

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/11-01/11
Date: 20 September 2012

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR V. LAURENT GBAGBO***

Public

**Decision on issues related to the hearing on Mr Gbagbo's fitness to take part in
the proceedings against him**

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

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Judge Silvia Fernández de Gurmendi, Single Judge for Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”), responsible for carrying out the functions of the Chamber in relation to the situation in the Republic of Côte d’Ivoire and the cases emanating therefrom,¹ hereby issues this decision on issues related to the hearing on Mr Gbagbo’s fitness to take part in the proceedings against him.

I. Procedural history

1. On 19 June 2012, the Defence submitted its “Defence application for additional medical and psychological evaluation of President Gbagbo”.²

2. On 26 June 2012, the Single Judge issued the “Order to conduct a medical examination” whereby she appointed, with a view to determining whether Mr Gbagbo is fit to take part in the proceedings against him, three experts to undertake the examination of Mr Gbagbo (the “Experts”).³

3. On 19 July 2012, the Registry filed in the record of the case the medical reports of the experts appointed by the Chamber (the “Expert Reports”).⁴

4. On 16 August 2012, the “Prosecution’s observations on the Expert Reports” were filed.⁵

5. On 23 August 2012, the Office of Public Counsel for victims (the “OPCV”), as previously authorised,⁶ submitted its “Observations on the legal principles applicable to the determination of a suspect’s fitness.”⁷

¹ ICC-02/11-01/11-61.

² ICC-02/11-01/11-158-Conf-Exp-tENG and ICC-02/11-01/11-158-Conf-Red2.

³ ICC-02/11-01/11-164-Conf-tENG.

⁴ ICC-02/11-01/11-190-Conf.

⁵ ICC-02/11-01/11-214-Conf.

⁶ ICC-02/11-01/11-211.

⁷ ICC-02/11-01/11-228.

6. On 27 August 2012, the Defence filed the “*Observations de la Défense sur les rapports médicaux préparés par les experts nommés par la Chambre et sur la procédure à suivre*”.⁸

7. On 4 September 2012, following an order from the Single Judge in this regard,⁹ the Defence refiled the “*Observations de la Défense portant sur les rapports déposés par les experts médicaux nommés par la Chambre et sur la procédure à suivre déposées à la suite de l’ordonnance de la Chambre du 3 septembre 2012 (ICC-02/11-01/11-238)*”.¹⁰

8. On 12 September 2012, the Single Judge issued the “Order scheduling a hearing in relation to Mr Gbagbo’s fitness to take part in the proceedings against him” whereby she scheduled a hearing to be held in closed session on 24 and 25 September 2012 (the “Hearing”).¹¹

9. On 13 September 2012, the Prosecutor filed the “Prosecution’s request in relation to the “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”¹² whereby the Prosecutor requests access to two documents in the record of the case and seeks guidance with respect to the procedure to be followed during the Hearing (the “Request for Guidance”).

10. On 14 September 2012, the Defence submitted the “*Demande de report de l’audience de “fitness hearing” prévue pour les 24 et 25 septembre 2012 (ICC-02/11-01/11-241)*” (the “Request for Postponement”).¹³

⁸ ICC/02/11-01/11-233-Conf.

⁹ ICC-02/11-01/11-238.

¹⁰ ICC-02/11-01/11-239-Conf.

¹¹ ICC-02/11-01/11-241.

¹² ICC-02/11-01/11-242.

¹³ ICC-02/11-01/11-243.

11. On 17 Septembre 2012, the Prosecutor filed the *“Réponse de l’Accusation à la Demande de la Défense de report de l’audience de « fitness hearing » prévue pour les 24 et 25 septembre 2012 (ICC-02/11-01/11-243)”*.¹⁴

12. On the same day, the OPCV submitted the “Views and concerns of victims in relation to the “Order scheduling a hearing in relation to Mr Gbagbo’s fitness to take part in the proceedings against him” and on the Defence’s request for postponement.”¹⁵

13. On 18 September 2012, the Defence filed its *“Observations de la Défense sur « Prosecution’s request in relation to the “Order scheduling a hearing in relation to Mr Gbagbo’s fitness to take part in the proceedings against him” » (ICC-02/11-01/11-242-Conf)”*.¹⁶

14. On the same day, the Defence also filed the *“Requête de la Défense aux fins de rejet des « Views and concerns of victims in relation to the “Order scheduling a hearing in relation to Mr. Gbagbo’s fitness to take part in the proceedings against him” and on the Defence’s request for postponement » (ICC-02/11-01/11-245 ; ICC-02/11-01/11-246)”*.¹⁷

15. For the purposes of the present decision, the Single Judge notes articles 61, 67 and 82 of the Rome Statute (the “Statute”), rules 113 and 135 of the Rules of Procedure and Evidence (“Rules”) and regulation 23 *bis* of the Regulations of the Court.

¹⁴ ICC-02/11-01/11-244.

¹⁵ ICC-02/11-01/11-245.

¹⁶ ICC-02/11-01/11-247-Conf.

¹⁷ ICC-02/11-01/11-248.

II. Request for Postponement

A. Submissions of the parties and participants

16. In its Request for Postponement, the Defence requests that the Hearing be postponed to 3 and 4 October 2012, contending that such postponement is necessary to ensure that it has adequate time to prepare.¹⁸ In particular, the Defence alleges that since the Hearing will concern technical and medical issues, and since the procedure to be followed has not yet been determined, it will require adequate time to prepare in order to put relevant questions to the Experts.¹⁹ The Defence also contends that the Hearing is premature since there are pending requests for leave to appeal before the Chamber which may impact on the current proceedings and the holding of the scheduled hearing.²⁰

17. The Prosecutor submits that the Request for Postponement should be rejected in order to safeguard the expeditiousness of the proceedings.²¹ In particular, she submits that the Defence has had adequate time for its preparation considering that: (i) the Expert Reports were disclosed to it on 20 July 2012; (ii) it had access to the Prosecutor's observations on the Expert Reports on 16 August 2012; and (iii) it filed its observations on the Expert Reports on 27 August 2012.²² The Prosecutor also submits that the questions pending before the Chamber, notably that two requests for leave to appeal and the request for guidance with respect to the procedure to be followed, do not impact on the Hearing.²³

18. The OPCV suggests that the Request for Postponement be rejected as the Defence has not shown good cause. In particular, it submits that the

¹⁸ ICC-02/11-01/11-243, paras 26-28.

¹⁹ ICC-02/11-01/11-243, paras 21-23.

²⁰ ICC-02/11-01/11-243, paras 17-20.

²¹ ICC-02/11-01/11-244, para. 4.

²² ICC-02/11-01/11-244, para. 5.

²³ ICC-02/11-01/11-244, paras 6-7.

pending requests for leave to appeal are not of a nature to justify a suspension of the normal course of the proceedings and that the Defence should be deemed ready for the hearing.²⁴ The OPCV also submits that “it is in the interest of victims that the matter is solved as expeditiously as possible.”²⁵

B. Determination of the Single Judge

19. The Single Judge notes that the Expert Reports were made available to the Defence on 20 July 2012. The Defence was given an opportunity to submit observations on the Expert Reports as well as on the subsequent procedure to be followed,²⁶ and the Defence has indeed availed itself of this opportunity.²⁷

20. The Single Judge further notes that the Hearing has been convened to provide “the parties and the Chamber with the opportunity to seek clarification from the experts on issues of particular significance arising from their respective reports, as well as to receive additional relevant submissions and information from the parties.”²⁸

21. The Single Judge considers that the Defence, having submitted its observations, has already analysed the Expert Reports and is in a position to fully participate in the Hearing, including by identifying the questions it may wish to put to the Experts.

22. In relation to the pending requests for leave to appeal, the Single Judge notes that article 82(1)(d) of the Statute does not provide for suspensive effect of requests for leave to appeal.

23. Accordingly, the Request for Postponement shall be rejected.

²⁴ ICC-02/11-01/11-245, paras 18-19.

²⁵ ICC-02/11-01/11-245, para.20.

²⁶ ICC-02/11-01/11-201, p.8.

²⁷ ICC-02/11-01/11-239-Conf.

²⁸ ICC-02/11-01/11-241.

III. Requests for access to documents

A. Submissions of the parties and participants

24. The Prosecutor requests access to two documents in the record of the case (letters by two of the Experts sent to the Defence prior to their appointment by the Chamber under rule 135 of the Rules).²⁹ According to the Prosecutor, the two documents are relevant in order to adequately prepare for their questioning.³⁰

25. In addition, the OPCV requests the Single Judge to order the parties to file suitable redacted versions of their respective submissions in the case record and to evaluate whether certain parts of the Hearing might be held in public sessions with the attendance of the Common legal representative (the “OPCV Request”). It submits that “the issue of Mr Gbagbo’s fitness to take part in proceedings against him is a matter of serious concern for victims” who “fear that the issue at stake is simply a Defence manoeuvre to avoid criminal proceedings to be carried out and therefore lead to the impossibility to establish the truth about the events they have suffered from.”³¹ The OPCV submits that such concerns are “all the more vivid insofar as all the submissions by the parties with regard to the issue at stake are filed confidential and therefore fuelling any kind of speculation on the matter.”³²

26. The Defence opposes the Prosecutor’s request for disclosure, submitting that the Prosecutor failed to explain why these documents were relevant for the present debate.³³ The Defence underlines that the Hearing is

²⁹ ICC-02/11-01/11-158-Conf-Exp-Anx1, ICC-02/11-01/11-Conf-Exp-Anx2.

³⁰ ICC-02/11-01/11-242, paras 7-8.

³¹ ICC-02/11-01/11-245, paras 12-13.

³² ICC-02/11-01/11-245, para. 14.

³³ ICC-02/11-01/11-247, paras 28-30.

limited to discuss the content of the Expert Reports and does not extend to discussing the competence of the Experts.³⁴

27. In relation to the OPCV Request, the Defence submits that in light of the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”, which set out the extent of victims’ participation, and in light of the previous decisions of the Single Judge concerning the participation of victims in the proceedings related to Mr Gbagbo’s fitness to take part in proceedings against him, the OPCV made its submissions before the Chamber without proper leave. In the view of the Defence, the request of the OPCV should therefore be rejected.³⁵

B. Determination of the Single Judge

28. The principle of publicity of the proceedings as well as regulation 23 *bis* of the Regulations of the Court impose on the Chamber the general duty to ensure that documents in the record of the case are filed under the appropriate classification. Regulation 23*bis* (1) of the Regulations of the Court requires that any non-public filing “shall state the factual and legal basis for the chosen classification.” The mere alleged irrelevance of a document for the public or another party is not a sufficient basis to classify it as confidential or *ex parte*. Pursuant to regulation 23 *bis* (3) of the Regulations of the Court, a document may be re-classified by the Chamber, upon request or on its own motion.

29. Having reviewed the two documents to which the Prosecutor is seeking access, the Single Judge is of the view that there exists no factual and legal basis for their classification as “*ex parte*”. However, in light of the

³⁴ ICC-02/11-01/11-247, paras 29-30.

³⁵ ICC-02/11-01/11-248, paras 19-30.

information contained in the letters, the documents cannot be made public at this stage of the proceedings. Accordingly, the two documents shall be re-classified as “confidential”.

30. Turning now to the OPCV Request, the Single Judge considers it admissible, in spite of the Defence objections. As the Defence noted correctly, the OPCV may make written submissions only with leave of the Chamber.³⁶ However, considering its substance, the filing in question must be seen as a request for participation in relation to the specific matter and, as such, must be considered as properly filed and the submissions therein considered on the merits.

31. In this respect, the Single Judge has recently held the sensitive and personal nature of the information contained in the Expert Reports made it impossible for them at this stage to be shared with the OPCV either in full or in redacted form.³⁷ In the view of the Single Judge, the same considerations are valid also in relation to the observations of the parties on the Expert Reports and in relation to the Hearing. Accordingly, the OPCV Request cannot be granted. Should circumstances change, public redacted versions of the relevant submissions will be ordered in due course.

IV. Conduct of the Hearing

A. Submissions of the parties and participants

32. The Prosecutor seeks guidance with respect to the procedure to be followed during the Hearing. In particular, she seeks guidance as to the order in which the Experts will be called to testify, any intended measures to prevent them from hearing the testimony of the other Experts, and the

³⁶ ICC-02/11-01/11-138, para. 60.

³⁷ ICC-02/11-01/11-211, para. 211.

manner in which they will be questioned and in particular whether leading questions will be permitted.³⁸

33. The Defence submits that the Experts are to be considered expert witnesses of the Chamber and that the procedure should be different from that applicable to Defence or Prosecutor's witnesses. The Defence suggests that the Experts be first questioned by the Chamber, then by the Prosecutor and finally by the Defence, which shall always have the last word.³⁹ The Defence further submits that the Experts should be questioned neutrally and that leading questions should not be allowed.⁴⁰

34. The Defence does not express any preference as to the order in which the Experts should be heard but submits that measures to prevent the Experts from hearing each other's testimony are unjustified.⁴¹ The Defence contends that the presence of all Experts at all times will allow for a constructive debate, and notes that that it is largely accepted in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia to allow the presence of experts during the testimony of another witness.⁴²

35. In addition, the Defence requests the Single Judge to clarify whether the Chamber expects the parties to make observations on the legal aspects of fitness to stand trial, on the procedure to be followed or whether it intends to put questions to the parties. The Defence requests clarifications as to the extent of the issues to be discussed at the Hearing.⁴³

³⁸ ICC-02/11-01/11-242, para.5.

³⁹ ICC-02/11-01/11-247, paras 16-17.

⁴⁰ ICC-02/11-01/11-247, paras 20-24.

⁴¹ ICC-02/11-01/11-247, paras 11-12.

⁴² ICC-02/11-01/11-247, paras 14-15.

⁴³ ICC-02/11-01/11-247, paras 31-32

36. Finally, the Defence submits that the Hearing as scheduled is too long for Mr Gbagbo, even if breaks are taken. It suggests that such sessions be reduced or to allow Mr Gbagbo to leave if need be.⁴⁴

B. Determination of the Single Judge

37. The Single Judge recalls that the Hearing has been scheduled *proprio motu* in order for the Chamber and the parties – if they so wish – to seek clarification from the Experts “on issues of particular significance arising from their respective reports”, as well as for the Chamber “to receive additional relevant submission and information from the parties.”⁴⁵ Considering the purpose of the hearing and the fact that the Experts have been appointed under rule 135 of the Rules for the purpose of enabling the Chamber to exercise its powers under the said rule, the Experts shall first be questioned by the Chamber, then by the Prosecutor and finally by the Defence, without prejudice to further questioning by the Chamber or the parties if the need arises. The Single Judge is further of the view that there is no reason to prevent the Experts from hearing the testimony of the other experts. The Single Judge recalls in this regard, that each of the Experts was appointed by the Chamber to conduct the medical examination of Mr Gbagbo in light of his or her field of expertise, namely physical, psychological and psychiatric expertise. Furthermore, the Single Judge recalls that the Experts were requested to submit, if possible, a joint report on Mr Gbagbo’s fitness to take part in the proceedings against him.⁴⁶

38. Moreover, in order to obtain the best possible quality of information, the Single Judge considers it appropriate that the parties use neutral questions

⁴⁴ ICC-02/11-01/11-247, para.25-27.

⁴⁵ ICC-02/11-01/11-241.

⁴⁶ ICC-02/11-01/11-164-Conf-tENG, p.15.

as far as possible, and to only resort to leading questions when necessary for the focus and the efficiency of the discussion.

39. The Single Judge further notes that by way of email sent to the Chamber, the Defence seeks guidance as to whether with the Experts may be contacted by the parties prior to the Hearing. The Single Judge recalls that rule 135 of the Rules is intended to ensure that a determination of a suspect's fitness to take part in the proceedings against him is made following an impartial procedure with proper oversight by the Chamber and the parties.⁴⁷ Considering also the purpose of the Hearing as discussed above,⁴⁸ the Single Judge is of the view that the Chamber will benefit from the outcome of any discussion between either of the parties and the Experts it has appointed and for this purpose, such discussion shall thus take place in the presence of the Chamber at the Hearing. For these reasons, the Single Judge is of the view that it is not appropriate for the Experts to be contacted by the parties prior to their testimony. The Single Judge clarifies, however, that this is without prejudice to a courtesy meeting to be organized by the Registry as part of the familiarisation process.

40. Finally, the Single Judge wishes to inform Mr Gbagbo and his defence, that should he require a break or medical assistance in the course of the Hearing or wish to be excused for the rest of the Hearing, he is invited to raise this matter with the Chamber. The necessary arrangements may then be made by the Registry in due course. In this respect, the Single Judge already informs Mr Gbagbo that necessary arrangements have been made in a room next to the court room in order to enable him to rest during breaks if needed.

⁴⁷ ICC-02/11-01/11-241, para.11; ICC-02/11-01/11-152, para.26 and ICC-02/11-01/11-196-Conf, para.8.

⁴⁸ See para. 37.

41. In light of the foregoing, the Single Judge informs the parties that the Hearing will be held following the agenda in the annex to the present decision.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS the Request for Postponement;

ORDERS the Registry to reclassify as “confidential” documents ICC-02/11-01/11-158-Conf-Exp-Anx1 and ICC-02/11-01/11-Conf-Exp-Anx2;

REJECTS the OPCV Request;

INFORMS the parties that the Hearing shall be held following the agenda in the annex to the present decision.

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



Judge Silvia Fernández de Gurmendi

Single Judge

Dated this 20 September 2012

At The Hague, The Netherlands