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THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO

Public with Public Annex

Prosecution Response to Requests Concerning Judge Kaul (ICC-02/11-01/11-685)

Source: Office of the Prosecutor

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Introduction

1. The motion by counsel for Mr. Gbagbo (“the Defence”)¹—which requests access to Judge Kaul’s letter of resignation, any related materials, and a report from an independent expert appointed to review Judge Kaul’s medical records²—should be dismissed. It is a veiled and untimely attempt to challenge the basis on which Pre-Trial Chamber I confirmed the charges in this case,³ which is a matter for the Appeals Chamber—with leave of Pre-Trial Chamber I—and not the Presidency. Moreover, the intrusive measures sought by the Defence are unlikely to avail them in showing any unfairness or other error, and have no more than a limited forensic purpose. The basic premise of the Motion ignores both the judicial safeguards inherent in the confirmation process and the strong presumption of judicial integrity and professional conduct, which attaches to all three Judges of Pre-Trial Chamber I. The Motion also imperils the secrecy of judicial deliberations as well as the privacy to which Judge Kaul and his family remain entitled. The Defence remains, in any event, fully able to contest the case against them at trial.

Submissions

2. The Motion should be dismissed because it is procedurally incorrect, speculative, inconsistent with the cardinal principles by which the Court operates, and unnecessary.

3. Notwithstanding the duty of the Defence to advocate for their client,⁴ the Prosecution records its regret that the Motion—which makes serious allegations without any good cause—was ever filed. Such a public intrusion into Judge Kaul’s privacy and reputation—and that of his family—should not have been undertaken

¹ See ICC-02/11-01/11-685 (“Motion”).

² See Motion, paras.62-63.

³ See ICC-02/11-01/11-656-Red (“Confirmation Decision”).

⁴ See Motion, para.58 (citing the Code of Professional Conduct for Counsel, Art.5). Article 5 provides, however, not only that counsel will perform their duties diligently, independently and conscientiously, but also “honourably” and with “integrity”.

in such a cavalier fashion. The Prosecution therefore requests the Presidency to reject the Motion in terms which clearly express the Court's confidence in and appreciation of the professionalism of Judge Kaul, who may no longer speak for himself.

The Motion is procedurally incorrect

4. The Defence incorrectly argues that the relief sought in the Motion is "crucial" for the purpose of a hypothetical future request for reconsideration of the Confirmation Decision.⁵ This argument must be rejected both because it seeks to create an additional means to challenge a decision confirming the charges (as an alternative to an appeal with leave under Article 82(1)(d) of the Statute), and because in any event it mistakes the nature and purpose of reconsideration as a procedural remedy.

5. The merits of a decision confirming the charges against an accused person may be challenged only by means of an appeal under Article 82(1)(d), with leave of the Pre-Trial Chamber. With the benefit of a significant extension of time, the Defence applied for such leave on 29 July 2014.⁶ This was eight days after Judge Kaul had died,⁷ four weeks after his resignation had become effective,⁸ and more than six weeks after the Confirmation Decision was issued.⁹ Pre-Trial Chamber I unanimously denied the application.¹⁰ Although the Defence alleged numerous errors in the Confirmation Decision, it raised no concern as to Judge Kaul's judicial capacity. The Defence explanation that the lack of information at its disposal prevented it from raising this question is unconvincing.¹¹ Not only is it uncertain that the information requested will ultimately add any substance to the facts already

⁵ See Motion, paras.54-55.

⁶ See ICC-02/11-01/11-680 ("ALA Decision"), paras.2, 5.

⁷ Judge Kaul died on 21 July 2014.

⁸ Judge Kaul resigned effective 1 July 2014.

⁹ The Confirmation Decision was issued on 12 June 2014.

¹⁰ See ALA Decision, para.10.

¹¹ *Contra* Motion, para.64.

known,¹² the Defence fails to explain why this application was not filed at the appropriate time.

6. The Defence claims that the Presidency is the proper forum to hear the Motion.¹³ Yet the analogy with the Presidency's powers with respect to the excusal or disqualification of Judges is unhelpful since, in this case, neither remedy is sought or indeed available.¹⁴ Likewise, although the proper administration of the *Court* is indeed the general responsibility of the Presidency,¹⁵ the "proper administration of justice" in the circumstances of a particular case is the responsibility of the relevant Chamber(s).¹⁶ This follows from the very structure of the Statute, which, for example, does not envisage the Presidency as hearing trials, appeals or other reviews on case-specific issues.¹⁷ Consistent with the established practice of other international courts and tribunals, the procedure to excuse or to disqualify a sitting Judge should be procedurally distinct from review of an allegedly erroneous or unjust decision resulting from the personal characteristics of one or more of the Judges.¹⁸ The latter is the apt procedure in this case, yet the Defence elected not to pursue the question of Judge Kaul's capacity in their application for leave to

¹² See below para.8.

¹³ Motion, para.67.

¹⁴ See Motion, para.66 (citing Statute, Art.41).

¹⁵ See Statute, Art.38.

¹⁶ *Contra* Motion, para.65.

¹⁷ See e.g. Statute, Arts.38-39, 41, 56-61, 64, 81-84.

¹⁸ See e.g. ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Decision on Mićo Stanišić's Motion Seeking Reconsideration of Decision on Stanišić's Motion for Declaration of Mistrial and Župljanin's Motion to Vacate Trial Judgement, 24 July 2014, para.14-15 (recalling that "allegations of partiality are dealt with in the course of the normal appellate process"); ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement, 2 April 2014, para.21 (recalling "the well-established practice at the Tribunal to deal with allegations of partiality in the course of the normal appellate process, i.e. in the appeal judgements"); ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para.128 (dismissing a sub-ground of appeal related to a Judge's certification that he had adequately familiarised himself with a case); ICTY, *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, paras.34-45 (dismissing a sub-ground of appeal related to an allegedly biased Judge); ICTY, *Prosecutor v. Delalić et al*, IT-96-21-A, Judgement, 20 February 2001, paras.620-650 (dismissing a ground of appeal related to an allegedly sleeping Judge), 651-693 (dismissing a ground of appeal related to an alleged reasonable apprehension of bias concerning a Judge); ICTY, *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, paras.164-215 (dismissing a ground of appeal related to an alleged reasonable apprehension of bias concerning a Judge).

appeal.¹⁹ They should not now be permitted to conduct a ‘fishing expedition’ in the faint hope of a further challenge to this decided matter.

7. In any event, the Defence is mistaken in its assertion that the information sought in the Motion will assist a possible future motion for reconsideration. As recalled in the *Lubanga* decision to which the Defence cites,²⁰ reconsideration may be granted where “a decision was made in ignorance of relevant information”.²¹ Yet the Pre-Trial Chamber in this case must necessarily have been fully aware of all the material circumstances, including Judge Kaul’s condition.²² Even taken at its highest, the Motion is thus not directed to ascertaining information unknown to the Pre-Trial Chamber but simply information unknown, at least in some details, to the Defence. This is insufficient to justify reconsideration—and therefore the Defence lacks a legitimate forensic purpose in seeking to obtain the information at all.

8. There may also be good reason to consider that a Pre-Trial Chamber’s decision confirming the charges may never be amenable to a motion for reconsideration, akin to other types of “final” decisions.²³ This follows from the fact that, once the Pre-Trial Chamber has confirmed the charges (and has addressed any resulting application for leave to appeal), it “concludes the proceedings in the case before this Chamber”.²⁴ Correspondingly, Article 61(11) of the Statute states that, once charges have been confirmed, the Trial Chamber “shall be responsible for the conduct of

¹⁹ See also e.g. ICC-01/05-01/13-511-Anx, para.41 (warning a party seeking to disqualify a Judge from “attempt[ing] to convert appellate issues into issues of disqualification”).

²⁰ Motion, para.54 (citing ICC-01/04-01/06-2705 (“*Lubanga* Decision”).

²¹ See *Lubanga* Decision, paras.15-18.

²² See below para.12.

²³ See e.g. ICTY, *Prosecutor v. Lukić and Lukić*, IT-98-32/1-A, Decision on Sredoje Lukić’s Motion Seeking Reconsideration of the Appeal Judgement and on the Application for Leave to Submit an *Amicus Curiae* Brief, 30 August 2013, p.3 (“it is the established jurisprudence of the Tribunal that the Appeals Chamber does not possess an inherent power to reconsider its final judgement as the Statute of the Tribunal only provides ‘for a right of appeal and a right of review but not for a second right of appeal by the avenue of reconsideration of a final judgement’”).

²⁴ See e.g. ALA Decision, para.53.

subsequent proceedings”.²⁵ Allowing an unfettered right to seek reconsideration of the document confirming the charges would grant the parties a means to continue litigation before the Pre-Trial Chamber based on continuing developments in the case, even when the Trial Chamber has been seised of the proceedings. This would not be consistent with the efficient and expeditious administration of justice.

The Motion is speculative, and undermines cardinal principles of the Court’s process

9. The Motion is speculative. The Defence asserts that it is “important” to be able to “verify” if Judge Kaul’s rapid deterioration in health “did not have an effect on his capacity to discharge his judicial office” and “if the treatment that he received prevented him from meeting his obligations” as a Judge.²⁶ Such obligations, they contend, required Judge Kaul to be able to work “flat out” on the Defence response from at least the end of May until 12 June 2014.²⁷ Yet the materials to which they request access are unlikely to provide information of particular relevance or probative value to their apparent concern. Medical records—which are of themselves confidential²⁸—may provide diagnostic and treatment information but, of themselves, are unlikely to make observations on matters which touch upon Judge Kaul’s judicial capacity as such. Judge Kaul’s resignation letter and any related materials are unlikely to be much more enlightening in this regard. To the contrary, the most probative information is the information which is already in the public domain: the Confirmation Decision itself, and the professionalism of the three Judges of Pre-Trial Chamber I which it reflects.

²⁵ Statute, Art.61(11). This provision must necessarily be subject to any continuing exclusive competence of the Pre-Trial Chamber expressly set out in the Statute, such as the amendment of charges under Article 61(9).

²⁶ Motion, para.25. *See also* para.57 (asserting that the parties “must have the power to assure themselves that the Judge was capable of examining in detail the elements of proof which were presented, to understand them, to analyse them, to interpret them, to contextualise them, and to consider them in relation to the submissions of the parties”).

²⁷ *See* Motion, para.33 (“it is thus crucial to know if between the end of May and 12 June 2014, Judge Kaul was able to work flat out on [the Defence observations], with reference to thousands of pieces [of evidence]”). *See also* para.35.

²⁸ *See below* para.17.

10. Beyond the fact of Judge Kaul's illness and subsequent death, the Defence has no basis to justify its concern for his judicial conduct. Nothing in the Confirmation Decision or the record suggests that Judge Kaul was anything less than diligent and professional. The Motion disregards the established principles by which the Court operates, and to which it should have had first resort in considering these issues. These principles must require that, without some showing of good cause, the very lack of evidence cannot itself be a sound basis for further investigative measures.

11. Judges are entitled to a "strong presumption of impartiality that is not easily rebutted".²⁹ "[I]t is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them".³⁰ The ICTY Appeals Chamber has expressly stated that the "duty" of a Judge includes "seek[ing] medical assistance" and, if necessary, "withdraw[ing] from the case" if they "suffer[] from some condition which prevents him or her from giving full attention" to the proceedings.³¹ Likewise, Article 7(2) of the Code of Judicial Ethics at this Court provides that "Judges shall take reasonable steps to maintain [...] the knowledge, skills and personal qualities necessary for judicial office."

12. Applying these established principles, Judge Kaul is entitled to the strong presumption that he would have withdrawn from the proceedings if he was unable to meet his judicial obligations. Beyond speculation, the Defence shows nothing in the record suggesting the contrary. Nor is there any reasonable prospect that the information sought will show anything further.

²⁹ See ICC-01/05-01/13-511-Anx, para.18 (citing ICC-01/04-01/06-3040-Anx, para.10; ICC-02/05-03/09-344-Anx, para.14).

³⁰ See ICC-01/05-01/13-511-Anx, para.18 (citing ICC-01/04-01/06-3040-Anx, para.10; ICC-02/05-03/09-344-Anx, para.14).

³¹ ICTY, *Prosecutor v. Delalić et al*, IT-96-21-A, Judgement, 20 February 2001, para.629.

13. It may also be presumed that Judge Kaul would have informed the other members of the Pre-Trial Chamber of any personal matters of which he believed they should be aware. Indeed, implicit in the Defence speculation is not only the suggestion that Judge Kaul breached his professional obligations but that the other members of Pre-Trial Chamber I did so too. To any extent that Judge Kaul, by virtue of his medical condition, was unable to participate appropriately in deliberations, the other Judges would necessarily have apprehended this. From the very absence of any measures taken by Pre-Trial Chamber I concerning Judge Kaul, or any relevant discussion either in the Confirmation Decision or the ALA Decision, it must be assumed that Judges Fernández de Gurmendi and Van den Wyngaert acquiesced in Judge Kaul's continued involvement in the case.³² In this decision, they too are entitled to a strong presumption of impartiality and professionalism. Again, the Defence shows no basis upon which this presumption should be disturbed.

14. The authorities cited by the Defence are inapposite, and do not assist them. *Cesan v. the Queen* and *Prosecutor v. Delalić* both concerned Judges shown to be asleep at material times during the trial.³³ As such, both concerned Judges whose failure to meet the necessary standard of judicial conduct was already established.³⁴ This is not

³² By analogy, for example, see ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para.128 ("The Trial Chamber, by continuing with the case with the substitute Judge, impliedly acquiesced in the certification that Judge Hanoteau was familiar with the case to the requisite degree").

³³ See Australia, *Cesan v. the Queen*; *Mas Rivadavia v. the Queen* [2008] HCA 52, para.94 ("The trial judge was asleep on a number of occasions on the 11 days when evidence was being given. He slept at least once on most of those days and on some days on two or three occasions. Some of the sleep episodes, possibly between two and five, lasted from 10 to 15 minutes. Most lasted between two and 10 minutes. The judge's sleeping was accompanied by heavy breathing on a number of occasions and he snored when [the accused] was giving his evidence. This was disruptive and caused [the accused] to look around at the trial judge. [...] The jury was distracted by the judge's sleep episodes and some of the jury members found his behaviour amusing and even emulated it"); ICTY, *Prosecutor v. Delalić et al*, IT-96-21-A, Judgement, 20 February 2001, para.628 ("The appellants have manifestly failed to establish [...] that Judge Karibi-Whyte 'was asleep during substantial portions of the trial'. The Extracts Tapes do, however, demonstrate a recurring pattern of behaviour where Judge Karibi-Whyte appears not to have been fully conscious of the proceedings for short periods at a time. Such periods were usually of five to ten seconds only, but this pattern is repeated over extended periods of ten to fifteen minutes on a number of occasions. On very few occasions, this loss of attention lasted up to thirty seconds. On one occasion only [...] the judge appeared to be asleep for approximately thirty minutes").

³⁴ The cases varied in their disposition. In *Cesan*, as French CJ determined, the Judge's inattention caused a miscarriage of justice by failure of the judicial process, resulting from his failure to maintain the necessary supervision and control of the trial, and the distraction his own behaviour caused to the trial process: Australia, *Cesan v. the Queen*; *Mas Rivadavia v. the Queen* [2008] HCA 52, para.96. In *Delalić*, the ICTY Appeals

the case here, where there is absolutely no evidence to suggest that Judge Kaul or the other Judges of Pre-Trial Chamber I fell below the required standard. In *Commonwealth of Pennsylvania v. John Wilson*, the Superior Court of Pennsylvania ordered a new trial on the basis of “additional shadows”—the subsequent “institutionaliz[ation]” of the trial Judge—cast “on an already clouded record”.³⁵ Reference to this case is manifestly inapposite since Judge Kaul’s record is unimpeachable, nor is there any suggestion of mental incapacity.

15. In addition to the strong presumption of the Judges of Pre-Trial Chamber I’s impartiality and professionalism, there are two other cogent reasons why granting the Motion would be contrary to the public interest.

16. Implicit in the Motion is a request to pierce the veil of judicial deliberations—which, for the purpose of confirmation proceedings, must be considered as secret, by analogy with Article 74(4) and Rule 142(1) concerning deliberations for the determination of guilt. Indeed, the Motion is explicit that its objective—to “shed some light on the circumstances in which the [Confirmation Decision] were taken”³⁶—is to examine the manner in which deliberations were conducted. However, as the SCSL Appeals Chamber has affirmed, “[a] claim that there are improprieties in the deliberative process must be supported by concrete evidence; general allegations are insufficient.”³⁷ It continued,

While the deliberation process is private and secret in order to ensure judicial independence, the obligations imposed by Rule 87 are transparent and the outcome of the deliberative process is public and open. The Judgment, pronounced in public and set forth in writing [...], would show whether or not the Trial Chamber

Chamber determined that, in the circumstances, both relating to the procedures of the ICTY itself and the specific incidents in which Judge Karibi-Whyte may not have been fully attentive, the Accused was not prejudiced, and therefore dismissed the appeal: ICTY, *Prosecutor v. Delalić et al*, IT-96-21-A, Judgement, 20 February 2001, paras.630-639, 650.

³⁵ See Motion, para.56 (quoting United States of America, *Commonwealth of Pennsylvania v. John Wilson*, Sept. 15, 1967, 210 Pa.Super. 424, 234 A.2d 63, pp.425-426).

³⁶ Motion, para.25.

³⁷ SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgement, 26 September 2013, para.618.

deliberated Taylor's guilt beyond a reasonable doubt and voted for separate convictions as to each count. The Judgment accordingly speaks for itself.³⁸

17. The Defence shows no reason to suppose that evidence of a nature sufficient to establish improprieties in the deliberative process even exists. Moreover, the Confirmation Decision, like a Judgement, speaks for itself. It shows that the majority of Pre-Trial Chamber I carefully considered the charges presented to them, and reached reasoned conclusions. The dissenting Judge likewise carefully set out her views. None of the three Judges stated anything to suggest that the deliberative process had not been conducted in accordance with the highest traditions of this Court.

18. The Motion also gives insufficient consideration to Judge Kaul's privacy. As the Defence have themselves previously observed, there is at least a need for caution when the Court considers measures which touch upon the right to privacy and especially the right to maintain the confidentiality of medical records.³⁹ The measure proposed by the Defence in this case—appointing an independent expert to review Judge Kaul's medical records, and then presumably to submit a report—insufficiently safeguards these interests given the tenuous and speculative basis on which access to the records is sought. In any event, it is not at all clear that the Court is even in a position to obtain the medical records requested (having particular regard to the absence of any information as to whether the records continue to exist, who might hold them, and what legal regime applies), given the unique circumstances of this application.

The Motion is also unnecessary

19. Confirmation of charges is an important procedural step prescribed by the Statute and, as such, requires due process. Yet, as reflected by the lesser standard of

³⁸ SCSL, *Prosecutor v. Taylor*, SCSL-03-01-A, Judgement, 26 September 2013, para.620. See also paras.622-623, 625.

³⁹ See e.g. ICC-02/11-01/11-660-Corr-Red, para.23.

proof employed,⁴⁰ its consequences are not so grave as the determination of guilt or innocence under Article 74 of the Statute.⁴¹ The Statute also recognises this fact by providing for appeal of a decision confirming the charges with leave, and not as of right.

20. The charges against Laurent Gbagbo have been fairly confirmed, and he has been fairly committed for trial. He has sought leave to appeal, and been denied. Beyond his speculation, there is nothing in the Confirmation Decision to indicate any impropriety. Nor will the information he seeks avail him in attempting to show otherwise. He remains fully able to defend himself at the forthcoming trial. Neither the interest in compliance with the letter of the procedures of this Court, nor fairness itself, warrants any further delay.

Relief sought

21. For the reasons above, the Motion should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 26th day of September 2014

At The Hague, The Netherlands

⁴⁰ See Statute, Art.61(7) (“The Pre-Trial Chamber shall [...] determine whether there is sufficient evidence to establish reasonable grounds to believe that the person committed each of the crimes charged”).

⁴¹ See also Statute, Art.66(3) (“to convict the Accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt”).