appel de la ‘Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court’ (ICC-02/11-01/11-286-Conf)”

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. PROCEDURAL HISTORY

1. On 23 November 2011, the then Pre-Trial Chamber III issued an arrest warrant for Mr. Laurent Gbagbo,¹ who was surrendered to the Court on 30 November 2011. During the first appearance of Mr. Gbagbo, on 5 December 2011, the Chamber scheduled the commencement of the confirmation of charges hearing for 18 June 2012.²

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

3. On 12 June 2012, the Single Judge decided to postpone the commencement of the confirmation of charges hearing to 13 August 2012.⁶

4. On 3 August 2012, the Single Judge filed a “Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing

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

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

³ See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012.

⁴ *Idem.*, p. 25.

⁵ *Ibid.*, p. 26.

⁶ See the “Decision on the “Requête de la Défense en report de l’audience de confirmation des charges prévue le 18 juin 2012”” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-152-Red, 12 June 2012, p. 12.

the date of the confirmation of charges hearing”⁷ by which she *inter alia* (i) requested the Prosecutor and the Defence to submit observations on the medical reports of the three experts, filed by the Registry in the record of the case on 19 July 2012, as well as on the subsequent procedure to be followed before delivering a decision on the issue of Mr. Gbagbo’s fitness to take part in the proceedings against him, by 13 and 21 August 2012 respectively,⁸ and (ii) to postpone the confirmation of charges hearing until such issue is resolved.⁹

5. On 12 September 2012, the Chamber issued an order scheduling a hearing to be held on 24 and 25 September 2012 to discuss the issue of the fitness of Mr. Gbagbo to participate in the proceedings against him.¹⁰ Despite the fact that the issue of the suspect’s fitness to take part in the proceedings against him has been recognised by the Single Judge as relevant for the personal interests of the victims participating at the pre-trial stage, the Common Legal Representative has not been invited to attend said hearing.

6. On 2 November 2012, the Single Judge issued a public version of the “Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court”¹¹ (the « Decision »), finding that M. Gbagbo « *is able to meaningfully exercise his fair trial rights* » and « *is fit to take part in the proceedings against him* »¹².

⁷ See the “Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and Evidence and postponing the date of the confirmation of charges hearing” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-201, 3 August 2012 (dated 2 August 2012).

⁸ *Idem.*, par. 16 and p. 8.

⁹ *Ibid.*, par. 22.

¹⁰ See the “Order scheduling a hearing in relation to Mr Gbagbo's fitness to take part in the proceedings against him”, No. ICC-02/11-01/11-241, 12 September 2012.

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

¹² *Idem.*, par. 101.

7. On 12 November 2012, the Defence filed an application for leave to appeal the Decision.¹³ This application was filed confidential and was notified to the Common Legal Representative upon express request dated 13 November 2012¹⁴ following an order of the Single Judge to this effect.¹⁵

8. On 19 November 2012, the Common Legal Representative responded to the Defence's application.¹⁶

9. On 29 November 2012, the Chamber issued the "Decision on three applications for leave to appeal" (the "Decision"), which was notified on 30 November 2012,¹⁷ dismissing the Defence's application.¹⁸

10. On 10 December 2012, the Defence filed a confidential application for leave to appeal the Decision which was not notified to the Common Legal Representative.¹⁹ A redacted version thereof was subsequently filed on 17 December 2012 (the "Defence Application").²⁰ Incidentally, the Common Legal Representative deplores the

¹³ See the "Corrigendum de la demande d'autorisation d'interjeter appel de la 'Décision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court' (ICC-02/11-01/11-286-Conf)", No. ICC-02/11-01/11-292-Corr, 12 Novembre 2012

¹⁴ See the "Request in relation to the Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court", No. ICC-02/11-01/11-293, 13 November 2012 and the "Version publique expurgée du corrigendum de la demande d'autorisation d'interjeter appel de la 'Décision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court' (ICC-02/11-01/11-286-Conf)", No. ICC-02/11-01/11-292-Corr-Red, 15 Novembre 2012.

¹⁵ See the "Decision on the OPCV's 'Request in relation to the 'Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court'" (Single Judge, pre-Trial Chamber I), No. ICC-02/11-01/11-296, 14 November 2012.

¹⁶ See the "Réponse du Représentant légal commun des victimes à la requête de la Défense du 15 Novembre 2012 aux fins d'autorisation d'interjeter appel de la Décision sur l'aptitude de M. Gbagbo à prendre part à la Procédure à sen encontre", No. ICC-02/11-01/11-298, 19 November 2012.

¹⁷ See the "Decision on three applications for leave to appeal" (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012) (the "Decision").

¹⁸ *Idem*, paras. 52-77.

¹⁹ See 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)", No. ICC-02/11-01/11-318-Conf, 10 December 2012.

²⁰ See the "Version publique expurgée de la demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire I 'on three applications for leave to appeal' (ICC-02/11-01/11-307) et plus précisément de la décision de refus d'autoriser la défense à interjeter appel de la 'Decision on the

continuous filing by the Defence of submissions on a confidential basis and its abuse of confidential procedures which *de facto* deprives victims of their rights to fully participate and to respond to any documents filed in the proceedings as provided for in regulation 24(2) of the Regulations of the Court.

11. On 13 December 2012, the Prosecution responded to the Defence Application on a confidential basis. By order of the Pre-Trial Chamber said submission was reclassified public on 17 December 2012.²¹

12. The Principal Counsel of the OPCV, acting as Common Legal Representative, hereby submits her response to the Application which was notified to the Office on 17 December 2012 in a public redacted version.

13. This submission is filed on an urgent basis since the Common Legal Representative gained knowledge of the Defence Application 7 days after its registration in the case record and it can be inferred that the Chamber will take soon a decision in the matter.

II. RESPONSE

A. The Request shall be dismissed *in limine*

14. The Defence Application should be rejected summarily because it relies on an incorrect legal basis, namely Article 82(1)(d) of the Rome Statute.²² This provision cannot be the basis of requests concerning decisions granting or denying leave to appeal previously issued pursuant to the same provision.

fitness of Laurent Gbagbo to take part in the proceedings before this Court» (ICC-02/11-01/11-286-Conf)”, No. ICC-02/11-01/11-318-Red, 17 December 2012.

²¹ See 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”, No. ICC-02/11-01/11-323, 13 December 2012, notified to the Common Legal Representative on 17 December 2012.

²² See the Defence Application, *supra* note 20, par. 30.

15. Indeed, as confirmed by several Chambers relying on a literal, contextual and teleological interpretation of Article 82(1)(d) of the Rome Statute, this provision grants the intervention of the Appeals Chamber for ensuring an “immediate” resolution of issues that may adversely impact the proceedings, instead of potentially protracting litigation *ad infinitum*.²³ Should the Defence request be declared admissible and leave to appeal be granted, the prior decision of this Chamber denying the Defence leave to appeal will *de facto* be deprived of its final character.

16. Similarly, even if the Defence is not granted leave to appeal, the mere fact of declaring the request admissible will open the door to similar litigation in the future. As a result the principle of legal certainty would be greatly violated, despite the contrary contentions of the Defence.²⁴

17. The Defence request must also be rejected *in limine* on the basis of the drafting history of Article 82(1)(d) of the Rome Statute. As confirmed by the Appeals Chamber, the dismissal of the Kenyan suggestion for this provision during the Rome Conference, whereby “*other decisions may be appealed with the leave of the Chamber concerned and in the event of refusal such refusal may be appealed*”, was “*deliberate*”.²⁵ The aim of the discussions during the negotiations was to shape a provision that, whilst allowing interlocutory appeals when necessary to preserve fairness and expeditiousness in proceedings or when crucial for the outcome of the trial before the

²³ In this sense see the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168, 13 July 2006, par. 18; the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, par. 21 and the “Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008” (Trial Chamber I), No. ICC-01/04-01/06-1191, 26 February 2008, paras. 12-13

²⁴ See the Defence Application, *supra* note 20, par. 60.

²⁵ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 23, par. 40.

Court, would ensure that such appeals would not have a “*paralysing effect*”.²⁶ Accordingly, Article 82(1)(d) of the Statute cannot be interpreted as allowing the parties to seek leave to appeal a prior decision granting or denying leave to appeal.

B. In the alternative: The request shall be dismissed as unfounded

18. If, by extraordinary the Chamber finds that Article 82(1)(d) of the Rome Statute is the correct legal basis for the relief sought by the Defence, the Common Legal Representative contends, in the alternative, that the Defence request cannot be granted since it is based on an erroneous reading of the prior dismissal of the Defence request for leave to appeal.

19. First, the Defence argues that the Decision is based on a wrong interpretation of the definition of an appealable “issue” pursuant to Article 82(1)(d) of the Rome Statute. Indeed, the Defence argues that “*le test de la Chambre Préliminaire est donc fondé sur la détermination de l’existence d’erreurs de fait ou de droit [...]. Sur la base de cette interprétation, la Chambre Préliminaire reproche à la Défense de ne pas avoir allégué d’erreurs de droit ou de fait*”.²⁷ However, the Common Legal Representative contends that the test used by the Chamber was based on the need for the party seeking leave to appeal to identify an “issue”, defined by the Appeals Chamber as “*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*”.²⁸ Therefore, as rightly explained by the Chamber, the Defence did not determine the existence of an “issue” but rather merely put forward a different opinion regarding Mr. Gbagbo’s fitness to stand trial.²⁹

²⁶ See the “Decision on the Prosecutor’s Application for Leave to Appeal Dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th day of May 2006” (Pre-Trial Chamber II), No. ICC-02/04-01/05-90, 10 July 2006, par. 21.

²⁷ See the Defence Application, *supra* note 20, paras. 34-35

²⁸ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 23, par. 9.

²⁹ See the Decision, *supra* note 17, paras. 71 and 76.

20. Second, the Defence makes reference to the irrelevance or non-necessity to “address arguments relating to the merits or substance of the appeal”,³⁰ and argues that “*en imposant à la défense de lui soumettre ses arguments d’appel pour pouvoir les examiner, donc les juger, la Chambre préliminaire se met dans la position de la Chambre d’Appel*”.³¹ However, in its decision the Chamber did not enter into examining or considering “argument on the merit of the appeal”, as warned by Pre-Trial Chamber II.³² Consistent with this jurisprudence, the Chamber only made reference to the necessity of “indicating a specific factual and/or legal error” because of the undefined character of the “issue” for which the Defence had sought leave to appeal.³³

21. Third, the Defence argues that the Chamber imposed the requirement to elaborate on “grounds of appeal” in order to be granted leave to appeal.³⁴ However, in its decision the Chamber did not rule upon any “ground of appeal”. It simply relied on the “grounds of appeal” envisaged by the Defence to seek clarification as to the “issue(s)” in relation to which the Defence sought leave to appeal.³⁵

22. Fourth, the Defence argues that the “issue” identified in the Pre-Trial Chamber’s decision of 29 November 2012 significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial, and an immediate resolution of which by the Appeals Chamber may materially advance the proceedings.³⁶ However, the Defence’s contentions should have been brought to the Pre-Trial Chamber’s attention in its initial “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)” dated 12 November 2012, or were

³⁰ See the Defence Application, *supra* note 20, par. 36.

³¹ *Idem*, par. 38.

³² See the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, *supra* note 23, par. 22.

³³ See the Decision, *supra* note 17, par. 70.

³⁴ See the Defence Application, *supra* note 20, par. 42.

³⁵ See the Decision, *supra* note 17, paras. 72 and 77.

³⁶ See the Defence Application, *supra* note 20, paras. 49-60.

already addressed by the Pre-Trial Chamber in its “Decision on three applications for leave to appeal” dated 29 November 2012.

For the foregoing reasons, the Common Legal Representative respectfully requests the Pre-Trial Chamber:

- To reject the Defence Application *in limine*.
- In the alternative, to reject the Defence Application as unfounded since it is based on an erroneous reading of the prior dismissal of the Defence request for leave to appeal.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line underneath.

**Paolina Massidda
Principal Counsel**

Dated this 19th day of December 2012

At The Hague, The Netherlands