

**Cour
Pénale
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**International
Criminal
Court**



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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 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”

Source: Office of the Prosecutor

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INTRODUCTION

1. The Defence is seeking leave to appeal Pre-Trial Chamber I's ("Chamber") "Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court" ("Decision")¹ which found that Mr Gbagbo is fit to participate in a confirmation hearing in this case.
2. The Prosecution submits that the Defence Application should be rejected. The Defence does not identify any appealable issue for the purposes of article 82(1)(d). Even if, *arguendo*, the Chamber considers that the Defence has identified such an issue, the Defence Application should nonetheless be rejected, as the Defence discusses the issue in the abstract and does not demonstrate how the concrete manner in which the Chamber adjudicated the issue before it meets the criteria for leave to appeal.
3. Pursuant to the Decision of the Single Judge of 14 November 2012,² and because no reference to confidential information is made, the Prosecution files this document publicly.

PROCEDURAL BACKGROUND

4. On 5 June 2012, the Defence filed the "*Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012*", in which it argued that the confirmation hearing should be postponed, *inter alia*, because Mr Gbagbo's state of health made him unfit to stand trial.³
5. On 12 June 2012, the Single Judge issued the "Decision on the '*Requête de la Défense en report de l'audience de confirmation des charges prévue le 18 juin 2012*'",

¹ ICC-02/11-01/11-268-Conf and ICC-02/11-01/11-286-Red.

² ICC-02/11-01/11-296.

³ ICC-02/11-01/11-140-Conf, paras.21-60 and ICC-02/11-01/11-140-Red.

finding, *inter alia*, that the allegations of Mr Gbagbo's unfitness had not been sufficiently substantiated. However, the Single Judge added that since the suspect's ability to participate in the confirmation hearing was crucial to the fairness of the proceedings, she was prepared to entertain a request for a medical, psychiatric or psychological examination of Mr Gbagbo pursuant to rule 135.⁴

6. On 26 June 2012, the Single Judge issued the "Order to conduct a medical examination", whereby she appointed three experts to conduct medical, psychological and psychiatric examinations of Mr Gbagbo.⁵
7. On 19 July 2012, the Registry filed the medical reports of the three experts appointed by the Single Judge.⁶ The Prosecution⁷ and the Defence⁸ subsequently filed their observations to these reports.
8. On 24 and 25 September 2012, a hearing was held in closed session before the Chamber, in the presence of Mr Gbagbo, his Defence, the Prosecutor, representatives of the Registry and the experts appointed by the Chamber.⁹
9. On 2 November 2012, the Chamber issued the "Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court" ("Decision")¹⁰, finding that Mr Gbagbo is fit to participate in the confirmation hearing in this case.
10. On 12 November 2012, the Defence filed an application for leave to appeal the Decision.¹¹ On 15 November 2012, the Defence filed a Corrigendum to the

⁴ ICC-02/11-01/11-152-Conf and ICC-02/11-01/11-152-Red.

⁵ ICC-02/11-01/11-164-Conf.

⁶ ICC-02/11-01/11-190-Conf-Exp-Anx1(confidential redacted version, ICC-02/11-01/11-190-Conf-Anx1), ICC-02/11-01/11-190-Conf-Exp-Anx2, (reclassified on 2 August 2012 as "confidential"), ICC-02/11-01/11-190-Conf-Exp-Anx3 (confidential redacted version, ICC-02/11-01/11-190-Conf-Anx3). Official English translations of the Expert Reports are also available, see ICC-02/11-01/11-190-Conf-Exp-Anx1-tENG ("Report of Dr Chuc"), ICC-02/11-01/11-190-Conf-Exp-Anx2-tENG ("Report of Dr Daunizeau"), ICC-02/11-01/11-190-Conf-Exp-Anx3-tENG ("Report of Dr Lamothe").

⁷ ICC-02/11-01/11-214-Conf-Corr and annex.

⁸ ICC-02/11-01/11-239-Conf.

⁹ ICC-02/11-01/11-T-6-CONF-ENG, ICC-02/11-01/11-T-7-CONF-ENG. See also "Order scheduling a hearing in relation to Mr Gbagbo's fitness to take part in the proceedings against him", ICC-02/11-01/11-241, and "Decision on issues related to the hearing on Mr Gbagbo's fitness to take part in the proceedings against him", ICC-02/11-01/11-249 and annex.

¹⁰ ICC-02/11-01/11-286-Conf and ICC-02/11-01/11-286-Red.

Defence Application (“Defence Application”),¹² as well as a public redacted version thereof.¹³

SUBMISSIONS

A. The Defence has not identified an appealable issue within the meaning of Article 82(1)(d)

The Defence has failed to identify an appealable issue

11. The Defence refers to the Chamber’s finding that “Mr Gbagbo is fit to take part in the proceedings before this Court”.¹⁴ On that basis alone, the Defence submits that the sole issue for which it seeks leave to appeal is the fitness of Mr Gbagbo to be judged and to effectively participate in the proceedings (the “Issue”).¹⁵
12. The Prosecution submits that the Issue as presented in the Defence Application does not constitute an appealable issue. The Appeals Chamber has held that “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, not merely a question over which there is disagreement or a conflicting opinion. [...] 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. It may be legal or factual or a mixed one.”¹⁶

¹¹ ICC-02/11-01/11-292-Conf.

¹² ICC-02/11-01/11-292-Conf-Corr; and ICC-02/11-01/11-292-Conf-Corr-Anx: Corrigendum de la 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 Prosecution has no objections to the Corrigendum.

¹³ ICC-02/11-01/11-292-Corr-Red.

¹⁴ Defence Application, para.24.

¹⁵ Defence Application, para.25: “l’aptitude du Président Gbagbo à être jugé et à participer effectivement à la procédure”.

¹⁶ ICC-01/04-168 OA3, paras. 9. 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. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

13. The Issue identified in the Defence Application is not a concrete or specific issue arising from the manner in which the Chamber adjudicated the question of Mr Gbagbo's fitness to stand trial. Rather, 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. This is inadequate for the purposes of article 82(1)(d).
14. The Prosecution recalls that an "issue" must be an identifiable subject or topic,¹⁷ and that accordingly a general statement will not suffice. In the absence of a showing of a concrete issue related to the manner in which the Chamber adjudicated on Mr. Gbagbo's fitness to stand trial, the Application "merely represents an abstract question or a hypothetical concern"¹⁸ and "a question over which there is disagreement or conflicting opinion".¹⁹
15. If the conclusory Issue put forward by the Defence were to be qualified as an issue within the terms of article 82(1)(d), that would mean that all rulings regulating the proceedings or adjudicating on motions from the parties would automatically involve an issue. That would render the term "issue" included in article 82(1)(d) irrelevant as one of the qualifying criteria for leave to appeal, which is the object and purpose of the provision.²⁰ It would also detach the term from the manner in which it was defined by the Appeal Chamber.²¹
16. Moreover, it is difficult to identify what could be a proper issue for appeal in the Decision. The Decision, which finds only that Mr. Gbagbo is fit to participate in

¹⁷ ICC-01/04-168 OA3, paras. 9. 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. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

¹⁸ ICC-01/05-01/08-532, para.17. ICC-01/05-01/08-75 para.11, ICC-02/04-01/05-367, para.22; ICC-01/09-01/11-301 para.34, ICC-01/09-02/11-406, paras.50, 61.

¹⁹ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179,para.27; ICC-02/11-01/11-99-Conf, para.21.

²⁰ "The rule governing the interpretation of a section of law is its wording read in context and light of its object and purpose": ICC-01/04-168 OA3, para. 33; ICC-01/04-01/07-522 OA3, para. 39; ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para 55.

²¹ See para.12 above.

the present proceedings, i.e. the confirmation hearing, rests on a straightforward factual determination of Mr. Gbagbo's physical and psychological health. There is no issue for appeal. Mere disagreements as to the manner in which the evidence has been evaluated are not appealable issues. Further, the Appeals Chamber is not in a position to re-adjudicate the factual determinations of the Pre-Trial Chamber which rely primarily on the expert testimony heard by the Chamber.

The grounds of appeal brought by the Defence should be ignored

17. In a separate portion of the Defence Application, the Defence puts forward five grounds of appeal that it would raise before the Appeals Chamber if and when leave is granted. These arguments relate to the merits of an appeal and are premature and improper at this stage.
18. Further, those grounds of appeal should not be confused with the Issue for which leave to appeal is sought. The Defence itself makes a clear distinction between the Issue for which certification is sought and the grounds of appeal which it intends to present before the Appeals Chamber.²² For the purposes of determining whether the Defence has met its burden under article 82(1)(d), only those submissions related to the Issue and its ability to fulfil the requirements of the provision should be considered. The "grounds of appeal" are irrelevant for the purposes of the Pre-Trial Chamber's determination of the Defence Application for leave to appeal.

B. The Defence has not demonstrated that the Issue meets the criteria for leave to appeal under Article 82(1)(d)

19. In its Application, 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

²² Defence Application, paras.25 and 63.

relevance for the criteria under article 82(1)(d).²³ However, it 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 outcome²⁴ of the trial against him, or why in this specific case an immediate resolution by the Appeals Chamber may materially advance the proceedings. Since the Defence Application takes the same approach with respect to all criteria under article 82(1)(b), the Prosecution addresses them jointly.

20. The citation of general principles of law without making concrete references to the case at hand is manifestly inadequate for the purposes of article 82(1)(d). According to the consistent jurisprudence of this Court, the Defence cannot speculate in the abstract that a decision causes prejudice to the rights of an accused person to demonstrate that the fairness of the proceedings is affected.²⁵ It does not suffice for an issue to have merely a hypothetical impact on the fairness or expeditiousness of proceedings²⁶ or on the outcome of the trial.²⁷
21. In addition, the Defence notes that this is the first time that the question of fitness arises before the Court. It submits that it is therefore critical that the Appeals Chamber decide on such an important legal issue, as it will also affect future proceedings.²⁸ The Prosecution submits that this argument is insufficient to warrant appeal in this case. The question of Mr. Gbagbo's fitness, while important, is a narrow and factual one. There is no basis to use this case as a

²³ Defence Application, paras.28-56.

²⁴ Regarding the outcome of the proceedings, the Defence has not submitted any arguments at all.

²⁵ 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.

²⁶ ICC-01/04-01/07-1958, para. 20. See also: ICC-02/04-01/05-367, para. 21-22

²⁷ ICC-01/04-01/07-1958, para. 20; ICC-01/09-02/11-406, paras. 42-43.

²⁸ Defence Application, paras.64-66.

vehicle to engage general and speculative questions that are not at issue, regardless of their novelty.²⁹

22. The Prosecution agrees with the Chamber that the issue of fitness of a suspect to participate in the proceedings is of “crucial importance”³⁰ and that “the concept of fitness to stand trial must be reviewed as an aspect of the broader notion of fair trial”.³¹ However, it is not the importance of the issue, formulated in abstract terms, what matters, but rather the manner in which that issue has been dealt with by the Pre-Trial Chamber. Not every “important” decision may automatically be appealed. Unless the Defence identifies a *concrete appealable issue* that meets the criteria of article 82(1)(d), the Chamber should not grant leave to appeal. The Appeals Chamber has made it clear that appeals cannot be brought outside the context of articles 81 and 82 of the Statute.³² As stated by the Appeals Chamber, “the fact that granting of appeal may, in the eyes of the [...] Chamber, be desirable or even necessary does not justify departure from the clearly enumerated grounds of appeal in the Statute”.³³
23. The Prosecution additionally emphasizes that this Decision does not cause any incurable prejudice to the accused. The Pre-Trial Chamber found that Mr Gbagbo is fit to effectively participate in the proceedings and as a result it will set a date for the confirmation of charges hearing.³⁴ However, if and when the charges against Mr. Gbagbo are confirmed, the Defence may raise the issue of fitness again before the trial commences. In addition, for the purposes of the confirmation of charges hearing, the Pre-Trial Chamber has already found that adjustments shall be made in order to enable Mr. Gbagbo to participate fully at

²⁹See ICC-01/04-01/06-1557, para.25; ICC-02/04-01/05-20, para. 21, ICC-01/04-135-tEN, para. 21; ICC-01/04-01/06-1191, para.11; ICC-01/05-01/08-1169, para.25; ICC-01/05-01/08-980, para.16.

³⁰ICC-02/11-01/11-164-Conf, para.23.

³¹Decision, para.43.

³²ICC-01/04-168 OA3, paras.35-41.

³³ICC-01/04-01/06-2799-conf OA19, para.8.

³⁴Decision, para.101.

the hearing.³⁵ It also ruled that, “regardless of the finding that Mr. Gbagbo is fit to take part in the proceedings against him, his health requires heightened attention”.³⁶ As a result, the Pre-Trial Chamber is exploring any measures that can be taken to help the physical recovery of Mr. Gbagbo.³⁷

CONCLUSION

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



Fatou Bensouda, Prosecutor

Dated this 16th day of November 2012

At The Hague, The Netherlands

³⁵ Decision, para.102.

³⁶ Decision, para.103.

³⁷ Decision, para.103.