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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

With Confidential, *EX PARTE*, Annexes A, B and C

Public redacted version of "Prosecution's supplemental submissions concerning the selection of experts (ICC-02/11-01/15-206-Conf-Exp)", 15 September 2015, ICC-02/11-01/15-219-Conf-Exp

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Introduction

1. On 16 June 2015, the Prosecution filed a request for the medical examination of the Accused Laurent Gbagbo pursuant to rule 135 of the Rules of Procedure and Evidence (“Rules”).¹ On 7 September 2015, the Trial Chamber granted the request, in part, and ordered the Prosecution and Defence to file additional submissions “on the specific type of expertise that may be warranted to assess Mr Gbagbo’s abilities with respect to participating in the trial [...] and on the specific expert(s) who are best placed to conduct this examination.”²

2. The Prosecution requests that the Chamber appoint a panel of experts to assist it in determining the Accused’s fitness to stand trial and the practical modalities to facilitate his attendance at trial.³ The panel would most usefully be composed of a clinical forensic examiner, and a psychiatrist. The Prosecution submits that Professor Bertrand Ludes and Dr Pierre Lamothe should be appointed. Should the Chamber deem the appointment of a psychologist helpful in its assessment under rule 135 of the Rules, then the Prosecution does not oppose the appointment of Mr Alain Dumez. The experts should be instructed to file (i) a joint report; or (ii) a joint report specifying the conclusion/s on which they agree and any individual reports as necessary containing the conclusion/s on which they do not agree.

Confidentiality

3. The Prosecution files this submission as confidential – *ex parte* only available to the Prosecution, Defence team of Laurent Gbagbo and Registry since it refers to information discussed during an *ex parte* private hearing.⁴ The Prosecution will

¹ ICC-02/11-01/15-94-Conf-Exp.

² ICC-02/11-01/15-206-Conf-Exp, para.12 and p.7.

³ See ICC-02/11-01/15-206-Conf-Exp, para.10.

⁴ Hearing of 16 June 2015, ICC-02/11-01/15-T-2-CONF-EXP-ENG ET.

submit a redacted version of this request upon the further instruction of the Chamber.

Procedural Background

4. On 2 November 2012, the Pre-Trial Chamber declared the Accused fit to take part in the confirmation of charges proceedings (“Decision on Fitness”).⁵ The Pre-Trial Chamber found that the Accused was physically fit to attend the proceedings.⁶ It also concluded that the Accused was mentally fit. The Pre-Trial Chamber concluded, based on the report and testimony of Dr Lamothe “that Mr Gbagbo possesses the capacities to understand the charges against him, as well as the conduct and the possible consequences of proceedings against him, and is capable of giving instructions to counsel as well as of making a statement.”⁷ In its analysis of the evidence on record, the Pre-Trial Chamber attached limited weight to the findings of Dr Chuc⁸ and Mr Daunizeau⁹ in relation to the mental capacities of the Accused.¹⁰
5. In its Decision on Fitness, the Pre-Trial Chamber also instructed the Registry to “submit a report and to explore ‘any measures that can be taken to help physical recovery’ of Mr Gbagbo”.¹¹
6. On 2 November 2012, the Single Judge further held that:

“[It] is necessary to obtain further specific information, by way of a report, about the available avenues to provide adequate treatment to improve Mr Gbagbo's

⁵ ICC-02/11-01/11-286-Conf.

⁶ ICC-02/11-01/11-286-Conf, para.100.

⁷ ICC-02/11-01/11-286-Conf, para.100.

⁸ In light of Prosecution’s submissions and Dr Chuc’s own concession that the psychiatric expert would be better placed to provide more detailed information on PTSD and its consequences, the Pre-Trial Chamber considered it “more appropriate to be guided by the results of Dr Daunizeau and Dr Lamothe respectively” (ICC-02/11-01/11-286-Conf, paras.75-76).

⁹ The Pre-Trial Chamber found that “[Dr Daunizeau’s] diagnosis, even if it were to be considered accurate, does not assist the Chamber for the purposes of the current determination as these alleged changes in the personality of Mr Gbagbo are not at issue.” It then concluded that “[f]or these reasons, the Chamber does not consider that the report of Dr Daunizeau and his oral answers at the hearing provide a sufficient basis to find Mr Gbagbo mentally unfit to take part in proceedings against him.” (ICC-02/11-01/11-286-Conf, para.86.)

¹⁰ ICC-02/11-01/11-286-Conf, para.100.

¹¹ ICC-02/11-01/11-286-Conf, para.103.

physical and psychological health at the detention centre or elsewhere in the Netherlands. Such report shall take into account, in particular, the findings and recommendations made by the experts in relation to the Post Traumatic Stress Disorder (PTSD) and the hospitalisation syndrome".¹²

7. [REDACTED],¹³ [REDACTED].
8. On 6 May 2015, the Chamber convened an *ex parte* status conference¹⁴ which was held in private session on 16 June 2015.¹⁵
9. On 16 June 2015, the Prosecution filed a request for the medical examination of the Accused Laurent Gbagbo pursuant to rule 135 of the Rules.¹⁶ In its request, the Prosecution also proposed that Professor Ludes and Dr Lamothe be appointed as experts to conduct the necessary examination.
10. On 13 July 2015, the Defence objected to the medical examination, or in the alternative invited the Chamber to:

"- Surseoir à statuer sur la demande du Procureur jusqu'à obtention du consentement de Laurent Gbagbo;
*- Inviter la Défense et le Procureur à déposer des soumissions plus détaillées sur la procédure précise à suivre dans l'éventualité d'une nouvelle expertise, notamment en ce qui concerne la nomination des experts."*¹⁷
11. The Defence also submitted that previous experts who had met the Accused, such as Dr An Chuc, [REDACTED]¹⁸ and [REDACTED], would be in a position to verify the aggravation of his symptoms.¹⁹
12. On 7 September 2015, the Chamber granted the request for a medical examination, in part, and ordered the Prosecution and the Defence to file submissions "on the specific type of expertise that may be warranted to assess Mr

¹² ICC-02/11-01/11-287-Conf-Corr, para.10.

¹³ ICC-02/11-01/15-84-Conf, para.1.

¹⁴ ICC-02/11-01/15-57.

¹⁵ ICC-02/11-01/15-T-2-CONF-EXP-ENG ET.

¹⁶ ICC-02/11-01/15-94-Conf-Exp.

¹⁷ ICC-02/11-01/15-133-Conf-Exp-Red2, p. 26.

¹⁸ [REDACTED].

¹⁹ ICC-02/11-01/15-133-Conf-Exp-Red2, paras.93-95.

Gbagbo's abilities with respect to participating in the trial [...] and on the specific expert(s) who are best placed to conduct this examination."²⁰

Submissions

13. The Prosecution submits that the Chamber should appoint a panel of experts composed of a clinical forensic examiner and a psychiatrist, to assess the Accused's fitness to stand trial. This panel of experts would also be in a position to advise the Chamber on the practical modalities to facilitate the Accused's attendance at trial.²¹

Composition of Panel

14. Professor Bertrand Ludes, a clinical forensic examiner, is a certified expert before the *Cour de cassation* in Paris and would be in a position to conduct a physical examination of the Accused. The Prosecution re-attaches Professor Ludes' *curriculum vitae* as Confidential Annex A hereto.²² To date, the only contact that the Prosecution has had with Professor Ludes, regarding a potential assessment, was to inquire about his availability.

15. The Prosecution maintains that a psychiatric examination of the Accused would be of necessary assistance to the Chamber.²³ As against the Defence's position,²⁴ [REDACTED].²⁵ Furthermore, as against the Defence's submission that post-traumatic stress disorder ("PTSD") lies not in the domain of psychiatry but of psychology only,²⁶ the Prosecution notes that PTSD is referenced in the main psychiatry manuals, such as the Diagnostic and Statistical Manual of Mental

²⁰ ICC-02/11-01/15-206-Conf-Exp, para.12 and p.7.

²¹ ICC-02/11-01/15-206-Conf-Exp, para.10.

²² Professor Ludes' *curriculum vitae* is extracted from a longer document, entitled "*Titres et Travaux*", the full content of which is not attached at Annex A, but which can be provided on request. A short biography for Dr Lamothe is available at ICC-02/11-01/11-190-Conf-Anx3-Red.

²³ The Prosecution notes that the engagement of a psychiatrist has been the approach adopted by the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia. See 002/19-09-2007-ECCC/TC, *Decision relative à l'aptitude des accusés à être jugés et ordonnance portant designation d'experts*, Trial Chamber, 17 February 2014, para.10.

²⁴ See ICC-02/11-01/15-133-Conf-Exp-Red2, paras.80-87.

²⁵ [REDACTED].

²⁶ See ICC-02/11-01/15-133-Conf-Exp-Red2, para.81.

Disorders.²⁷ A psychiatrist is in the unique position to render an assessment on both a psychological level,²⁸ as well as a physiological level. This dual expertise would also allow a psychiatrist to assess reported symptoms, and to treat the Accused, including through the prescription of medication if deemed necessary. A clinical psychologist cannot prescribe medication.

16. The Prosecution proposes Dr Pierre Lamothe as the panel's psychiatrist. Dr Lamothe was previously appointed by the Pre-Trial Chamber and examined the Accused in July 2012 to that end.²⁹ He would therefore be in a position to describe any changes in the Accused's physical and psychiatric condition, including any aggravation of symptoms.³⁰ Pre-Trial Chamber I was assisted by Dr Lamothe's assessment, stating that it based its finding of fitness mainly on his written report and testimony.³¹ To date, the only contact that the Prosecution has had with Dr Lamothe, regarding a potential further assessment, was to inquire about his availability.

17. The inclusion of a psychiatrist on the panel of experts would, in the Prosecution's submission, render the additional expertise of a psychologist unnecessary. However, if the Chamber considers that it would be assisted by the inclusion of a psychologist, then the Prosecution does not oppose the Defence's proposal of Mr Alain Dumez, in this capacity. The Prosecution notes that Mr Dumez is expert in

²⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.) (2013).

²⁸ This includes the ability to determine whether the patient's trauma has led to a change in his personality, and if so, to what extent this affects his mental faculties and his capacity to participate in the trial process: cf ICC-02/11-01/15-133-Conf-Exp-Red2, paras.85 and 87, whereby the Defence claims that only a psychologist has these abilities.

²⁹ See ICC-02/11-01/11-190-Conf-Exp-Anx3.

³⁰ Dr Bruno Daunizeau also provided a psychiatric report to the Pre-Trial Chamber: See ICC-02/11-01/11-190-Conf-Anx2-Red. The Prosecution submits that in light of the field of expertise of Dr Daunizeau and the comments of the Pre-Trial Chamber as to the conclusion of his expertise in the Decision on Fitness, he should not be re-appointed. See ICC-02/11-01/11-286-Conf, para.86.

³¹ ICC-02/11-01/11-286, para.100. As summarised by the Pre-Trial Chamber, it was the opinion of Dr Lamothe that the Accused "possesse[d] the capacities to understand the charges against him, as well as the conduct and the possible consequences of proceedings against him, and [was] capable of giving instructions to counsel as well as of making a statement." See also ICC-02/11-01/11-190-Conf-Exp-Anx3, pp.23-24. Cf ICC-02/11-01/15-133-Conf-Exp-Red2, paras.9, 10, 13 and 71, whereby the Defence suggests that Dr Lamothe deemed the Accused not fit to be tried.

the area of “*psychologie clinique et pathologique*”.³² His *curriculum vitae*, as filed with the Registry, is attached as Confidential Annex B.

18. The other experts proposed by the Defence would not, in the Prosecution’s submission, be appropriate members of the panel.

- a. Dr An Chuc provides assessments in the French judicial system, but does not do so at the highest (*Cour de Cassation*) level, in contrast to Professor Ludes. Dr Chuc was one of the experts in the 2012 fitness proceedings before the Pre-Trial Chamber. It is of note that the Pre-Trial Chamber considered it more appropriate to be guided by Dr Lamothe’s findings.³³ This appeared to be largely due to Dr Chuc’s acknowledgment, in her report and at the hearing, that the psychiatric expert would be better placed to explain post-traumatic stress disorder.³⁴
- b. [REDACTED] is a general practitioner [REDACTED].³⁵ [REDACTED], the Prosecution submits that for this specific expertise he would not be an appropriate candidate to join a panel of external, independent experts appointed by the Chamber.

Scope of report(s)

1. The Prosecution submits that the scope of the expert opinion requested should be framed in the same terms as provided by the Pre-Trial Chamber in the 2012

³² He is also “*diplômé en psychiatrie Légale*”, but this does not equate to a specialisation in psychiatry, which requires first undergoing a medical degree. See http://www.medecine.u-psud.fr/fr/formations/formation_continue/diplomes_universite/psychiatrie-legale.html (consulted 15 September 2015).

³³ ICC-02/11-01/11-286-Conf, paras.76 and 100.

³⁴ ICC-02/11-01/11-T-6-Conf-Eng, p.15, lns.18-23; p.16, lns.6-8; p.23, lns.5-6. See also ICC-02/11-01/11-286-Conf, para.75.

³⁵ See [REDACTED].

proceeding. [REDACTED].³⁶ [REDACTED].³⁷ [REDACTED].³⁸ The Pre-Trial Chamber further specified, in its Decision on Fitness, that:

“the question before the Chamber is not merely the existence of particular medical conditions, or what their sources are, but *primarily whether those medical conditions affect the capacities of the person concerned to meaningfully exercise his or her fair trial rights.*”³⁹

19. In this regard, the Prosecution supports the stated aim of the present examination, as formulated by the present Trial Chamber, to assess the Accused’s current medical condition, including the presence of PTSD and “hospitalisation syndrome”, and to identify “the consequences of this, if any, on his ability to follow and take part in the forthcoming trial proceedings.”⁴⁰

20. In addition, as regards the measures to enable the Accused’s participation at trial, the panel should be requested to provide an opinion on whether any difficulties related to the Accused’s level of fatigue and/or attention span would require the length of hearing sessions to be reduced (and, if so, to what extent), or for any specific measures to be taken (such as breaks, or the presence of a medical professional).

Access to materials

21. In order to perform the fullest assessment possible of the Accused, the panel of experts should be provided with unrestricted access – in unredacted form – to the Accused’s medical file, as well as all prior medical reports,⁴¹ detention reports,

³⁶ ICC-02/11-01/11-164-Conf-tENG, para.35.

³⁷ ICC-02/11-01/11-164-Conf-tENG, para.39.

³⁸ ICC-02/11-01/11-164-Conf-tENG, para.39.

³⁹ ICC-02/11-01/11-286-Conf, para.51 (emphasis added).

⁴⁰ ICC-02/11-01/15-206, para.11.

⁴¹ Including, but not limited to the external medical practitioner’s report (ICC-02/11-01/11-105-Conf-Exp-Anx8, referred to in ICC-02/11-01/11-164-Conf-tEng, para.32), the reports of the 2012 panel of experts (ICC-02/11-01/11-190-Conf-Exp-Anx1, ICC-02/11-01/11-190-Conf-Exp-Anx2, ICC-02/11-01/11-190-Conf-Exp-Anx3), and the joint expert report of 27 March 2014 (referred to in ICC-02/11-01/15-133-Conf-Exp-Red2, para.16).

and joint Registry and Defence reports.⁴² The experts should also be given access to an unredacted version of the Defence's 13 July 2015 response to the Prosecution's request for medical examination.⁴³

22. On the question of medical confidentiality and the right to privacy, the consent of the person concerned is not necessarily a pre-requisite to the disclosure of medical information to another party. The Prosecution disagrees with the Defence's assertion that the disclosure of information covered by medical confidentiality to another party must be expressly authorised by the person concerned.⁴⁴ Regulation 156, paragraph (2) of the Regulations of the Registry does guarantee that a detained person's medical records shall not be consulted by persons other than treating medical staff without the express written consent of the detained person. However, paragraph (5) of the same regulation provides for notification to the Chamber, where the detained person has refused to consent to the Chamber being provided with his or her medical records. It is well-recognised that records can be disclosed upon a court's order to appointed experts to facilitate their examination, those experts being bound by applicable codes of medical ethics.⁴⁵ The Prosecution annexes the relevant provisions, and related commentary, of the Ivorian and French *Codes de Déontologie Médicale*, as Confidential Annex C. Any other interpretation would deprive a Trial Chamber of its ability to satisfy itself, under article 64(8) of the Statute, that the accused understands the nature of the charges, by rendering its ability to order an examination of the accused under rule 135 of the Rules entirely futile.

⁴² Including, but not limited to, [REDACTED] (referred to in ICC-02/11-01/15-84-Conf, para.1), and/including [REDACTED]: ICC-02/11-01/11-T-7-CONF-ENG, p.77, lns.10-12).

⁴³ ICC-02/11-01/15-133.

⁴⁴ ICC-02/11-01/15-133-Conf-Exp-Red2, para.39.

⁴⁵ See *Loi no 628-248 du 31 juillet 1962, Code de Déontologie Médicale* (Côte d'Ivoire), arts.53-56; *Code de Déontologie Médicale* (France), arts.105-108 (available at: <http://www.conseil-national.medecin.fr/sites/default/files/codedeont.pdf> , consulted 15 September 2015), and the commentary of the *Conseil national de l'Ordre des médecins* on art.108 (available at <http://www.conseil-national.medecin.fr/article/article-108-redaction-du-rapport-et-secret-332>, consulted 15 September 2015).

Timeframe

23. The Prosecution concurs with the Defence that the Accused's trial should not be delayed by long medical examinations and debates over his fitness to be tried.⁴⁶ To this end, the panel of experts should be requested to comply with a timeframe that avoids any postponement of the opening statements scheduled for 10 November 2015. In this regard, the Prosecution advises that Professor Ludes and Dr Lamothe are both available to assess the Accused on any of the following dates: 7, 20, 21 and 22 October 2015.

Conclusion

24. For the foregoing reasons, the Prosecution proposes the appointment of Professor Bertrand Ludes and Dr Pierre Lamothe to an expert panel for the filing of a joint report. Should the filing of a full joint report not be possible, the experts should be requested to file individual reports, as necessary, containing any conclusions on which they do not agree. Alternatively, the Prosecution has no objection to the additional appointment of Mr Dumez to this panel of experts.

25. To facilitate the panel's assessment, the Defence should be ordered to ensure that the Accused has consented in writing, pursuant to regulation 156(2) of the Regulations of the Registry, to the disclosure of his medical records to the members of the expert panel.



Fatou Bensouda, Prosecutor

Dated this 1st day of February 2016

At The Hague, The Netherlands

⁴⁶ See ICC-02/11-01/15-133-Conf-Exp-Red2, para.58.