

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-02/11-01/11
Date: 13 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

Confidential

**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**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

.....

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. The Defence seeks leave to appeal the Chamber's decision rejecting its earlier separate application for leave to appeal the Chamber's decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court.
2. The Prosecution submits that the Defence application should be rejected. It is filed out of time, is procedurally inadmissible and fails to meet the criteria under Article 82(1)(d) for leave to appeal.
3. Pursuant to Rule 23*bis*, the Prosecution files this document confidentially, as it responds to a document filed with the same classification. However, the Prosecution has no objection to reclassifying this filing as public.

ARGUMENT

4. On 2 November 2012, the Chamber issued the "Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court",¹ finding that Mr Gbagbo is fit to participate in the confirmation hearing in this case.
5. On 12 November 2012, the Defence filed an application for leave to appeal the 2 November Decision.² The Prosecution submitted its response on 16 November 2012.³
6. On 29 November 2012, the Chamber dismissed the Defence application of 12 November 2012 ("Decision"),⁴ concluding that "the Defence has failed to identify an appealable issue arising out of the Decision of 2 November 2012".⁵

¹ ICC-02/11-01/11-286-Conf and ICC-02/11-01/11-286-Red.

² ICC-02/11-01/11-292-Conf. On 15 November 2012, the Defence filed a corrigendum: ICC-02/11-01/11-292-Conf-Corr; and ICC-02/11-01/11-292-Conf-Corr-Anx. The Defence also filed a public redacted version of this document: ICC-02/11-01/11-292-Corr-Red.

³ ICC-02/11-01/11-297.

⁴ ICC-02/11-01/11-307, paras.52-77.

⁵ ICC-02/11-01/11-307, para.77.

7. On 10 December 2012, the Defence filed an application ("Defence Application") for leave to appeal the Decision,⁶ to challenge the manner in which the Chamber defined and interpreted the concept of "appealable issue" ("Issue").⁷
8. The Prosecution submits that the Defence Application should be summarily dismissed.
9. First, the Defence Application was filed out of time. According to Rule 155(1) and Regulation 33, the application for leave to appeal against the Decision was due on 5 December 2012. The Application was filed five days later. The Defence does not provide any explanation for this significant delay. The Prosecution submits that for this reason alone the Defence Application must be rejected.⁸
10. Second, the Defence Application is procedurally inadmissible. Only in the most extraordinary instance should a decision denying leave to appeal itself be appealable. Otherwise the cycle will be potentially endless.
11. Third, in case the Chamber nevertheless considers the Defence Application to be validly filed, the Prosecution submits that it falls short of the requirements for leave to appeal under Article 82(1)(d) for the following reasons:
 - a. The Defence misrepresents the Decision and therefore the Issue as framed in the Defence Application does not arise out of the Decision. Contrary to the contention by the Defence, the Chamber did not require the Defence to argue the merits of the issue.⁹ It merely required the Defence to identify the issue with sufficient clarity. Indeed, it disavowed expressly that an application for leave to appeal must persuade the Chamber that its decision was wrong. The Chamber stated that "while an application for leave to appeal *should not contain in detail the arguments which the party*

⁶ ICC-02/11-01/11-318-Conf.

⁷ Decision, para.32.

⁸ ICC-01/04-01/07-522 OA3, paras.11-12.

⁹ See Defence Application, paras.34-48.

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".¹⁰

- b. The Prosecution further notes that granting leave to appeal against the Decision would not "'significantly affect', *i.e.* in a material way, either a) 'the fair and expeditious conduct of' the proceedings or b) 'the outcome of the trial'", but instead would cause unnecessary delay.¹¹ Moreover, the Appeals Chamber has already defined the concept of "appealable issue".¹² As a result, there is no need to engage the Appeals Chamber again on this matter.

CONCLUSION

12. For the reasons set out above, the Prosecution submits that the Chamber should reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 13th day of December 2012

At The Hague, The Netherlands

¹⁰ Decision, para.70, emphasis added.

¹¹ ICC-01/04-168 OA3, 13 July 2006, para.10.

¹² ICC-01/04-168 OA3, 13 July 2006, para. 9; "Only an "issue" may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution. . . . An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination."