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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

PUBLIC

Public redacted version of "Prosecution's response to Laurent Gbagbo's application for leave to appeal the 'Order to conduct an examination of Mr Gbagbo under Rule 135 of the Rules'", 12 October 2015, ICC-02/11-01/15-286-Conf-Exp

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Introduction

1. The Defence for Laurent Gbagbo's request for leave to appeal the Trial Chamber's decision appointing experts to medically examine Mr Gbagbo¹ should be dismissed. The Application is but one more in a series of applications brought by the Gbagbo Defence indiscriminately under article 82(1)(d) of the Statute. Yet again the Gbagbo Defence disregards the exceptional nature of interlocutory appeals under article 82(1)(d). Rather, the Application represents no more than "a tool for expressing [the Defence's] disagreement with the decision taken by the Chamber",² no more than "an automatic reflex" against the Decision.³

2. Far from articulating any appealable issues, the Defence merely professes its discontent with the Decision. Merely because the Chamber remained unpersuaded by the Defence submissions or its choice of experts does not render the five alleged issues⁴ appealable. Nor should the Chamber be persuaded to grant leave to appeal when the Defence has merely repeated its earlier failed arguments. The Defence also makes several gratuitous and inappropriate comments alleging that the Chamber rejected its arguments "*sans qu'aucune raison légitime ne le justifie*".⁵ It also

¹ ICC-02/11-01/15-274-Conf-Exp ("Application"); ICC-02/11-01/15-253-Conf ("Decision").

² ICC-01/12-01/15-T-1-ENG (open session), p. 12, lns. 7-16, where the Single Judge noted "[t]hird, and final, issue is regard to the leave to appeal. In this regard, I remind the parties that interlocutory appeals under Article 82(1)(d) of the Statute are to be considered as an exceptional—as an exceptional—remedy in the presence of one of the issues mentioned therein, which have to be and which will be interpreted restrictively by the Chamber. Interlocutory appeals are not a tool for expressing disagreement with the decision taken by the Chamber. Normally the Chamber—a decision of the Chamber is always disagreed by one party, so—but that's not the problem, so it is not a disagreement, as very often it is perceived and it appears. Of course I'm not referring to this case because it is too early to refer to this case, but to my experience. And, therefore, I'm saying this as a guidance to the parties."

³ ICC-01/05-01/13-T-10-CONF-ENG (open session), p. 3, lns. 3-12, where the Presiding Judge noted that "[w]hile the Chamber is mindful of the rights of the parties to seek legal remedy under [a]rticle 82(1)(d) of the Statute, I would like to remind that such interlocutory appeals are exceptional. And they are not or should not be an automatic reflex as it sometimes appears. They are neither meant to be a hidden application for reconsideration nor a legal tool to express mere disagreement with any of the Chamber decisions. And we all know that it lies in the nature of things that usually at least one party is not completely satisfied with what the Chamber decides. Furthermore, even if we talk about potentially reversible error this may be particular at the stage of proceedings that we have now reached better and justly deferred to any final appeal under [a]rticle 81."

⁴ Here, "Issues".

⁵ Application, para. 31.

unacceptably alleges “*d’un biais en faveur de l’Accusation*.”⁶ The Application should be dismissed on this basis alone.

3. Further, the Application fails to meet any of the remaining criteria under article 82(1)(d). It fails to show any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Nor is the Appeals Chamber’s immediate intervention necessary.

Level of Confidentiality

4. The Prosecution files this response as “Confidential *Ex parte*” pursuant to regulation 23bis(2) of the Regulations of the Court, because it responds to a submission of the same classification.

Submissions

5. None of the five Issues are appealable. All result from the Defence’s misapprehension or selective reading of the Decision. Equally, all merely disagree with the Decision, and express conflicting opinion. None identify “[a]n identifiable subject or topic requiring a decision for its resolution.”⁷

i. The First Issue is not appealable

6. The First Issue—whether the Chamber erred in fact in nominating experts unfamiliar with Mr Gbagbo’s medical dossier⁸—merely disagrees with the Decision. First, the Defence simply contests the Chamber’s assessment of which experts could

⁶ Application, paras. 30-31.

⁷ See e.g. See 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 (Partly 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.” See also ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 25; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

⁸ Application, paras. 13-15.

offer the best assistance. Although the Defence quarrels with the Chamber's selection of two out of three experts—Dr Lamothe (psychiatrist), and Professor Ludes (clinical forensic examiner)—over the ones it had put forward—Dr Chuc (general and forensic practitioner) and Dr Eckhof (general practitioner)—,⁹ such disagreement cannot advance its Application. The Chamber was entitled to decide whose particular expertise it wanted to decide Mr Gbagbo's fitness to stand trial, and the Defence now merely challenges the Chamber's proper exercise of its discretion, without showing error.

7. Second, the Defence selectively reads the Decision. Familiarity with the dossier was not the only criterion upon which the experts were selected. As the Decision makes clear, the experts were selected equally because they had "standing as experts before the French *Cour de Cassation*".¹⁰ Nor did the Chamber say—contrary to what the Defence alleges—that Professor Ludes had already examined Mr Gbagbo and was familiar with his condition.¹¹ Indeed, the Decision clearly expresses that "[...] Dr. Lamothe and Mr Dumez have already examined Mr Gbagbo"—and not Professor Ludes.¹² The Defence's contesting of the Decision on the basis that "[...] *Monsieur Ludes, qui n'est jamais intervenu dans le dossier*"¹³ is neither accurate nor relevant.

8. Third, the Defence advances its preference for Dr Chuc on the basis of her previous involvement in assessing Mr Gbagbo.¹⁴ Although the Defence may have a partiality towards a particular expert, this remains a matter of its subjective opinion. It cannot, however, make this Issue an appealable one.

9. For these reasons, since the First Issue merely disagrees with the Chamber's selection of experts, and misreads the criteria against which they were selected, it is therefore not appealable. It should be dismissed.

⁹ Application, paras. 13-15.

¹⁰ Decision, para. 10.

¹¹ *Contra* Application, para. 14.

¹² Decision, para. 10.

¹³ Application, para. 14.

¹⁴ Application, para. 15.

ii. *The Second Issue is not appealable*

10. The Second Issue—whether the Chamber erred in fact in dismissing Dr Chuc as an expert because the Pre-Trial Chamber had previously found her contribution to be “minor”¹⁵—is not appealable. It misreads the Decision and does not arise from it. It also merely disagrees with the Chamber’s findings.

11. Although the Defence contests the Chamber’s findings that Dr Chuc’s expertise was of “limited weight”,¹⁶ it misapprehends the Decision. Equally, it fails to properly acknowledge the Pre-Trial Chamber’s findings on Dr Chuc’s expertise. As a plain reading of the Pre-Trial Chamber’s Decision of 2 November 2012 on Dr Chuc’s expertise shows, the Chamber noted that “[Dr Chuc] also conceded, both in her written report and at the hearing, that the psychiatric expert would be better placed to provide more detailed information on PTSD and its consequences.”¹⁷ The Pre-Trial Chamber therefore found that, *in relation to the mental capacity of Mr Gbagbo*,¹⁸ it was “more appropriate to be guided by the results of the psychological and psychiatric examinations” conducted by *inter alia* Dr Lamothe.¹⁹ The Pre-Trial Chamber then expressly found that the findings of Dr Chuc were assigned “*only limited weight*”.²⁰ The Trial Chamber has done no differently. In the context of issues of *Mr Gbagbo’s mental fitness*, the Trial Chamber merely noted the Pre-Trial Chamber’s finding according Dr Chuc’s findings “*limited weight*”.²¹ So too did the Prosecution.²² The

¹⁵ Application, paras. 16-24.

¹⁶ Decision, para. 10. *Contra* Application, para. 20, stating “[i]l convient de souligner que les Juges de la Chambre préliminaire n’avaient pas, contrairement à ce que dit la Chambre, accordé un « limited weight to the findings of Dr Chuc. »”

¹⁷ ICC-02/11-01/11-286-Conf (“Pre-Trial Chamber’s Decision of 2 November 2012”), para. 75.

¹⁸ Emphasis added.

¹⁹ Pre-Trial Chamber’s Decision of 2 November 2012, para. 76.

²⁰ Pre-Trial Chamber’s Decision of 2 November 2012, para. 100, stating “As for Mr Gbagbo’s mental capacities, the Chamber, as explained above, attached only limited weight to the findings of Dr Chuc and Dr Daunizeau in this regard.” (emphasis added).

²¹ Decision, para. 10, fn. 17, noting Pre-Trial Chamber’s Decision of 2 November 2012, para. 100 (emphasis added).

²² ICC-02/11-01/15-219-Conf-Exp, para. 18, again noting *inter alia* the Pre-Trial Chamber’s Decision of 2 November 2012, paras. 76, 100.

Defence's allegations that the Prosecution's submissions are "*spécieux*" or "*fausse affirmation*"²³ are both unfounded and gratuitous.

12. Further, to the extent that the Defence now challenges the findings in the Pre-Trial Chamber's Decision of 2 November 2012,²⁴ it is more than two years too late to do so. These aspects of this Issue do not even arise from the Decision.

13. Moreover, contrary to the Application,²⁵ the Chamber was not required to explain further. As the Appeals Chamber has noted, a reasoned decision does not necessarily require a Chamber to recite and summarise each and every factor before it; rather a Chamber must identify the facts relevant to its conclusion.²⁶ The Decision is properly reasoned in line with this appellate standard. The Defence fails to show otherwise.

14. Nor is there any indication that "*la Chambre semble ici avoir oublié l'existence du syndrome de l'hospitalisation.*"²⁷ The Defence only speculates. It also misreads the Decision. In designating the mandate of the appointed experts, the Chamber ruled that "the examination should be conducted 'with a view to assessing Mr Gbagbo's current medical condition, including whether he is still suffering from PTSD and *hospitalisation syndrome* [...]'."²⁸ It is clear that the Chamber considered the hospitalisation syndrome in remitting the assessment to the experts. Additionally, the Chamber retained discretion to decide which expertise would be suitable. As the Chamber found, in order "to obtain a full picture of Mr Gbagbo's health situation and attendant capacities leading up to trial", it could benefit "by receiving assessments from specialists who have different areas of expertise."²⁹ Yet again, the Defence merely disagrees with the Chamber's discretion in choosing the appropriate experts, but shows no error.

²³ Application, paras. 16, 19, 21.

²⁴ See e.g. Application, paras. 17, 20.

²⁵ Application, para. 18.

²⁶ ICC-01/04-01/06-773 OA5, para. 20; ICC-01/04-01/06-774 OA6, para. 30.

²⁷ Application, para. 22.

²⁸ Decision, para. 12 (emphasis added).

²⁹ Decision, para. 9.

15. Likewise, the Defence's claim that "*il y a une forme d'incohérence dans la décision de la Chambre*"³⁰ is unfounded. It also wrongly pre-supposes that the experts proposed by the Defence are the only experts who can assist the Chamber. There is simply no factual or logical basis for assuming this.³¹ Nor was the Chamber bound to nominate the experts who had been designated in 2013 again.³²

16. Because the Second Issue results from a piecemeal and incorrect reading of the Chamber's findings, it is not appealable. It should therefore be dismissed.

iii. The Third Issue is not appealable.

17. The Third Issue—whether the Chamber erred in fact in appointing an expert registered on the list of the French *Cour de cassation* instead of the *Cour d'Appel*³³—is not appealable. Yet again, the Defence merely disagrees with the Decision. And its hypotheses do not substantiate its claims.

18. Although the Defence specifically contests the appointment of Professor Ludes as one of the appointed experts because he has standing before the French *Cour de Cassation*,³⁴ the Gbagbo Defence's general discourse on the relative merits of the French judicial system, nor of the *Cour de Cassation* and the *Cour d'Appel* cannot assist its Application. The Chamber was still entitled to select the experts who could best assist it. And its proper choice to disregard two of the experts proffered by the Defence is not appealable.

19. Ultimately, the Defence's arguments contesting Professor Ludes' appointment is no more than its thinly veiled discontent with the Chamber's acceptance of the Prosecution's arguments over its own. Nor are its submissions that "*[...] il n'existe aucune différence de qualité ou de compétence entre experts à la Cour de cassation et experts*

³⁰ Application, para. 23.

³¹ *Contra* Application, para. 23.

³² *Contra* Application, para. 24.

³³ Application, paras. 25-26.

³⁴ Application, para. 25.

auprès des Cours d'appel"³⁵ substantiated. The Chamber cannot grant leave to appeal on the sole basis of the Defence's conjecture and subjective opinion.

20. Nor is the Application assisted by its claim that the Decision "*ignore les décisions prises par la CPI elle-même*."³⁶ These submissions are unfounded. Nor is it apparent why the Chamber was obliged to only select experts from the "ICC list".³⁷

21. The Defence's mere disagreement and speculation does not render the Third Issue appealable. It should therefore be dismissed.

iv. The Fourth Issue is not appealable

22. The Fourth Issue—whether the Chamber erred in requiring the appointed experts to submit their reports by 29 October 2015³⁸—is not appealable. The Defence once again misreads the Decision. The Issue is no more than the Defence's conjecture.

23. Here, the Defence attempts to impugn—in an abstract manner—the expertise of the selected experts and questions if they would be able to respect the deadline of 29 October 2015 to submit their reports.³⁹ In doing so, however, the Defence only makes conclusory statements and ignores several key findings in the Decision.

24. The Defence's claim that "*ils nomment des experts sans connaissance du dossier*" selectively reads the Decision. To the contrary, the Decision states, in express terms, that two of the three experts "have already examined Mr Gbagbo, and are therefore familiar with his health condition, thereby enabling them to assess any changes in his condition from 2012 to the present."⁴⁰ Not only have the majority of the experts appointed previously examined Mr Gbagbo, all of them will be provided with Mr Gbagbo's earlier medical reports prepared by other medical professionals who

³⁵ Application, para. 25.

³⁶ Application, para. 26.

³⁷ Application, para. 26.

³⁸ Application, para. 27.

³⁹ Application, para. 27.

⁴⁰ Decision, para. 10.

reported on his health condition.⁴¹ The Defence therefore has simply no basis to allege that the experts would be unfamiliar with the dossier. Nor does it have any basis to claim, as it does,⁴² that its preferred experts—Dr Chuc [REDACTED]—would have any greater familiarity with the dossier.

25. Because the Fourth Issue is nothing more than speculation, it should be dismissed.

v. The Fifth Issue is not appealable

26. The Fifth Issue—whether the Chamber erred in not sufficiently defining the mandate of the experts⁴³—is not appealable. Yet again, the Defence selectively reads the Decision and disagrees with it.

27. The Defence is simply wrong to claim that the Chamber “ [...] *ne précisant pas suffisamment la mission des experts et en ne leur expliquant pas exactement ce qui était attendu d’eux.*”⁴⁴ To the contrary, the Decision sets out the experts’ mandate in clear terms.

- First, the Chamber noted that the examination should be conducted “with a view to assessing Mr Gbagbo’s current medical condition, including whether he is still suffering from PTSD and hospitalisation syndrome, and if so, identifying the consequences of this, if any, on his ability to follow and take part in the forthcoming trial proceedings.”⁴⁵
- Second, the Chamber emphasised that the experts “are not required to themselves make a determination of Mr Gbagbo’s fitness to stand trial; that is a legal determination to be made by the Chamber.”⁴⁶

⁴¹ Decision, paras. 17-18, pp. 9-10.

⁴² Application, para. 27.

⁴³ Application, paras. 28-29.

⁴⁴ Application, para. 28.

⁴⁵ Decision, para. 12.

⁴⁶ Decision, para. 14.

- Third, the experts were required “to assess and address in their reports whether Mr Gbagbo is physically and psychologically able to withstand full-time trial proceedings (approximately 4.5 hours per day, in 1.5 hour sessions, five days per week, for periods of approximately four or five weeks at a time).”⁴⁷ This assessment is to include “details on any perceived consequences on the health of the accused resulting from the trial proceedings[.]” and “whether Mr Gbagbo’s health situation requires any particular accommodation[.]”⁴⁸
- Fourth, the Chamber also noted that article 67(1) required that an accused must have the capacity to understand and defend himself against the charges, which includes, *inter alia*, the capacity to understand the purpose, including the consequences, of the proceedings; the course of the proceedings, including the nature and significance of pleading to the charges; the evidence; and to testify or give an unsworn statement (should the accused so choose); and to instruct counsel in the preparation and conduct of a defence.⁴⁹
- Fifth, the Chamber also instructed the experts “to the extent possible and as considered appropriate, [to] collaborate in the preparation of their individual reports[.]”⁵⁰

28. Nor is it apparent from the Application why knowledge of “*interventions devant la CPI*” or the difference between common law and French law⁵¹ should impact the experts’ determination. Nor is it obvious how the sweeping unsubstantiated reference to “*la jurisprudence de la CPI*”⁵² is relevant.

⁴⁷ Decision, para. 15.

⁴⁸ Decision, para. 15.

⁴⁹ Decision, para. 13.

⁵⁰ Decision, para. 16.

⁵¹ Application, para. 28.

⁵² Application, para. 29.

29. Further, the Defence only speculates that *“les experts n’en ont pas la moindre idée, puisque la question [des instructions à son conseil] n’est pas posée en ces termes en France.”*⁵³

It is unclear why the experts would not know that an accused must be able to understand the charges against him.⁵⁴ Nor does it persuade, absent any substantiation, how *“la Chambre a pris le risque de n’obtenir qu’une expertise partielle et peu utile[...].”*⁵⁵

30. Because the Fifth Issue both misreads the Decision and speculates, it is not appealable, and should be dismissed.

vi. The article 82(1)(d) test is not met

31. The Article 82(1)(d) criteria are cumulative. A failure to fulfil any one of these criteria is fatal to the Application.⁵⁶ Because the Application fails to demonstrate that any of the Issues are appealable, it should be dismissed without further consideration.

32. Nevertheless, none of the other article 82(1)(d) criteria are met either.

33. First, the Application fails to demonstrate any impact on the fairness of the proceedings. Contrary to the Defence’s submissions,⁵⁷ there is little doubt that the issue of an accused’s fitness to stand trial is crucially important. However, the issue in the present case is still not ripe for determination. The Chamber has not yet decided if Mr Gbagbo is fit to stand trial. As the Decision makes clear, the Chamber, and not the experts will make that legal determination.⁵⁸ In this sense, the Application’s claims of unfairness resulting from the experts’ appointment⁵⁹ are

⁵³ Application, para. 29.

⁵⁴ Application, para. 29.

⁵⁵ Application, para. 29.

⁵⁶ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria is cumulative, and “[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal.”

⁵⁷ Application, paras. 33-41.

⁵⁸ Decision, para. 14.

⁵⁹ Application, para. 39.

premature and abstract. And even if the Defence is dissatisfied with the selected experts, it is still afforded a further opportunity to submit observations on their reports prior to trial.⁶⁰ Nor is the Defence's reliance on the past litigation on this issue persuasive:⁶¹ such issues are beyond the Decision's scope. In these circumstances, there cannot be any impact on the fairness of the proceedings.

34. Second, the Application fails to show any impact on the expeditiousness of the proceedings.⁶² Mere speculation that the Chamber would not be benefitted by the expertise provided and would have to begin the process again cannot advance the Application. The Defence provides no credible basis for its belief.

35. Third, the Application's claim of impact on the outcome of the trial is barely expressed.⁶³ More so, it only speculates that the Chamber would not have "*les informations complètes*" to make its decision. The Defence's mere subjective opinion cannot persuade. Nor is the Application's link to the outcome of the trial, in terms of the article 74 judgement, argued or apparent.

36. Finally, contrary to the Application,⁶⁴ the Appeals Chamber's immediate resolution of the matter will not materially advance the proceedings. Indeed, the Appeals Chamber's intervention is not needed to correct the Defence's misreading of the Decision. Nor is the Appeals Chamber required to address the Defence's conjecture.

⁶⁰ Decision, para. 20.

⁶¹ See e.g. Application, para. 32.

⁶² Application, para. 40.

⁶³ Application, para. 41.

⁶⁴ Application, paras. 42-44.

Conclusion

37. As shown above, none of the five Issues are appealable. They also fail to meet the article 82(1)(d) test for leave to appeal. The Application should, therefore, be dismissed.



Fatou Bensouda, Prosecutor

Dated this 1st day of February 2016

At The Hague, The Netherlands