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Date: 7 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

**Request for leave to submit observations and
Request to access the Expert Reports**

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 Evidence and postponing the date of the confirmation of charges hearing” (the

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.

“Decision of 3 August 2012”)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. The Principal Counsel of the OPCV, in her capacity of Common Legal Representative of the victims admitted to participate in the proceedings (the “Common Legal Representative”), respectfully requests the Chamber (1) to be authorised to submit observations on the Expert Reports as well as on the subsequent procedure to be followed, and (2) to access the Expert Reports.

II. REQUEST FOR LEAVE TO SUBMIT OBSERVATIONS ON THE EXPERT REPORTS

6. In her Decision of 4 June 2012, the Single Judge considered as follows:

*“the Common Legal Representative of victims admitted to participate by the present decision may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be exercised upon the conditions that (i) the legal representative proves, by way of an application to that effect, that the victims’ personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems it appropriate, in light of, inter alia, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.”*¹⁰

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) (the “Decision of 3 August 2012”).

⁸ *Idem.*, par. 16 and p. 8.

⁹ *Ibid.*, par. 22.

¹⁰ See the Decision of 4 June 2012, *supra* note 3, par. 60.

7. In her Decision of 3 August 2012, the Single Judge decided to postpone the confirmation of charges hearing “*until the issue of Mr. Gbagbo’s fitness to take part in the proceedings against him is resolved*”.¹¹

8. According to rule 135(4) of the Rules of Procedure and Evidence, where a Chamber is satisfied that the person concerned is unfit to take part in the proceeding against him or her, it shall order that the proceedings be adjourned.

9. The Common Legal Representative submits that the issue of Mr. Gbagbo’s fitness to take part in the proceedings against him is likely to significantly affect the expeditious conduct of the proceedings in the present case, as far as an adjournment would necessarily result in delaying the proceedings. Moreover, the said issue is likely to affect the outcome of the proceedings. Indeed, should Mr. Gbagbo’s unfitness deemed unsolvable, a Chamber may consider ordering an indefinite or even permanent stay of the proceedings;¹² the existence of such a risk was indeed one of the delegations’ major concerns during the drafting of rule 135 of the Rules of Procedure and Evidence.¹³

10. The Common Legal Representative observes that victims authorised to participate in the proceedings were not invited by the Single Judge to submit observations on either the Expert Reports or the subsequent procedure to be followed before a decision on the issue of Mr. Gbagbo’s fitness to take part in the proceedings against him is delivered by the Chamber. Considering the determinative character of the issue of Mr. Gbagbo’s fitness as regards the outcome and the

¹¹ *Ibid.*, p. 8.

¹² In particular, pursuant to article 31(1)(a) of the Rome Statute, a person shall not be criminally responsible if, at the time of that person’s conduct, he or she suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

¹³ In this sense, see LEWIS (P.), “Trial Procedure”, in LEE (R.S.) (ed.), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, Transnational Publishers Inc., 2001, p. 545.

expeditious conduct of the proceedings,¹⁴ the Common Legal Representative argues that said issue clearly affects the personal interests of the victims admitted to participate in the present case. Indeed, should the Chamber be satisfied that Mr. Gbagbo is unfit to take part in the proceedings against him, this would result in an adjournment and/or a stay of the proceedings. Both said results are likely to jeopardise the victims' right to truth and to the determination of the facts.

11. In this regard, the Common Legal Representative submits that, pursuant to the jurisprudence established by the Court, "[t]he participation of victims in the proceedings is not limited to an interest to receiving reparations and their personal interests are self-evidently not limited to reparations issues,"¹⁵ and that "the victims are seeking not only to obtain reparations, but they also mention other grounds, such as seeking determination of the truth concerning the events they experienced, or wishing to see the perpetrators of the crimes they suffered being brought to justice."¹⁶ The Single Judge of Pre-Trial Chamber I referred to "the latest empirical studies conducted amongst victims of serious violations of human rights, which show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body."¹⁷ According to the Single Judge, the "victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right

¹⁴ See *supra*.

¹⁵ See the "Decision on victims participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 98.

¹⁶ See the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, par. 59.

¹⁷ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, par. 31. See also in this regard AMBOS (K.), *El Marco Jurídico de la Justicia de Transición*, Tenus, Bogota, 2008, notes 107-112; KIZA (E.), RATHGEBER (C.), ROHNE (H.), *Victims of War An Empirical Study on War-Victimization and Victims Attitudes towards Addressing Atrocities*, Hamburg 2006, pp. 123 and 126.

See also the Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of Sub-Commission resolution 1996/28, UN Doc. E/CN.4/1997/104, 13 January 1997, pp. 2 to 5. See also the Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119. Question of the impunity of perpetrators of human rights violations (civil and political), UN Doc. E/CN.4/Sub.2/1997/20, 26 June 1997, pp. 3 to 31.

to the truth for the victims of serious violations of human rights,”¹⁸ finding that is fully supported by international human rights jurisprudence and scholar studies.¹⁹ In particular, “[w]hen the right to truth is to be satisfied through criminal proceedings, victims have a central interest in the outcome of such proceedings: (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.”²⁰

12. The Common Legal Representative further submits that providing the victims authorised to participate with the possibility to submit observations on the issue of Mr. Gbagbo’s fitness to take part in the proceedings against him is not in itself prejudicial or inconsistent with the rights of the suspect and the fairness of the proceedings but is, to the contrary, likely to help the Chamber in making its legal determination on a critical issue affecting both the outcome and the expeditious conduct of the proceedings. Furthermore, the participation of the victims in determining the issue of Mr. Gbagbo’s fitness is appropriate given the critical

¹⁸ See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, par. 32.

¹⁹ See in this regard IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, No. 162, par. 222 ; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, No. 155, paras. 153 et seq. ; *Almohacid-Arellano and al v. Chile*, Judgment of 26 September 2006, Series C, No. 154, par. 148; *Comunidad Monviana v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, par. 204 ; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162 to 166 and 174.

See also ECHR, *Hugh Jordan v. UK*, Application No. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application No. 25803/94, 28 July 1999, par. 79; *Kurt v. Turkey*, Application No. 24276/94, 25 May 1998, par. 140; *Selcuk and Asker v. Turkey*, Application No. 23184/94, 24 April 1998, par. 96; *Aydin v. Turkey*, Application No. 23178/94, 25 September 1997, par. 103; and *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, par. 98. In this sense, see also NAQVI (Y.), “The Right to the Truth in International Law Fact or Fiction 9”, in (2006) *ICRC International Review*, No. 88, pp. 267-268; MENDEZ (J.), “The Right to Truth”, in JOYNER (Ch.) (Ed.), “*Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights’ Proceedings of the Siracuse Conference*”, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257 et seq. and AMBOS (K.), *El Marco Juridico de la Justicia de Transición*, Tenus, Bogota, 2008, pp. 42 to 44.

²⁰ See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, par. 34.

character of the matter and its material impact on the personal interests of the victims.²¹

13. Consequently, the Common Legal Representative respectfully requests the Chamber to be authorised to submit observations, within a deadline set out by the Chamber, on the Expert Reports as well as on the subsequent procedure to be followed before a decision on the issue of Mr. Gbagbo's fitness to take part in the proceedings against him is delivered.

III. REQUEST TO ACCESS THE EXPERT REPORTS

14. The Common Legal Representative understands that the Expert Reports contain sensitive information regarding the health conditions of the suspect. But she observes that in order to enable the Prosecutor to provide observations on the issues identified in the Decision of 3 August 2012, the Single Judge ordered the Defence to file in the record of the case redacted versions of two Expert Reports and to provide the Prosecutor with the un-redacted version of the third Expert Report.²² In relation to the two redacted Expert Reports, the Common Legal Representative submits that since the sensitive information have already been redacted, there seems to be no reason for not providing said documents to her. In relation to the third un-redacted Expert Report, the Common Legal Representative submits that the Single Judge has determined that the information contained is necessary for the Prosecutor to file her observations in the matter. Therefore, she submits that the same principle should apply to the Common Legal Representative on the basis that the personal interests of

²¹ In accordance with the jurisprudence of the Court, "[t]he Court's discretion in determining the appropriateness of a victim's participation has to be exercised against the criterion of the impact on the personal interests of the applicant and this determination will also depend upon the nature, scope of the proceeding as well as the personal circumstances of each victim": see the "Decision on victims' application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/127/06" (Pre-Trial Chamber II, Single Judge), No. 02/04-101, 10 August 2007, par. 89.

²² See the Decision of 3 August 2012, *supra* note 7, p. 8.

the victims authorised to participate in the proceedings are affected by the matter at stake.

15. Given that the issue of Mr. Gbagbo's fitness to take part in the proceedings against him clearly affects the personal interests of the victims authorised to participate in the proceedings,²³ the Common Legal Representative respectfully requests the Chamber, in order to enable her to submit observations on the said issue, to be given access to the three Expert Reports under the same conditions as determined for the Prosecution. She submits in this regard that all information contained in the Expert Reports is supposed to be relevant for the determination of the issue of Mr. Gbagbo's fitness. Furthermore, as far as the experts have been appointed by the Chamber in order to resolve the suspect's fitness to the proceedings before the Court, said reports should be accessible to all the parties and the participants in the proceedings. Finally, the Common Legal Representative recalls that she is bound by rules of confidentiality under the Code of Professional Conduct of Counsel.

16. In this regard, the Common Legal Representative submits that in accordance with the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") and the International Criminal Tribunal for Rwanda (the "ICTR"), medical reports regarding the accused persons' health conditions were systematically subject to disclosure to the parties for the purpose of determining whether an accused is fit to attend court proceedings.²⁴ In particular, Trial Chamber I of the ICTY held that *"any redactions of medical reports will only be considered in relation*

²³ See Part II *supra*.

²⁴ See ICTY, *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, "Decision on urgent Defence request for further submissions of psychiatric medical expert and Decision on Defence motion to redact medical reports", 6 August 2009, par. 18. See also in this sense ICTY, *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, "Decision on start of trial and modalities for trial", 29 May 2009; *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, "Reasons for Decision on assignment of Defence counsel", 22 September 2004; and *The Prosecutor v. Radoslav Brđjanin and Momir Talić*, Case No. IT-99-36-T, "Decision on Prosecution's oral request for the separation of trials", 20 September 2004. See also ICTR, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Nsengiyumva motions to call doctors and to recall eight witnesses", 19 April 1997.

to ‘redacting from the public’, and not as ‘redacting from the Chamber or the parties’”.²⁵ Trial Chamber III of the ICTR hold that “determining whether an accused is able to attend court proceedings ‘requires a legal determination in which facts presented by a medical assessment are but one, although a large, consideration’”²⁶ and that “[i]n order to make the necessary legal determination regarding whether and how to resume the proceedings, the Chamber finds that fully-informed submissions from all parties are necessary”.²⁷

17. The Common Legal Representative submits that the said jurisprudence should apply *mutatis mutandis* to the present instance, so as to support her request to be given access to the Experts Reports in order to submit observations on an issue of determinative character as regards both the outcome and the expeditious conduct of the proceedings, *i.e.* the issue of Mr. Gbagbo’s fitness to take part in the proceedings against him.

18. Should the Chamber decide to apply further redactions to already redacted versions of the two Expert Reports and/or redactions to the un-redacted version of the third Expert Report, as disclosed to the Prosecution, before they are transmitted to the Common Legal Representative, the latter submits that those redactions should not jeopardise her capacity to submit comprehensive observations on the issue of Mr. Gbagbo’s fitness to take part in the proceedings against him.

19. In light of the fact that the Single Judge has already set the deadlines for the Prosecution and the Defence to submit observations on the Expert Reports and of the fact that the matter needs to be solved expeditiously, the Common Legal Representative respectfully requests the Chamber to treat this request on an urgent basis.

²⁵ See ICTY, *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, “Decision on urgent Defence request for further submissions of psychiatric medical expert and Decision on Defence motion to redact medical reports”, 6 August 2009, par. 18.

²⁶ See ICTY, *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-T, “Decision on motion for disclosure of medical information and for extension of time”, 28 August 2009, par. 13.

²⁷ *Idem.*, par. 14.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber:

- a) To be authorised to submit observations, within a deadline set out by the Chamber, on the Expert Reports as well as on the subsequent procedure to be followed before a decision on the issue of Mr. Gbagbo's fitness to take part in the proceedings against him is delivered by the Chamber; and
- b) To be given access to the three Expert Reports under the same conditions as determined for the Prosecution or, in the alternative, with redactions which should not jeopardise the capacity of the Common Legal Representative to submit comprehensive observations on the issue of Mr. Gbagbo's fitness to take part in the proceedings against him.



Paolina Massidda
Principal Counsel

Dated this 7th day of August 2012

At The Hague, The Netherlands