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Date: **24 August 2012**

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurumendi, 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 Document

**Prosecution Response to the Defence request for application for leave to appeal
the Single Judge's "Decision on the OPCV's 'Request for leave to submit
observations and Request to access the Expert Reports' (ICC-02/11-01/11-211)"**

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INTRODUCTION

1. The Defence for Mr. Gbagbo seeks leave to appeal¹ the decision of the Single Judge of Pre-Trial Chamber I (“Single Judge”), which grants the common legal representative for the victims, the OPCV, leave to submit observations on the legal principles applicable to determine Mr. Gbagbo’s fitness to stand trial and procedure to be adopted following submission of the expert reports.² The Defence also asks that the Chamber delay the submission by the OPCV of its observations on this matter until the Appeals Chamber decides on the issue or until the Defence’s application for leave to appeal is rejected³ (“Defence Application”).
2. The Prosecution submits that the Defence Application should be rejected. The Defence fails to identify any appealable issue that satisfies the requirements of article 82(1)(d). In addition, the Defence has not demonstrated that the issue presented meets the criteria for leave to appeal. Finally, the request that the Chamber delay submission by OPCV of its observations is moot, since those observations were filed on 23 August.⁴

PROCEDURAL BACKGROUND

3. On 4 June 2012, the Single Judge granted 139 victims the right to participate at the confirmation of charges hearing and in related proceedings and appointed the OPCV as their common legal representative.⁵
4. On 19 June 2012, the Defence requested the medical evaluation of Mr. Laurent Gbagbo (“the Suspect”).⁶
5. On 26 June 2012, the Single Judge appointed three medical experts to proceed with a medical examination of the Suspect, with a view to determining his

¹ ICC-02/11-01/11-222.

² ICC-02/11-01/11-221.

³ ICC-02/11-01/11-222, p.10.

⁴ ICC-02/11-01/11-228-Corr.

⁵ ICC-02/11-01/11-138.

⁶ ICC-02/11-01/11-158-Conf-Exp; ICC-02/11-01/11-158-Conf-Red2.

fitness to participate in the hearing on the confirmation of charges against him.⁷ The experts' medical reports were filed in the record of the case on 19 July 2012 ("Expert Reports").⁸

6. On 26 July 2012, the Single Judge granted the parties the opportunity to submit observations on the Expert Reports and on the subsequent procedure before making a decision on the fitness of the Suspect to participate in the proceedings.⁹
7. On 2 August 2012, the Single Judge: (i) postponed the commencement of the confirmation hearing, scheduled for 13 August 2012, until the issue of the Suspect's fitness to take part in the proceedings against him was resolved, (ii) ordered that redacted versions of two of the Expert Reports be disclosed to the Prosecutor and that the third be disclosed to the Prosecutor in full, and (iii) ordered the Prosecutor and the Defence to file their observations, if any, on the Expert Reports and the subsequent procedure to be followed by 13 August 2012 and 21 August 2012 respectively.¹⁰
8. On 7 August 2012 the OPCV filed its request to be granted access to the Expert Reports and for authorisation to submit observations on the Expert Reports and the subsequent procedure to be followed ("OPCV Request").¹¹
9. On 13 August 2012 the Defence filed its response to the OPCV Request, submitting that the OPCV failed to demonstrate that the personal interests of victims were affected and that participation on the issue of the Suspect's fitness to stand trial should be limited to the parties.¹²
10. On 15 August 2012 over Defence objections, the Single Judge authorised the OPCV to submit by 24 August 2012 observations on the legal principles

⁷ ICC-02/11-01/11-164-Conf.

⁸ ICC-02/11-01/11-190-Conf.

⁹ ICC-02/11-01/11-196-Conf, par.9.

¹⁰ ICC-02/11-01/11-201.

¹¹ ICC-02/11-01/11-203.

¹² ICC-02/11-01/11-209, paras.31-66.

applicable to the determination of the Suspect's fitness to stand trial and the procedure to be adopted following the submission of the Expert Reports.¹³

11. On 21 August 2012, the Defence filed the Defence Application.¹⁴

SUBMISSIONS

The issue for which leave to appeal is requested

12. In its Application, the Defence refers to the Single Judge's decision that: "[t]he personal interests of victims may, in principle, be affected by a determination as to the fitness of Mr. Gbagbo to participate in the hearing on the confirmation of charges against him, in particular by any delay in the proceedings which may result therefrom and that it may be appropriate to receive their observations in this regard".¹⁵

13. The Defence states that the Single Judge then permitted the OPCV to make observations of a general nature regarding the procedure to be followed depending on the fitness of the Suspect to stand trial, and thereby afforded victims the opportunity to demonstrate their opposition to any postponement, adjournment, or release from detention of the Suspect.¹⁶ It also complains that the Single Judge wrongly concluded that a potential delay of proceedings on account of the Suspect's fitness had a sufficient potential effect on the victims' interests to justify their participation.¹⁷

14. Based on this, the Defence requests that the Chamber certify for appeal the definition of the concept of 'personal interests of the victims', in relation to the consequences that the victims' intervention could have on the exercise of the rights of the Suspect and on the fairness of the proceedings ("Issue").¹⁸

¹³ ICC-02/11-01/11-211, p.6.

¹⁴ ICC-02/11-01/11-222.

¹⁵ ICC-02/11-01/11-222, para.15.

¹⁶ ICC-02/11-01/11-222, para.16.

¹⁷ ICC-02/11-01/11-222, para.17.

¹⁸ ICC-02/11-01/11-222, para.18.

The Defence has failed to identify an appealable “issue”

15. As the Appeals Chamber has held, *“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.”*¹⁹ The Prosecution submits that the Issue does not constitute an appealable “issue” within the terms of article 82(1)(d).
16. First, the Issue as described by the Defence has not been defined with sufficient precision. The Defence submits that the “question” concerns the definition of the concept of “personal interests of the victims” as adopted by the Single Judge. However, the Chamber did not define “personal interests”, it merely found that there was sufficient personal interest in the very narrow issue – the legal standard by which the facts concerning Mr Gbagbo’s fitness should be determined -- to permit the victims’ participation. Nor, in any event, does the Defence elaborate as to why this broad issue is appealable, beyond alluding to the alleged impact of victim intervention on the rights of the Suspect and the fairness of the proceedings.²⁰
17. Second, the Issue, as undefined as it is, appears to constitute, at its core, only a disagreement with the Single Judge, and indeed in part it is a disagreement with what it misconstrues as the Single Judge’s ruling. The Defence appears to disagree with the Single Judge’s conclusion that: the “personal interests of the victims” may be affected by a determination of the fitness of the Suspect to participate in the confirmation of charges hearing if a delay results from the finding on fitness.²¹ It also disagrees that it would be appropriate for the victims to make general observations related to the Suspect’s fitness to stand for trial. On the first question, this is purely a situation-specific determination – the Chamber found that the victims have an interest, a finding with which

¹⁹ ICC-01/04-168 OA3, para.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”.

²⁰ ICC-02/11-01/11-222, para. 18.

²¹ ICC-02/11-01/11-222, paras.15-18.

the Defence disagrees. That disagreement alone does not justify interlocutory appeal. On the second question, regarding the appropriateness of victims observations about the Suspect's fitness,²² its factual predicate is inaccurate; OPCV was granted the right to present observations on the appropriate legal standard, but not on the Suspect's fitness. Indeed, it was not granted access to the Expert Reports.²³

The Issue does not meet the requirements under Article 82 (1) (d)

18. The Prosecution submits that even if the Chamber considers that the Issue does arise from the Decision, it does not fulfill the requirements for leave to appeal under article 82(1)(d) for the following reasons: (i) the Issue does not affect the fair conduct of the proceedings; (ii) the Issue does not affect the expeditious conduct of the proceedings; and (iii) an immediate resolution of the Issue will not materially advance the proceedings.

The Issue does not affect the fair conduct of the proceedings

19. The Defence fails to demonstrate that the Issue affects the fair conduct of the proceedings.²⁴ The Defence is wrong when it states that the common legal representative for the victims will in this instance (and thus presumably more than it would do in any other instance) act as a second prosecutor.²⁵

20. Contrary to the Defence suggestion, the OPCV was not authorized to provide observations regarding the conclusions of the experts, thereby affecting the rights of the Defence.²⁶ Instead, the Single Judge denied its request for access to the Expert Reports and allowed OPCV to make observations only of a

²² ICC-02/11-01/11-222, para.23.

²³ ICC-02/11-01/11-221, para.14. The Single Judge, after refusing the request for access to the Expert Reports, further stated that the OPCV could submit "observations of a general nature on procedural and legal issues related to the question of a suspect's fitness to participate in the proceedings against him".

²⁴ ICC-01/04-168 OA3, para. 11. The Appeals Chamber has ruled that: "[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseparable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights".

²⁵ ICC-02/11-01/11-222, para.20.

²⁶ ICC-02/11-01/11-222, para.23.

general nature on legal principles applicable to the determination of the Suspect's fitness to stand trial.²⁷

21. The Defence is also incorrect when it states that allowing the victims to intervene at this stage of the proceedings would upset the balance between the Prosecution and Defence and limit the possibility of the Defence to be heard, thereby impacting on the fairness of the proceedings.²⁸ The Defence may file its observations after the OPCV, so the Suspect will have an opportunity to respond to the common legal representative's arguments and will have his arguments heard.

The Issue does not affect the expeditious conduct of the proceedings

22. The Defence Application fails to demonstrate that the Issue significantly affects the expeditious conduct of the proceedings within the meaning of article 82(1)(d). The Defence asserts that the proceedings will be conducted more expeditiously if the victims do not intervene on the issue of the procedure concerning the fitness of the Suspect to stand for trial.²⁹ But the legal representative for the victims (OPCV) have filed observations already (on 23 August, in advance of the due date of 24 August 2012). At this point, no delay can be anticipated as a consequence of the OPCV filing. On the contrary, certifying the issue for appeal will unavoidably slow down the process.

23. Moreover, it is not correct that the Decision expounds a broad definition of the personal interests of victims that will lead to an unreasonable level of future requests for participation by the victims (and consequent requests for leave to appeal), delaying the proceedings.³⁰ As previously stated, the nature of the victims' intervention in this instance has been limited to making general

²⁷ ICC-02/11-01/11-222, paras. 12, 14-15, p.6. The Single Judge, after refusing the request for access to the Expert Reports, further stated that the OPCV could submit "observations of a general nature on procedural and legal issues related to the question of a suspect's fitness to participate in the proceedings against him". This is precisely what OPCV has done. See ICC-02/11-01/11-228-Corr.

²⁸ ICC-02/11-01/11-222, para.21.

²⁹ ICC-02/11-01/11-222, para. 26.

³⁰ ICC-02/11-01/11-222, paras.27-28.

observations regarding legal principles. In addition, decisions as to victims' participation on specific issues are decided on a case by case basis, so it cannot be assumed that allowing victims to make observations in this instance will necessarily guarantee that they will have the right to intervene in other instances. The Defence's assertions in this regard are purely speculative.

*Immediate resolution of the Issue will not materially advance the proceedings*³¹

24. The Defence argues that allowing for the appeal would correct an error and also provide legal certainty and avoid future delay when victims again seek to participate in order to protect their personal interests.³² In the Prosecution's view, the Defence fails to show that the immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings. In particular, the underlying matters that the Defence wishes to litigate on appeal are truly not novel and have already been adjudicated in one way or another by the Appeals Chamber.

25. For instance, the Appeals Chamber has already determined, in the context of litigation surrounding a stay of proceedings, that a delay in the conduct of the case can impact on a victim's "personal interests".³³ Moreover, the proper scope of "personal interests" - a recurrent question raised by the Defence in the Application - has also been the subject of a number of rulings,³⁴ and the Defence fails to identify a specific aspect of this definitional issue that has not previously been addressed and that would benefit from more clarity from the Appeals Chamber.

³¹ See ICC-01/04-168, paras.14-15, 18. This requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "move forward" by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings".

³² ICC-02/11-01/11-222, paras.30-32.

³³ The *Prosecutor v Thomas Lubanga*, Decision on the Participation of Victims in the Appeal against Trial Chamber's Decision to Stay the Proceedings, ICC-01/04-01/06 OA 18, para.9.

³⁴ See *inter alia* ICC-01/04-01/06-925, para. 28; ICC-01/04-503, para. 97; ICC-02/04-01/05-324, para. 14; ICC-01/04-01/10-483, para. 34.

CONCLUSION

26. For the reasons set out above, the Prosecution requests that the Chamber reject the Defence's Application.



Fatou Bensouda, Prosecutor

Dated this 24th August 2012

At The Hague, The Netherlands