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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
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

**Prosecution's response to Mr Gbagbo's applications for leave to appeal the
decision concerning Witness P-0583**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Trial Chamber should reject the Defence of Mr Gbagbo's application for leave to appeal¹ its oral decision² in which it rejected the Defence's request that Witness P-0583 not be considered as an expert witness.³ Out of the three issues⁴ referred to in the Application, the First and the Second Issues do not arise from the Decision, and the Third Issue does not qualify as an appealable issue within the meaning of article 82(1)(d). Even if, *arguendo*, the Chamber considers that the Application does raise an issue arising from the Decision, it should nonetheless reject the Application as the Defence does not demonstrate how the Issues meet the remaining criteria for leave to appeal.

Submissions

A. The Issues do not arise from the Decision or are not appealable issues

The First Issue does not arise from the Decision

2. The First Issue,⁵ namely whether the Chamber erred in refusing to consider the question of subordination of Witness P-0583 to the Prosecution, does not correctly represent the Decision. As a result, it does not arise from it.

3. In its Decision, the Chamber expressly noted that "[W]itness P-0583 is a staff member of the Office of the Prosecutor appointed by the Office of the Prosecutor for this case as a forensic expert."⁶ This demonstrates that the Chamber addressed the question of the relationship of subordination of the witness to the Prosecution,⁷ and that the First Issue does not arise from the Decision. In any event, the Defence's additional arguments to the contrary are without merit and should be rejected.

¹ ICC-02/11-01/15-1021 ("Application").

² ICC-02/11-01/15-T-185-CONF-ENG, p. 6 l. 11 to p. 7, l. 3 ("Decision").

³ ICC-02/11-01/15-1016 ("Defence Request").

⁴ "Issues".

⁵ Application, paras. 14-20.

⁶ Decision, p. 6, l. 20-21.

⁷ *Contra*, Application, para. 17.

4. Contrary to the Defence's argument,⁸ the Chamber did address the Defence's submission concerning the alleged lack of independence of Witness P-0583. In fact, the Chamber expressly mentioned Witness P-0583's affiliation with the Prosecution and found his appearance as an expert witness did not prejudice or otherwise affect the rights of the Defence.⁹

5. In addition, since the Chamber allowed the Prosecution to call Witness P-0583 to testify about his forensic expertise in this case—as opposed to the Prosecution's investigations in general—there was no need for the Chamber to further clarify its finding that Witness P-0583 was “not involved in investigative activities.”¹⁰ In any event, even if some of Witness P-0583's activities in this case could be qualified as investigative activities,¹¹ this would not demonstrate that the Chamber failed to consider his relationship with the Office of the Prosecutor. Accordingly, it would not demonstrate that the First Issue arises from the Decision.

6. In addition, the Defence presents lengthy arguments on why the Chamber should have taken a different approach in evaluating Witness P-0583's subordination to the Prosecution.¹² Regardless of the merits of these arguments, they do not demonstrate that the Chamber failed to consider Witness P-0583's subordination to the Prosecution and that the First Issue arises from the Decision. Instead, they express a mere disagreement with the Decision.

7. The First Issue should therefore be rejected.

⁸ Application, para. 16.

⁹ Decision, p. 6, l. 23-24.

¹⁰ *Contra*, Application, para. 18; challenging Decision, p. 6, l. 20-22.

¹¹ Application, para. 19.

¹² Application, paras. 5-8, 20.

The Second Issue does not arise from the Decision

8. The Second Issue, namely whether the Chamber refused to rule on the relevance of Witness P-0583 belonging to the French army¹³ also misrepresents the Decision and therefore does not arise from it.

9. The Chamber considered the Defence's submissions in its Request, which included the argument that Witness P-0583's prior affiliation with the French army would disqualify him to testify as an expert in this case.¹⁴ The Defence's arguments merely disagree with the Decision.¹⁵ The Chamber expressly stated that it had read the Defence's arguments,¹⁶ and concluded that the witness's appearance as an expert witness did "not prejudice or otherwise affect the right of the Defence to challenge his findings either through their own examination of that witness, or alternatively, by calling their own expert as a witness if they have appointed one."¹⁷ Accordingly, the Chamber decided that none of the Defence's arguments—including the submission that Witness P-0583 served in the French army—disqualified him from giving evidence as an expert witness, and that any matters concerning the credibility of the witness could be raised by the Defence in due course.

10. The Second Issue should therefore be rejected.

The Third Issue is not an appealable issue

11. The Third Issue, namely whether the Chamber erred in basing its decision on regulation 44 of the Regulations of the Court, while the Defence Request had not relied on this provision,¹⁸ is not an appealable issue.

12. The Defence Request clearly refers to regulation 44.¹⁹ In any event, it does not matter whether the Defence was relying on that provision, or whether it merely

¹³ Application, paras. 21-22.

¹⁴ Application, para. 21.

¹⁵ Application, paras. 21-22.

¹⁶ Decision, p. 6, l. 11-12.

¹⁷ Decision, p. 6, l. 23 to p. 7, l. 1.

¹⁸ Application, paras. 23-28.

¹⁹ Defence Request, para. 5.

referred to it as an example of the hybrid nature of the applicable procedures for the appointment of experts before the ICC.²⁰ The fact that the Chamber, in ruling on the Defence Request, relied on a legal provision that the Defence may not have invoked in its Request²¹ is not a “subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”²² Accordingly, it is not an issue within the meaning of article 82(1)(d). The Chamber was free to rely on any legal provision or on fact before it that it deemed relevant to dispose of the Defence Request. The suggestion that the Chamber, in applying the law to the facts before it, would be restricted to the legal arguments advanced by the Defence is wholly unfounded and does not merit further consideration.

13. The Defence’s additional argument that the Chamber failed to address its submission concerning Witness P-0583’s alleged lack of independence²³ merely repeats the Defence’s failed argument under its Second Issue.²⁴

14. The Third Issue should therefore be rejected.

B. The Issues do not meet the criteria for leave to appeal under article 82(1)(d)

15. As noted above, the Application should be rejected because the First and the Second Issues do not arise from the Decision and the Third Issue is not an appealable issue. In any event, the Application fails to show how the Issues meet the remaining requirements of article 82(1)(d).

16. The Issues do not significantly affect the fair and expeditious conduct of the proceedings. The Decision does not prevent the Defence from questioning the independence and impartiality of Witness P-0583 or any other expert witness.²⁵ To the contrary, one of the main reasons why the Chamber rejected the Defence Request was because the Defence could examine Witness P-0583 and challenge his testimony

²⁰ Application, para. 26.

²¹ Application, paras. 25, 28.

²² 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.

²³ Application, para. 24.

²⁴ See para. 9 above.

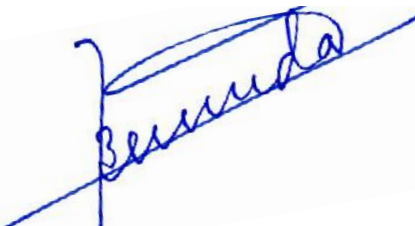
²⁵ *Contra*, Application, para. 29.

by presenting other evidence.²⁶ Nor is it unfair to the Defence that it does not know in advance what weight the Chamber may give to the evidence of a witness before he or she testifies.²⁷ The Defence's argument that the Issues affect the fairness of the proceedings and delay the proceedings because it does not know whether Witness P-0583 will be considered an expert²⁸ misrepresents the Decision. There is no doubt as to Witness P-0583's status: the Chamber rejected the Defence Request and ordered "the appearance of Witness 583 as an expert witness".²⁹

17. Finally, immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings.³⁰ The Issues are largely moot because Witness P-0583 has already testified. In addition, contrary to the Defence's argument,³¹ the Defence had ample opportunity to challenge Witness P-0583's status as an expert witness, and his independence and impartiality, when questioning the witness in court. Accordingly, there is no need for the Appeals Chamber's intervention to determine whether the Defence's rights have been protected in this case.

Conclusion

18. For the above reasons, the Prosecution requests the Chamber to dismiss the Application.



Fatou Bensouda, Prosecutor

Dated this 14th day of September 2017
At The Hague, The Netherlands

²⁶ Decision, p. 6, l. 23 to p. 7, l. 1.

²⁷ *Contra*, Application, para. 30.

²⁸ Application, para. 30.

²⁹ Decision, p. 6, l. 23.

³⁰ *Contra*, Application, paras. 31-32.

³¹ *Contra*, Application, para. 30.