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Date: **23 August 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

**Observations on the legal principles applicable to the determination of a suspect's
fitness**

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, 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 issued a “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings” (the “Decision of 4 June 2012”)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 of Pre-Trial Chamber I decided to postpone the commencement of the confirmation of charges hearing to 13 August 2012.⁶

4. On 3 August 2012, the Single Judge of Pre-Trial Chamber I issued a “Decision on issues related to the proceedings under rule 135 of the Rules of Procedure and

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 (the “Decision of 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.

Evidence and postponing 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 (the “Expert Reports”), 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 7 August 2012, the OPCV filed its request to be granted access to the Expert Reports and to be authorised to submit observations on said reports as well as on the subsequent procedure to be followed.¹⁰

6. On 15 August 2012, the Single Judge of Pre-Trial Chamber I issued her “Decision on the OPCV’s ‘Request to submit observations and Request to access the Expert Reports’” (the “Decision”)¹¹ recognising that “*the 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*”.¹² However, she did not consider appropriate that information contained in the Expert Reports be shared with the legal representative of the victims, even in a redacted form.¹³ The Single Judge nevertheless considered that “*despite lacking knowledge of the content of the Expert Reports and the nature of Mr Gbagbo’s medical condition, the OPCV is in a position to*

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 “Request for leave to submit observations and Request to access the Experts Reports”, No. ICC-02/11-01/11-205, 7 August 2012.

¹¹ See the “Decision on the OPCV’s ‘Request to submit observations and Request to access the Expert Reports’”, No. ICC-02/11-01/11-211, 15 August 2012 (the “Decision”).

¹² *Idem.*, par. 13.

¹³ *Ibid.*, par. 14.

submit useful 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".¹⁴

7. The Principal Counsel of the OPCV, acting as Common legal representative of the victims (the "Common Legal Representative"), hereby submits the following observations.

II. PRELIMINARY REMARKS

8. The Common Legal Representative contends that by virtue of the limited access to documents related to the issue at stake, she is unable to fully represent the interests of her clients and to convey to the Chamber their views and concerns on this very important matter.

9. Indeed, the fact that all the submissions by the parties with regard to the issue at stake are filed confidential, including requests for variation of time limits by the Defence¹⁵ - which the Common Legal Representative was first made aware of when notified of the decision of the Single Judge on said request - ¹⁶ clearly impacts on the effectiveness of the rights of the victims she represents. Indeed, the publicity of the proceedings¹⁷ has been so frustrated that it is not possible to represent the specific interests of the participating victims in this case, on issues that undoubtedly concern their personal interests, be it proceedings relating to interim release or the present one. The Common Legal Representative has been notified to date of 162 documents (out of 255 documents filed) pertaining to the present case. Amongst these documents, 124 contain annexes which are classified either confidential or confidential *ex parte*. Moreover, filings classified public are often only accompanying

¹⁴ *Ibid.*

¹⁵ See the "Demande de prorogation du délai relatif au dépôt d'observations sur l'état de santé du Président Gbagbo, son aptitude à être jugé et sur la suite de la procédure", No. ICC-02/11-01/11-214-Conf, 17 August 2012.

¹⁶ See the "Decision on the Defence 'Demande de prorogation du délai relatif au dépôt d'observations sur l'état de santé du Président Gbagbo, son aptitude à être jugé et sur la suite de la procédure'", No. ICC-02/11-01/11-218, 17 August 2012.

¹⁷ See article 64(7) of the Rome Statute.

the submission of annexes which contain the main information relevant for the proceedings. Therefore, a rough calculation makes it possible to estimate that only 38 documents are to date completely public in the case record. Last but not least, amongst the filings filed confidential and/or *ex parte*, very few are later redacted for the benefit of the public or the victims.

10. The Common Legal Representative does not question the assessment of the Single Judge according to which the Expert Reports contain sensitive and personal information.¹⁸ However, she suggests that some developments contained in the parties' submissions concerning the issue of the suspect's fitness to participate in the hearing on the confirmation of the charges could have been redacted for the benefit of the participating victims. In this regard, the Common Legal Representative submits that suitable redacted versions of the parties' submissions should be filed as soon as possible in the case record in order to allow the victims, as well as the general public, to follow the proceedings. The fact that the majority of the proceedings is at this point in time dealt with confidentially has created great concerns amongst victims who are unable to understand and follow the developments in the case.

11. These concerns are all the more vivid concerning the issue relating to Mr. Gbagbo's health problems that the victims have been well aware of his health conditions for a long time. Indeed these problems have long been used by his detractors to explain his inability to rule the country, but have never prevented him from exercising his presidential functions from 2000 until 2011.¹⁹ The victims consulted in the matter have indicated that they fear an indefinite prolongation of the proceedings and in the worst case scenario the death of Mr Gbagbo which would mean the end of the criminal proceedings and therefore the impossibility to establish the truth about the events they have suffered from.

¹⁸ See *supra* par. 5.

¹⁹ See in this sense, "COTE d'IVOIRE: La santé de Laurent Gbagbo pas si bonne qu'on le disait", available at the following address: <http://koaci.com/articles-71694>. According to this article, "[...] *peu après* [son] arrivée au pouvoir en 2000, il avait été révélé publiquement que Laurent Gbagbo souffrait de crise aigüe d'épilepsie. Depuis, à l'image des chefs d'Etat africains en général, aucune informations (sic) sur l'état de santé de l'ancien président n'avait été rendu public", lastly accessed on 23 August 2012.

12. Finally, the Common Legal Representative wishes to underline that she has been tasked with representing the specific interests of the participating victims, and not to provide general observations on an issue of a general nature.

III. OBSERVATIONS ON THE SUSPECT'S FITNESS TO PARTICIPATE IN THE PROCEEDINGS AGAINST HIM

13. When requesting to be granted access to the Expert Reports and to be authorised to submit observations thereon, the Common Legal Representative was acting in this specific capacity, *i.e.* representing the specific personal interests of the victims she represents. However, not been cognisant of the specificities of the issue at stake, it is impossible for her to fulfil her mandate.

14. Indeed, as far as the issue related to the determination of the suspect's fitness to be present at the confirmation of the charges hearing is concerned, this latter cannot be commented *in abstracto* and it would be counter-productive to even attempt to draw general conclusions without any knowledge of the request of the Defence in this regard or any other relevant submissions, for that matter of fact.

15. Accordingly, in the absence of any relevant information as to the fitness of Mr. Gbagbo, the Common Legal Representative cannot but reiterate that the victims demand that the hearing on the confirmation of the charges be held as soon as possible.

16. As far as the Common Legal Representative understands, in the present instance, the issue at stake seems to be not the determination of the suspect's fitness to stand trial - which is regulated by Article 64 of the Rome Statute clearly specifying that "[t]he accused shall be present during the trial". Rather, it seems to concern the non-willingness of the suspect to waive his right to be present during the confirmation of

the charges before trial, possibility provided for by article 61(2)(a) of the Rome Statute and rules 124, 125 and 126 of the Rules of Procedure and Evidence.

17. Indeed, should the suspect consider that his health condition is not compatible with his attendance at the confirmation of the charges hearing, he has the possibility to waive his right to be present pursuant to article 61(1) of the Rome Statute which provides for the principle according to which the *“hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel”*. Article 61(2) establishes the exception to this principle, mentioning that *“the Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged [...] when the person has: (a) [notably] Waived his or her right to be present [...]”*.

18. However, absent of any information on the present instance, it seems that the suspect rather than waiving his right to be present has chosen to disrupt the judicial proceedings. This is all the more unfortunate that in doing so he is himself not allowing the Pre-Trial Chamber to pronounce itself on the charges brought against the suspect therefore *“protect[ing] the rights of the Defence against wrongful and wholly unfounded charges”*,²⁰ which is the major safeguards of the rights of the defendant. Moreover, this disruption jeopardises not only his own right to a fair and expeditious proceedings, but also the established right of the victims to truth and to the determination of the facts.²¹

19. Furthermore, the Common Legal Representative is not privy to the legal reasoning of the Defence in this regard but contends that a clear distinction has to be drawn for the two stages of the proceedings, namely the pre-trial stage and the trial stage. This distinction should also guide the interpretation of the existing

²⁰ See *inter alia* the “Decision on the Confirmation of the Charges” (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tEN, 29 January 2007, par. 37 and. the “Decision on the confirmation of the charges” (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 30 September 2008, par. 63.

²¹ See the “Request for leave to submit observations and Request to access the Experts Reports”, *supra* note 10, paras. 10 and 11.

jurisprudence on the issue at stake. To this effect, the jurisprudence of the International Tribunal for former Yugoslavia outside the context of Rule 61 hearings would not be relevant since it would concern the issue of fitness of an accused to stand trial, governed within the framework of the Court by a totally different legal framework.²²

20. Finally, the Common Legal Representative is of the opinion that should there were any reasonable grounds for allowing the suspect not to be present at the confirmation of the charges hearing, rule 124 of the Rules of Procedure and Evidence does not prevent the Pre-Trial Chamber from receiving written observations on issues before the Chamber from the suspect himself and from authorising the use of communications technology to enable him to follow the hearing from outside the courtroom.²³ Moreover, arrangements could be put in place in order to avoid long sitting hours for the benefit of the suspect, if need be.

21. However, the Common Legal Representative wishes to make clear that the presence of the suspect at the confirmation of the charges hearing constitutes an essential element of the proceedings for the victims. Indeed, his appearance is a determining factor in enabling the victims to understand the proceedings, especially and specifically as these are followed from such a geographical and “procedural” distance. Besides, the appearance of the suspect at a hearing targeting the determination of whether substantial grounds to believe that he has committed the crimes as charged also plays a role in the context of the fight against impunity. Therefore, when deciding on the presence of the suspect at the confirmation hearing the Pre-Trial Chamber will have to based its decision on serious reasons, duly justified and unquestionable.

²² See *supra* par. 7.

²³ See respectively rule 124(4) and 124(5) of the Rules or Procedure and Evidence.

Respectfully submitted.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a prominent initial "P" and a long horizontal stroke at the end.

Paolina Massidda
Principal Counsel

Dated this 23rd day of August 2012

At The Hague, The Netherlands