

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-02/11-01/11  
Date: 29 November 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**

**Decision on three applications for leave to appeal**

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**

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**Registrar & Deputy Registrar**

Silvana Arbia

Didier Preira

**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 three applications for leave to appeal.

## **I. Procedural history**

1. On 26 June 2012, the Single Judge issued the “Order to conduct a medical examination”, whereby she appointed Dr An Chuc, Dr Bruno Daunizeau and Dr Pierre Lamothe to conduct, respectively, medical, psychological and psychiatric examinations of Mr Gbagbo.<sup>1</sup>

2. On 19 July 2012, the Registry filed in the record of the case, “*ex parte*, Registry and Defence only”, the medical reports of the three experts appointed by the Single Judge (the “Expert Reports”).<sup>2</sup>

3. On 26 July 2012, the Single Judge issued the “Order on the classification of the medical reports filed by the experts appointed by the Chamber”, ordering the Defence to “secure the written consent of Mr Gbagbo to the disclosure in their current form of the Expert Reports to the Prosecutor or, failing that, to propose reasoned redactions to the reports”.<sup>3</sup>

4. On 31 July 2012, the Defence filed the “*Propositions d’expurgations des rapports médicaux des Dr. Chuc, Daunizeau et Lamothe*”.<sup>4</sup>

5. On 2 August 2012, the Single Judge issued 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” (the “Decision of 2 August 2012”).<sup>5</sup>

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<sup>1</sup> ICC-02/11-01/11-164-Conf-tENG.

<sup>2</sup> ICC-02/11-01/11-190-Conf-Corr and annexes.

<sup>3</sup> ICC-02/11-01/11-196-Conf-tENG.

<sup>4</sup> ICC-02/11-01/11-198-Conf and annexes.

<sup>5</sup> ICC-02/11-01/11-201.

6. On 3 August 2012, pursuant to the Decision of 2 August 2012, the report of Dr Daunizeau was reclassified as “confidential” and notified to the Prosecutor.<sup>6</sup>

7. On 6 August 2012, also pursuant to the Decision of 2 August 2012, the Defence filed in the record of the case the confidential redacted versions of the reports of Dr Chuc and Dr Lamothe, which were notified to the Prosecutor.<sup>7</sup>

8. On 10 August 2012, the Defence filed the “*Demande d’autorisation d’interjeter appel de la décision de la Juge unique portant sur la question de la communication des rapports médicaux (Décision ICC-02/11-01/11-201 sur les questions relatives à la procédure à suivre en fonction de l’état de santé du Président Gbagbo et du report de l’audience de confirmation des charges)*” (the “First Defence Application”).<sup>8</sup>

9. On 14 August 2012, the Single Judge issued the “Decision on the ‘Prosecution’s request pursuant to Regulation 35 for an extension of time to submit its observations on the Expert Reports and request for the disclosure of additional medical reports’” (the “Decision of 14 August 2012”).<sup>9</sup>

10. On 16 August 2012, the Prosecutor filed the “Prosecution’s Response to Defence « *Demande d’autorisation d’interjeter appel de la décision de la Juge unique portant sur la question de la communication des rapports médicaux (Décision ICC-02/11-01/11-201 sur les questions relatives à la procédure à suivre en fonction de l’état de santé du Président Gbagbo et du report de*

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<sup>6</sup> ICC-02/11-01/11-190-Conf-Anx2.

<sup>7</sup> ICC-02/11-01/11-190-Conf-Red-Anx1, ICC-02/11-01/11-190-Conf-Red-Anx3.

<sup>8</sup> ICC-02/11-01/11-207-Conf.

<sup>9</sup> ICC-02/11-01/11-208-Conf and annex.

l'audience de confirmation des charges) »" (the "Prosecutor's Response to the First Defence Application").<sup>10</sup>

11. On 21 August 2012, the Prosecutor filed the "Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's request pursuant to Regulation 35 for an extension of time to submit its observations on the Expert Reports and request for the disclosure of additional medical reports'" (the "Prosecutor's Application").<sup>11</sup>

12. On 27 August 2012, the Defence submitted the "*Réponse de la Défense à « Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's request pursuant to Regulation 35 for an extension of time to submit its observations on the Expert Reports and request for the disclosure of additional medical reports' (ICC-02/11-01/11-224-Conf) »*" (the "Defence Response to the Prosecutor's Application").<sup>12</sup>

13. 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").<sup>13</sup>

14. 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)*".<sup>14</sup> A corrigendum and public redacted version thereof were filed on 15 November 2012 (the "Second Defence Application").<sup>15</sup>

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<sup>10</sup> ICC-02/11-01/11-213-Conf.

<sup>11</sup> ICC-02/11-01/11-224-Conf and annex.

<sup>12</sup> ICC-02/11-01/11-232-Conf.

<sup>13</sup> ICC-02/11-01/11-286-Conf. A public redacted version is also available, see ICC-02/11-01/11-286-Red.

<sup>14</sup> ICC-02/11-01/11-292-Conf.

<sup>15</sup> ICC-02/11-01/11-292-Conf-Corr and ICC-02/11-01/11-292-Corr-Red.

15. On 16 November 2012, the Prosecutor filed the “Prosecution Response to Defence application for leave to appeal the ‘Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court’” (the “Prosecutor’s Response to the Second Defence Application”).<sup>16</sup>

16. On 19 November 2012, the Office of Public Counsel for victims (the “OPCV”) filed 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 son encontre”* (the “OPCV’s Response to the Second Defence Application”).<sup>17</sup>

## II. Applicable law

17. The Chamber notes article 82(1)(d) of the Rome Statute (the “Statute”), rules 155 and 156 of the Rules of Procedure and Evidence (the “Rules”), and regulation 65 of the Regulations of the Court.

18. 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.

19. 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

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<sup>16</sup> ICC-02/11-01/11-297.

<sup>17</sup> ICC-02/11-01/11-298.

which is essential for the determination of matters arising in the judicial cause under examination.<sup>18</sup>

20. According to the jurisprudence of the Appeals Chamber, it is not sufficient to identify an “issue”. In addition, the issue must be shown to be one that would “*significantly affect*” (i) the fair and expeditious conduct of the proceedings or (ii) the outcome of the trial. The issue must be such to affect either of these two elements of justice “in a material way”.<sup>19</sup>

21. In the following sections, the Chamber will address in turn the three applications that are the subject of this decision.

### **III. First Defence Application**

#### **A. *The Decision of 2 August 2012***

22. In the Decision of 2 August 2012, the Single Judge held:

[T]he Single Judge is of the view that the expertise conducted by an expert appointed by the Chamber does not *per se* fall within the ambit of regulation 156 of the Regulations of the Registry, but that, nevertheless, information contained in any reports produced by such experts may make reference to information covered by the said regulation.<sup>20</sup>

23. Consequently, the Single Judge rejected the Defence proposals for redaction in the Expert Reports *vis-à-vis* the Prosecutor of information that did not stem from Mr Gbagbo’s medical record maintained at the detention centre where there was no further justification for such redaction.<sup>21</sup>

#### **B. *Submissions of the Defence***

24. The Defence submits:

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<sup>18</sup> 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. See also ICTY, Trial Chamber II, *Prosecutor v Ntahobali and Nyiramasuhuko*, “Decision on Ntahobali’s and Nyiramasuhuko’s Motions for Certification to Appeal the ‘Decision on Defence urgent motion to declare parts of the evidence of Witnesses RV and QBZ inadmissible’”, 18 March 2004, para 16.

<sup>19</sup> See ICC-01/04-168, para 10.

<sup>20</sup> Decision of 2 August 2012, para. 17.

<sup>21</sup> *Ibid.*, para. 18.

La Décision de la Juge unique pose donc un certain nombre de questions cruciales:

- i. La première est celle du statut des rapports rendus par des médecins Experts nommés par la Chambre :
  - Ces rapports sont-ils dans leur entièreté, par essence, couverts par le secret médical ?
  - Peut-on distinguer dans ces rapports les informations médicales *stricto sensu* qui seraient couvertes par le secret médical d'autres informations non couvertes par le secret médical ?
  - Ces rapports ne sont-ils, par essence, pas couverts par le secret médical ainsi que l'avance le Procureur et que l'admet la Juge; par conséquent, le consentement de l'intéressé est-il inutile à leur communication ?
- ii. La seconde question est celle de savoir ce que recouvre la notion de dossier médical au sens de la Norme 156 du Règlement du Greffe ;
- iii. La troisième question est celle du contrôle de l'intéressé sur la divulgation des éléments le concernant. La question de l'étendue du contrôle est cruciale : l'intéressé est-il le seul maître de la divulgation des documents le concernant couverts par le secret médical ? De tout élément de son dossier mentionnant des éléments couverts par le secret médical ? De l'entièreté de son dossier médical ? Ou, au-delà, de tout élément ou document faisant référence de façon précise à des éléments couverts par le secret médical ?
- iv. La quatrième question est celle du contrôle de l'intéressé sur la divulgation d'éléments d'information le concernant en dehors du champ d'application du secret médical?<sup>22</sup>

25. The Defence alleges that these issues affect the fairness of the proceedings because they concern medical privilege and the right to remain silent, both of which are fundamental rights of the accused.<sup>23</sup> In the context of the effect of the issue on the expeditiousness of proceedings, the Defence alleges that the resolution of the issue on appeal will influence the way experts prepare their reports in the future, will allow the parties to understand how to best use such expert reports, and will avoid the need to seize the Appeals Chamber again.<sup>24</sup> The Defence submits that an immediate resolution of the issue by the Appeals Chamber will advance the proceedings by assuring legal certainty for the parties, in particular for the Defence.<sup>25</sup>

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<sup>22</sup> First Defence Application, para. 21.

<sup>23</sup> *Ibid.*, para. 28. See also paras 29-34.

<sup>24</sup> *Ibid.*, para. 40.

<sup>25</sup> *Ibid.*, para. 43.

26. Finally, the Defence requests that suspensive effect be granted to its application, and that the disclosure of the Expert Reports to the Prosecutor be suspended.<sup>26</sup>

### *C. Submissions of the Prosecutor*

27. In her response, the Prosecutor argues that, in addition to the four issues explicitly identified, the Defence in fact argues a fifth issue, which is “[w]hether information should be kept confidential because it could be used against Mr. Gbagbo if disclosed, and thus such disclosure would constitute an infringement of his right to remain silent and not incriminate himself”.<sup>27</sup>

28. The Prosecutor argues that all five issues were rendered moot by the disclosure of the report of Dr Daunizeau and redacted versions of the reports of Dr Chuc and Dr Lamothe. In her submission, this has reduced the proposed issues to abstract questions of hypothetical concern, for which leave to appeal cannot be granted.<sup>28</sup>

29. In any case, the Prosecutor argues that the four issues explicitly identified by the Defence do not affect the fair and expeditious conduct of the proceedings as they do not have “an immediate and direct application to the case at hand”, but are instead “broad questions”, “abstract and unspecific”. On the other hand, the Prosecutor submits that the submissions of the Defence in relation to the fifth issue are “manifestly premature: the Prosecution has not sought to use any of the relevant items to incriminate Mr. Gbagbo”.<sup>29</sup>

30. Furthermore, the Prosecutor submits that the issues do not affect the expeditiousness of proceedings, since “the mere fact that a legal issue has not

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<sup>26</sup> *Ibid.*, para. 49.

<sup>27</sup> Prosecutor’s Response to the First Defence Application, para. 19.

<sup>28</sup> *Ibid.*, para. 20.

<sup>29</sup> *Ibid.*, paras 23-24.

previously arisen or been settled by the Appeals Chamber does not automatically render the issue amenable to appeal” and since the disclosure of the reports already took place.<sup>30</sup>

31. Similarly, the Prosecutor argues that the Defence has failed to demonstrate any impact of the issues on the outcome of the trial and has “advance[d] general or abstract concerns”.<sup>31</sup>

32. Finally, the Prosecutor submits that appellate resolution of the issues will not materially advance the proceedings, and will “only trigger needless litigation on issues that have already been rendered moot”. With respect to the issue of possible improper use by the Prosecutor of the information obtained, the Prosecutor submits that an intervention of the Appeals Chamber is not necessary at this point, and that “[i]f and when the Prosecution seeks to use the reports, the Defence will have ample opportunity to oppose”.<sup>32</sup>

#### *D. Analysis and conclusions of the Chamber*

33. The first and third issues, as put forward by the Defence, touch upon the same specific subject matter and can therefore be examined jointly. The defence alleges an error on the part of Single Judge in not recognising that Expert Reports are covered by medical privilege. Similarly, the fourth issue involves an allegation that the Single Judge erred in overruling the refusal of Mr Gbagbo to consent to disclosure to the Prosecutor of information that could be used against him, in violation of his right to remain silent under article 67(1)(g) of the Statute.

34. The Defence has presented the issues in such broad way that it has misstated the real scope of information that was disclosed as a result of the

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<sup>30</sup> *Ibid.*, paras 26-27.

<sup>31</sup> *Ibid.*, para. 29.

<sup>32</sup> *Ibid.*, paras 32-33.

impugned decision. Indeed, the Chamber notes that in an order on 26 July 2012, the Single Judge ordered the Defence to “secure the written consent of Mr Gbagbo to the disclosure in their current form of the Expert Reports to the Prosecutor or, failing that, to propose reasoned redactions to the reports”.<sup>33</sup> On 31 July 2012, the Defence informed the Chamber that Mr Gbagbo did not oppose the disclosure of redacted Expert Reports and requested the Chamber to:

PERMETTRE à la Défense de communiquer au Procureur les versions expurgées des rapports médicaux des Dr. Chuc, Daunizeau et Lamothe telles que proposées dans les annexes 1 à 3.<sup>34</sup>

35. The redactions proposed by the Defence were limited and were partly granted by the Single Judge in the Decision of 2 August 2012. The Chamber notes that to the extent the information involved: (i) stemmed from the medical record of Mr Gbagbo: or (ii) was of strictly personal nature and irrelevant to the issues under consideration, redactions were indeed authorized.<sup>35</sup> Accordingly, the first, third and fourth subjects advanced by the Defence constitute issues arising out of the Decision of 2 August 2012 only insofar as they concern the discrepancy between the redactions as proposed by the Defence, and the redactions as authorised by the Single Judge.

36. Accordingly, the Chamber must proceed to determining whether the issue is such that would that would *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial. As recalled above, the issue must be such to affect either of these two elements of justice “in a material way”.<sup>36</sup>

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<sup>33</sup> ICC-02/11-01/11-196-Conf-tENG, p. 5.

<sup>34</sup> ICC-02/11-01/11-198, p. 7.

<sup>35</sup> Decision of 2 August 2012, para. 18.

<sup>36</sup> See above, para. 20.

37. Although the issues are presented in broad terms invoking prejudice to the right to privacy and to the privilege against self-incrimination, whether or not any resulting prejudice would be “significant” must be determined in light of their real scope. The Chamber considers, in light of the limited scope of the redactions which were not granted by the Single judge, that any prejudice to Mr Gbagbo, on the assumption that the Single Judge erred in the Decision of 2 August 2012, would have been insignificant. The issues would not have affected the fair and expeditious conduct of the proceedings or the outcome of the trial in any material way. Accordingly, it cannot be determined that the first, third and fourth issues proposed by the Defence would significantly affect the fair and expeditious conduct of the proceedings, within the meaning of article 82(1)(d) of the Statute.

38. Similarly, as the issues are completely detached from the merits of the case against Mr Gbagbo, the Chamber is of the view that the issues would not affect the outcome of the trial.

39. Turning to the second issue put forward by the Defence (*“celle de savoir ce que recouvre la notion de dossier médical au sens de la Norme 156 du Règlement de Greffe”*), the Chamber notes that it is presented in the abstract, without any apparent link to the Decision of 2 August 2012. The Defence has not explained how this allegation constitutes an identifiable subject “the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.<sup>37</sup> As a result, the Defence has failed to identify an appealable issue, within the meaning of article 82(1)(d) and must be rejected.

40. Accordingly, the criteria of article 82(1)(d) of the Statute are not met with respect to any of the issues identified in the First Defence Application. With regard to the request for suspensive effect, the Chamber underlines that such

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<sup>37</sup> ICC-01/04-168, para. 9.

request, in accordance with rule 156(5) of the Rules, may only be entertained by the Appeals Chamber, once leave to appeal has been granted. Therefore the First Defence Application must be rejected.

#### **IV. Prosecutor's Application**

##### **A. *The Decision of 13 August 2012***

41. In the Decision of 13 August 2012, the Single Judge rejected a request by the Prosecutor for disclosure of four documents emanating from the medical record of Mr Gbagbo, on the basis that: (i) the disclosure of the documents was subject to Mr Gbagbo's consent, pursuant to regulation 156(2) of the Regulations of the Registry; and (ii) that such consent was not given.<sup>38</sup>

##### **B. *Submissions of the Prosecutor***

42. The Prosecutor seeks leave to appeal on the following issue:

Whether as a matter of law the consent of a person against whom a warrant of arrest has been issued is required for disclosure of his medical records to the Prosecution, including medical records held by the detention centre pursuant to Regulation 156 of the Regulations of the Registry and disclosed to doctors chosen by the Defence, when the person is seeking to establish that he is unfit to stand trial on medical grounds.<sup>39</sup>

43. The Prosecutor submits that the issue arises out of the decision,<sup>40</sup> and impacts the fairness of the proceedings as "[t]he lack of access to the medical documents contained in the medical record of the accused impacts on the Prosecution's ability to provide knowing observations on a major issue" and "impacts with the Prosecution ability to have a 'proper oversight' on 'the crucial determination of the fitness' of Mr Gbagbo 'to participate in proceedings'".<sup>41</sup>

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<sup>38</sup> Decision of 13 August 2012, para. 11 and p. 7.

<sup>39</sup> Prosecutor's Application, para. 12.

<sup>40</sup> *Ibid.*, paras 15-16.

<sup>41</sup> *Ibid.*, para. 18.

44. Additionally, the Prosecutor submits that the “[r]efusal to allow the Prosecution to have access to the requested medical documents, which inhibits its ability to provide fully informed comments on the experts’ reports, could well impact on the expeditious conduct of the proceedings”. In addition, the Prosecutor submits that, should the Chamber also certify appeal of the decision on the fitness of Mr Gbagbo to take part in the proceedings against him, joining this issue will “clearly advance expeditiousness and efficiency”.<sup>42</sup>

45. The Prosecutor also argues that the immediate resolution of the issue will materially advance the proceedings, by reference to its argument in relation to the expeditiousness of the proceedings.<sup>43</sup>

#### *C. Submissions of the Defence*

46. The Defence does not oppose the Prosecutor’s Application.<sup>44</sup> It submits that the issue raised by the Prosecutor is inseparable from the issues advanced in the First Defence Application.<sup>45</sup>

#### *D. Analysis and conclusions of the Chamber*

47. The Chamber agrees with the Prosecutor that the issue proposed for appeal arises out of the decision. Indeed, it was precisely the lack of consent of Mr Gbagbo that underpinned the Single Judge’s ruling not to allow the Prosecutor access to four documents emanating from Mr Gbagbo’s medical record.

48. However, the Chamber does not accept the Prosecutor’s argument that the issue significantly affects the fairness of the proceedings. It should be noted that the issue does not involve the medical records of Mr Gbagbo as a

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<sup>42</sup> *Ibid.*, para. 21.

<sup>43</sup> *Ibid.*, para. 25.

<sup>44</sup> Defence Response to the Prosecutor’s Application, para. 23.

<sup>45</sup> *Ibid.*, para. 24.

whole, but is confined to four specific documents from Mr Gbagbo's medical record. Notably, it does not concern the Prosecutor's access to the Expert Reports, which constituted, together with the clarifications provided by the experts at the hearing, the basis for the determination of the fitness of Mr Gbagbo to take part in the proceedings against him.<sup>46</sup>

49. The Chamber also considers it appropriate to note that proceedings for the determination of fitness to stand trial are specific in the sense that "[e]ven in the absence of a request from one of the parties, the Chamber must ensure, as spelled out in rule 135 of the Rules, that proceedings do not take place against an unfit suspect" and that "the role of the parties is better seen as assisting the Chamber in the exercise of its obligation".<sup>47</sup>

50. Thus, the Chamber is of the view that the Prosecutor's ability to provide knowing observations on the matter and to have proper oversight of the proceedings in relation to Mr Gbagbo's fitness to take part in the proceedings against him was not impaired by not having access to the four specific documents in question. The issue therefore would not significantly affect the fair and expeditious conduct of the proceedings.

51. For the same reason, the Chamber also considers that the issue proposed for appeal does not affect the outcome of the trial. Accordingly, the Prosecutor's Application must be rejected.

## **V. Second Defence Application**

### **A. *The Decision of 2 November 2012***

52. In the Decision of 2 November 2012, the Chamber held that it was "satisfied that Mr Gbagbo was able to meaningfully exercise his fair trial

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<sup>46</sup> See Decision of 2 November 2012, para. 60.

<sup>47</sup> *Ibid.*, para. 56.

rights” and, accordingly, found that he was “fit to take part in the proceedings against him”.<sup>48</sup>

### ***B. Submissions of the Defence***

53. In its second application, the Defence articulates the issue proposed for appeal as follows:

La question qui fait l’objet de la demande d’autorisation d’interjeter appel est donc celle de l’aptitude du Président Gbagbo à être jugé et à participer effectivement à la procédure.<sup>49</sup>

54. The Defence contends, also by reference to the Decision of 2 November 2012, that fitness to stand trial is of crucial importance and is related to the fairness of the proceedings.<sup>50</sup>

55. In relation to the necessity of appellate intervention, the Defence states that in light of the fact that fitness to stand trial is a component of the fairness of proceedings, it is evident that the intervention of the Appeals Chamber is necessary to prevent the effect of an erroneous decision on the fairness of the proceedings.<sup>51</sup> The Defence also submits that if the Appeals Chamber were not granted an opportunity to rule on the matter at the pre-trial stage, there would be a risk that the Court has to re-open the question at a later stage, thereby prejudicing the expeditiousness of the proceedings.<sup>52</sup>

56. In order to demonstrate that the resolution of the issue by the Appeals Chamber may materially advance the proceedings, the Defence refers to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”) in the case of *Strugar*. The Defence cites the Judgment of the Appeals Chamber in that case, which stated that an

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<sup>48</sup> Decision of 2 November 2012, para. 101; see also p. 36.

<sup>49</sup> Second Defence Application, para. 25.

<sup>50</sup> *Ibid.*, paras 28-37.

<sup>51</sup> *Ibid.*, para. 41.

<sup>52</sup> *Ibid.*, para. 44.

immediate resolution by the Appeals Chamber of any question of fitness would appear to be essential in that any decision that an accused is not fit to stand trial would necessarily materially advance the proceedings, and the previous decision of Trial Chamber II of the ICTY in the same case, which rejected the application for leave to appeal because the issue of fitness to stand trial had been raised late at trial and not at the preliminary stage of the proceedings.<sup>53</sup>

57. In a discrete section of the Second Defence Application, the Defence also lists five “grounds of appeal”, relating to the definition of fitness to stand trial, the impact of the Decision of 2 November 2012 on further stages of the proceedings, and the Chamber’s interpretation of the Expert Reports.<sup>54</sup>

58. The Defence underlines that the present instance is the first that the question of fitness to stand trial has arisen in proceedings before the Court and submits that it is important to allow the Appeals Chamber to pronounce itself on the matter.<sup>55</sup>

### *C. Submissions of the Prosecutor*

59. The Prosecutor submits that the Defence has failed to identify “a concrete or specific issue arising from the manner in which the Chamber adjudicated the question of Mr Gbagbo’s fitness to stand trial” and that “the Defence simply frames the overall conclusion of the Chamber as ‘an issue’ with the apparent hope of re-litigating the whole question of Mr Gbagbo’s fitness before the Appeals Chamber”. Thus, in the view of the Prosecutor, “the

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<sup>53</sup> *Ibid.*, paras 48, 51.

<sup>54</sup> *Ibid.*, paras 58-62.

<sup>55</sup> *Ibid.*, paras 64-67.

Application ‘merely represents an abstract question or a hypothetical concern’ and ‘a question over which there is disagreement or conflicting opinion’”.<sup>56</sup>

60. In addition, the Prosecutor argues that the Chamber should disregard the five grounds of appeal put forward by the Defence, as these arguments relate to the merits of an appeal and are premature and improper at this stage. The Prosecutor emphasises that these grounds of appeal should not be confused with the issue for which leave to appeal is sought, as already the Defence makes a clear distinction in this regard.<sup>57</sup>

61. The Prosecutor submits that the Defence “quotes general principles of law and elaborates in the abstract on the importance of the question of fitness to stand trial and its relevance for the criteria under article 82(1)(d)” but “fails to demonstrate in concrete terms how the manner in which the Chamber adjudicated the matter before it has a tangible impact on the fair and expeditious conduct of the proceedings against Mr Gbagbo or the outcome of the trial against him, or why in this specific case an immediate resolution by the Appeals Chamber may materially advance the proceedings”.<sup>58</sup>

62. Finally, the Prosecutor argues that the Decision of 2 November 2012 “does not cause any incurable prejudice to the accused” as the Defence will be able to raise the issue again before the trial commences if the charges are confirmed.<sup>59</sup>

#### *D. Submissions of the OPCV*

63. The OPCV, while generally endorsing the position put forward by the Prosecutor,<sup>60</sup> argues that the Defence has failed to demonstrate in what

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<sup>56</sup> Prosecutor’s Response to the Second Defence Application, paras 13-14 (footnotes omitted).

<sup>57</sup> *Ibid.*, paras 17-18.

<sup>58</sup> *Ibid.*, para. 19.

<sup>59</sup> *Ibid.*, para. 23.

<sup>60</sup> OPCV’s Response to the Second Defence Application, para. 13.

respect the Chamber erred in its Decision of 2 November 2012 and that, accordingly, the submissions of the Defence merely reflect its disagreement with the impugned decision, and cannot constitute an appealable issue.<sup>61</sup>

64. In relation to the grounds of appeal indicated by the Defence, the OPCV responds: (i) that the mere fact that a question is of general interest or that it may arise in subsequent proceedings does not suffice to grant leave to appeal; (ii) that the Chamber's determination of Mr Gbagbo's fitness does not extend beyond the pre-trial stage of proceedings; and (iii) that the Defence allegation that the Chamber failed to properly take into account the conclusions of the appointed experts does not rest on any real basis and is founded on an erroneous interpretation of the Decision of 2 November 2012. On this basis, the OPCV argues that the Defence has failed to identify an appealable issue.<sup>62</sup>

65. In the alternative, the OPCV argues that the Defence has failed to demonstrate how the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and how an immediate resolution by the Appeals Chamber may materially advance the proceedings. In particular, the OPCV submits that the arguments of the Defence in this respect relate to the merits of appeal and are as such not to be considered for the purpose of determining whether leave to appeal should be granted.<sup>63</sup>

66. The OPCV submits that the Decision of 2 November 2012 not only does not affect the fair and expeditious conduct of the proceedings, but, to the contrary, manifestly takes into account the rights and interests of Mr Gbagbo, as it envisages practical arrangements to enable Mr Gbagbo to avail himself of all the guarantees of fair trial. Furthermore, the OPCV avers that, if the charges are confirmed, the Defence will have the possibility of raising the

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<sup>61</sup> *Ibid.*, para. 22.

<sup>62</sup> *Ibid.* paras 23-25.

<sup>63</sup> *Ibid.*, para. 28.

question of Mr Gbagbo's fitness to stand trial anew before the Trial Chamber, which will not be bound by the determination of the Pre-Trial Chamber.<sup>64</sup>

67. The OPCV also argues that the notion of integrity of the proceedings, invoked by the Defence, is broader in scope than the concept of fairness of the proceedings *vis-à-vis* the suspect, and includes, *inter alia*, the protection of witnesses and victims, the sovereignty of States and the participation of victims in the proceedings before the Court. The OPCV submits that the need to preserve the integrity of the administration of justice always prevails over the specific interests of the parties, including the Defence. It adds that it is not the question of Mr Gbagbo's fitness to take part in the proceedings against him *per se* but the strategy of the Defence which affects the fairness, integrity and celerity of the proceedings, as the fact of raising the issue of Mr Gbagbo fitness seems really to hide the refusal of the suspect to renounce his right to be present at the confirmation of charges hearing. In this way, according to the OPCV, the Defence is preventing the Chamber from exercising its function under article 61(7) of the Statute and gravely undermining the right of the victims to justice. In the submission of the OPCV, the Second Defence Application clearly falls within the strategy of the Defence, the objective of which is to delay the confirmation of charges hearing.<sup>65</sup>

#### *E. Analysis and conclusions of the Chamber*

68. The Chamber must determine whether the Second Defence Application identifies an issue arising from the Decision of 2 November 2012 and whether the issue significantly affects either the fair and expeditious conduct of the proceedings or the outcome of the trial. In the context of the latter, the Appeals Chamber has stated that the "Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on

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<sup>64</sup> *Ibid.*, para. 33.

<sup>65</sup> *Ibid.*, paras 34-35.

the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.”<sup>66</sup>

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.

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.

71. In the present case, the Defence submits that the overall conclusion of the Decision of 2 November 2012 constitutes an appealable issue. It argues, in the abstract, the importance of fitness to stand trial, but does not indicate any legal or factual error in the reasoning underpinning the Chamber’s overall conclusion in the Decision of 2 November 2012. For the reasons advanced in

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<sup>66</sup> *Ibid.*, para. 13.

the preceding paragraph, the Chamber is of the view that the Defence has thus failed to identify an appealable issue.

72. The Chamber notes that in a discrete section of the Second Defence Application, the Defence presents what it refers to as five “grounds of appeal”. However, the Chamber notes that the Defence does not explain their relationship with the issue as defined in the application. In any case, the Chamber considers that the five “grounds of appeal”, whether treated as being subsumed within the proposed issue or as discrete issues themselves, do not meet the criteria of article 82(1)(d) of the Statute.

73. The first of these “grounds of appeal” relates to the definition of fitness to stand trial. The Defence states that it is “*particulièrement important que la Chambre d’appel puisse se prononcer sur ce point et que les parties puissent s’exprimer*”.<sup>67</sup> However, the Defence does not submit that the Chamber committed an error in defining fitness to stand trial but points to the importance of an abstract question of law being placed before the Appeals Chamber for its determination.

74. In the second and third “grounds of appeal”, the Defence argues that the Appeals Chamber should be asked to specify whether the Chamber must limit its findings concerning fitness to the confirmation of charges hearing, and that the scope of the decision, which impacts on the totality of the proceedings, should be discussed.<sup>68</sup>

75. In the view of the Chamber, no such issue arises out of the Decision of 2 November 2012. The decision addressed the fitness of Mr Gbagbo to take part in the proceedings against him at the time that it was issued, on the basis of information then available. However, the Decision of 2 November 2012 relates

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<sup>67</sup> Second Defence Application, para. 58.

<sup>68</sup> *Ibid.*, paras 59-60.

to a situation which naturally evolves. Accordingly, there may be a need to re-examine in the future, including by ordering further expertise under rule 135 of the Rules, the question of Mr Gbagbo's fitness to take part in the proceedings, if circumstances so require.

76. Finally, in the fourth and fifth "grounds of appeal", the Defence appears to challenge the Chamber's interpretation of the Expert Reports, wishing to explore on appeal whether the Chamber can take a decision on Mr Gbagbo's fitness to stand trial "*sans se référer expressément aux réponses que les experts ont donné aux questions que la Chambre avait elle-même posées*" and deeming the Chamber's interpretation "*une interprétation discrétionnaire qui ne reflète pas la lettre et l'esprit de certains des rapports ou témoignages*". However, the Chamber is of the view that these general statements of disagreement fail to identify an appealable issue. In particular, the Defence does not explain which findings are vitiated by the failure of the Chamber to refer to the answers of the experts to the question posed by the Chamber, or by the misrepresentation of the reports or testimonies of the experts. The Chamber is therefore not in a position to ascertain whether the submissions of the Defence relate to a subject matter the resolution of which is essential to the Chamber's determination.

77. In light of the above, the Chamber is of the view that the Defence has failed to identify an appealable issue arising out of the Decision of 2 November 2012. Accordingly, the Second Defence Application must also be rejected.

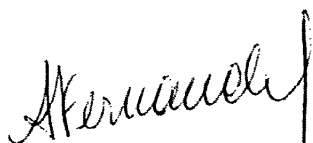
**FOR THESE REASONS, THE CHAMBER**

**REJECTS** the First Defence Application;

**REJECTS** the Prosecutor's Application;

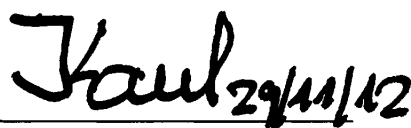
**REJECTS** the Second Defence Application.

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

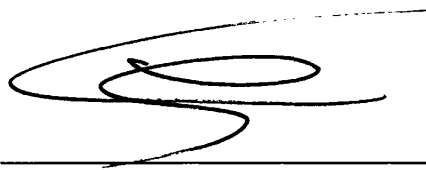


**Judge Silvia Fernández de Gurmendi**

**Presiding Judge**



**Judge Hans-Peter Kaul**



**Judge Christine Van den Wyngaert**

Dated this 29 November 2012

At The Hague, The Netherlands