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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

**Decision on the Application of the Defence for Mr Gbagbo of 23 September 2014
(ICC-02/11-01/11-685)**

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

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Other
Pre-Trial Chamber I
Trial Chamber I

The Presidency of the International Criminal Court ("Court") is hereby siesed of an Application from the Defence for Mr Laurent Gbagbo requesting, *inter alia*, the transmission to the parties of the letter of resignation of Judge Kaul and the nomination of an independent expert to evaluate whether the Judge was capable of fulfilling his judicial functions up to 30 June 2014; specifically that his capacities were not affected by his illness or the treatment he was receiving therefor between the date of the submission of the Document Containing the Charges in the case of *The Prosecutor v Laurent Gbagbo* on 13 January 2014 and the Decision Confirming the Charges in the case of 12 June 2014.

I. Procedural History

1. On 17 January 2013, the Prosecutor submitted the Document Containing the Charges in the case of *The Prosecutor v Laurent Gbagbo* ("case") to Pre-Trial Chamber I ("Chamber").¹
2. From 19 to 28 February 2013, the confirmation hearing in the case was held.
3. On 3 June 2013, the Chamber rendered its decision following the confirmation hearing.² The Chamber, by majority, Judge Fernandez de Gurmendi dissenting,³ refused to confirm the charges against the accused, considering that the evidence did not meet the threshold for confirmation, and decided to adjourn to allow the Prosecutor to present more evidence in support of the allegations contained in the Document Containing the Charges of 17 January 2014 in accordance with article 61(7)(c)(i) of the Rome Statute ("Statute").
4. On 13 January 2014, the Prosecutor submitted an amended Document in Support of the Charges in the case.⁴
5. On 12 June 2014, the Chamber, by majority (Judges Kaul and Fernandez de Gurmendi) confirmed charges against Mr Gbagbo ("Decision Confirming the Charges"), considering that there was sufficient evidence to establish substantial grounds to believe that Mr Gbagbo was criminally responsible for the crimes against humanity of murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution under article 25(3)(a),(b) or (d) of the Statute.⁵ In her dissenting opinion Judge Van den Wyngaert maintained that the evidence was still

¹ ICC-02/11-01/11-592-Anx1.

² ICC-02/11-01/11-432.

³ ICC-02/11-01/11-432-Anx-Corr.

⁴ ICC-02/11-01/11-592-Anx1.

⁵ ICC-02/11-01/11-656-Conf, paragraphs 266-278. Redacted to ICC-02/11-01/11-656-Red.

insufficient to meet the required standard to confirm the charges brought on the basis of article 25(3)(a),(b) or (d) of the Statute.⁶

6. On 25 June 2014, Judge Kaul resigned from the Court, effective 1 July 2014,⁷ and passed away on 21 July 2014.⁸
7. On 29 July 2014, the Defence applied for leave to appeal the Decision Confirming the Charges ("Application for Leave to Appeal"),⁹ which was denied on 11 September 2014 ("Decision on the Application for Leave to Appeal"), thereby concluding the pre-trial proceedings in the case.¹⁰
8. On 17 September 2014, the Presidency referred the case to Trial Chamber I for trial.¹¹
9. On 23 September 2014, the Defence filed the present Application ("Application").¹²
10. On 26 September 2014, the Prosecution filed a response to the Application ("Response").¹³

II. The Arguments of the Defence

11. From the history of the proceedings, the Defence argue that, clearly, it was the change of the position of Judge Kaul which led to the decision to confirm the charges against Mr Gbagbo.¹⁴ The Defence present documents seeking to demonstrate that Judge Kaul had informed his friends and acquaintances of his wish to resign for health reasons prior to his official resignation.¹⁵ The Defence further present documents seeking to demonstrate that according to some of Judge Kaul's friends, his illness was diagnosed at the end of March or beginning of April 2014.¹⁶ The Defence note that upon his death, the Court stated that Judge Kaul had passed away following a serious illness.¹⁷
12. In seeking to fulfil their professional duties, the Defence aim to verify, on the one hand, whether the rapid deterioration in the state of health of Judge Kaul had an effect on his capacities as a judge and, on the other hand, whether the treatment he was

⁶ ICC-02/11-01/11-656-Anx, paragraphs 1 and 12.

⁷ ICC-CPI-20140630-PR1023.

⁸ ICC-CPI-20140722-PR1032.

⁹ ICC-02/11-01/11-676-Conf. Redacted to ICC-02/11-01/11-676-Red.

¹⁰ ICC-02/11-01/11-680.

¹¹ ICC-02/11-01/11-682.

¹² ICC-02/11-01/11-685.

¹³ ICC-02/11-01/11-687.

¹⁴ Application, paragraph 18.

¹⁵ Application, paragraph 20.

¹⁶ Application, paragraph 21.

¹⁷ Application, paragraph 23, citing ICC-CPI-20140722-PR1032.

receiving prevented him from carrying out his judicial duties.¹⁸ The Defence argue that it is important to shed light on the circumstances in which the Decision Confirming the Charges was taken since it not only affects the destiny of Mr Gbagbo but also the future of the Ivory Coast and the credibility of the Court.¹⁹ The Defence recall that the case against Mr Gbagbo is the most important and complex before the Court due to: the number and identities of the persons concerned; the duration of the crisis in the country; and its political, economic and financial implications.²⁰ The Defence note the complexity of the judicial proceedings given: the number of incidents and locations relied upon by the Prosecutor; the fact that the case has had the longest confirmation proceedings in the history of the Court; that the case is the most substantive before the Court and founded on thousands of pieces of evidence.²¹ The Defence argue that both the complexity and importance of the case amplify the necessity of the complete immersion of the judges in the case file, particularly in the period between 13 January 2014 and 12 June 2014.²²

13. The Defence argue that Judge Kaul's illness appeared to have manifested itself in the course of the first trimester of 2014, a crucial period when the Chamber should have been entirely devoted to the case. In the period between 13 January 2014 and 12 June 2014, crucial documents, which were long and particularly complex both from a legal and factual perspective, were exchanged by the parties.²³ Between 13 January 2014, the date the Prosecutor submitted her amended Document in Support of the Charges, and 30 June 2014, 61 submissions were exchanged, including the 344 page Defence Observations.²⁴ As the judges could only decide whether to confirm the charges after a careful review of all the elements that had been submitted by the parties, their workload would have been particularly heavy, and they would have been particularly active, throughout this period.²⁵ Furthermore, given that the 344 page Defence Observations, which crucially contested key Prosecution evidence, was in French, the Defence note that an English translation of that document did not become available before the end of May 2014. It is therefore of crucial importance, it is argued, that between late May and the weeks preceding the Decision Confirming the Charges on

¹⁸ Application, paragraph 25.

¹⁹ Application, paragraphs 25-26.

²⁰ Application, paragraph 26.

²¹ Application, paragraph 27.

²² Application, paragraph 29.

²³ Application, paragraph 30.

²⁴ Application, paragraph 31.

²⁵ Application, paragraph 32.

12 June 2014, Judge Kaul was fit to work and was in possession of all his faculties.²⁶ Moreover, the Defence note that Judge Kaul participated in the decision on the confirmation of charges of 9 June 2014 in the case against Mr Ntaganda, which would have cost him a substantial amount of additional work.²⁷

14. The Defence submit that a judge must be in possession of all his intellectual and physical capacities in order to devote himself to a case file and understand very different and complex situations. It is argued that this is particularly true at the Court, and especially in the case against Mr Gbagbo which requires the judges to immerse themselves in a specific cultural and political context, in addition to responding to the particularly complex legal issues raised in this case.²⁸
15. The Defence submit that it is commonly accepted that illness is a factor leading to the incapacity of a judge.²⁹ The Defence note that fatigue is equally a reason for a judge to withdraw from a case, in reliance upon the findings of the Appeals Chamber of the ICTY in the context of a judge who had been asleep during the hearing, stating that: "[i]f a judge suffers from some condition which prevents him or her from giving full attention during the trial, then it is the duty of that judge to seek medical assistance and, if that does not help, to withdraw from the case".³⁰ The Defence argue that a fair trial requires a judge to be attentive to the evidence and submissions of the parties and a miscarriage of justice can be constituted by a failure to maintain the necessary supervision and control of the trial.³¹ The Defence argue that the Court has itself recognised that ill health constitutes a valid bar to exercising judicial functions, pointing to the fact that in the case against Mr Katanga, Trial Chamber II delayed the issuance of its Judgment due to the health of a judge.³²
16. The Defence argue that, as such, given the gravity of the illness suffered by Judge Kaul and the necessary strength of its treatment,³³ it is essential to verify that at the crucial time, commencing with the submission of the Document Containing the Charges on 13 January 2014 and until the Decision Confirming the Charges of 12 June 2014, Judge Kaul's capacities were not affected by his illness or the treatment he

²⁶ Application, paragraphs 33 to 36.

²⁷ Application, paragraph 37.

²⁸ Application, paragraph 40.

²⁹ Application, paragraph 41, citing the rule 26 of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon and rule 15*bis* of the International Criminal Tribunal for the former Yugoslavia ("ICTY").

³⁰ Application, paragraph 42, citing the Judgment of the Appeals Chamber of 20 February 2001, in the case of *The Prosecutor v Delalić* IT-96-21-A.

³¹ Application, paragraphs 43-44.

³² Application, paragraphs 46-47, citing ICC-01/04-01/07-3430, paragraph 1.

³³ Application, paragraph 52.

was receiving.³⁴ If Judge Kaul was unable to fulfil all or some of his obligations, such as participating in deliberations and giving instructions to legal staff, the case was judged by only two judges.³⁵

17. The Defence point to jurisprudence of the Court recognising the possibility of reconsideration in certain circumstances,³⁶ and state that they need first to verify whether Judge Kaul had his required faculties in order to be in a position to decide whether it is necessary to make such a request.³⁷

18. The Defence make their request to the Presidency in view of articles 38 and 41 of the Statute which respectively charge the Presidency with the proper administration of the Court and responsibilities relating to the excusal and disqualification of judges. It is maintained that this present matter concerns the proper administration of justice, which if left unanswered could entail serious adverse consequences for the rights of Mr Gbagbo and the judicial proceedings before the Court as a whole.³⁸

19. The Defence request the Presidency to:

- Transmit to the parties the letter of resignation of Judge Kaul and all the communications pertaining to his state of health preceding his letter of resignation and
- Nominate an independent doctor as an expert to transmit to the parties the extracts of Judge Kaul's medical file or a summary thereof which will permit them to evaluate whether the judge was capable of fulfilling his judicial functions until 30 June 2014 and
- Communicate all other pertinent elements to the parties.

III. The Response of the Prosecution

20. The Prosecution argue that the Application should be dismissed as a procedurally flawed, "veiled and untimely attempt" to create an additional means to challenge the Decision Confirming the Charges, which may be challenged only before the Appeals Chamber by means of an appeal under article 82(1)(d), with leave of the Pre Trial Chamber.³⁹ The Prosecution note that the Defence applied for such leave (which was

³⁴ Application, paragraph 49.

³⁵ Application, paragraph 53.

³⁶ Application, paragraph 54, citing ICC-01/05-01/08-T-42-CONF-ENG, page 2, line 2 of page 4, line 13 cited in ICC-01/04-01/062705, paragraph 14, ICC-01/04-01/06-2705, paragraph 13.

³⁷ Application, paragraphs 54-55.

³⁸ Application, paragraphs 64-65.

³⁹ Response, paragraphs 1 and 4-5.

denied by the Chamber) after both the resignation and death of Judge Kaul, and did not raise any concern as to Judge Kaul's judicial capacity therein.⁴⁰

21. The Prosecution argue that the reference in the Application to 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.⁴¹ It is also argued that the procedure to disqualify a sitting judge is procedurally distinct from the review of an allegedly erroneous or unjust decision. Moreover, the Prosecution argue that whereas the proper administration of the Court is the general responsibility of the Presidency, the proper administration of justice, in the circumstances of a particular case, is the responsibility of the relevant Chamber.⁴²
22. The Prosecution further submit that the Defence lack a legitimate purpose in seeking the information sought in the Application, since an application for reconsideration is granted where "a decision was made in ignorance of relevant information".⁴³ It is argued that the Chamber in this case must necessarily have been fully aware of all the material circumstances surrounding Judge Kaul's condition and that the Application is directed to ascertaining unknown information.⁴⁴ The Prosecution further submit that a decision on the confirmation of charges may not be amenable to reconsideration, since the Trial Chamber is responsible for the conduct of subsequent proceedings once the charges are confirmed and the Pre-Trial Chamber has addressed any resulting applications for leave to appeal.⁴⁵
23. The Prosecution argue that the materials requested by the Defence are unlikely to provide information of particular relevance or probative value upon Judge Kaul's judicial capacity.⁴⁶ The Prosecution submit that beyond the fact of Judge Kaul's illness and subsequent death, the Defence have no basis to justify its concern.⁴⁷ It is argued that the "basic premise" of the Application "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 [the Chamber]".⁴⁸ It is submitted that there is no evidence to suggest that Judge Kaul or

⁴⁰ Response, paragraphs 5-6.

⁴¹ Response, paragraph 6.

⁴² Response, paragraph 6.

⁴³ Response, paragraph 7, citing a decision of Trial Chamber I in the case against Mr Lubanga, ICC-01/04-01/06-2705.

⁴⁴ Response, paragraph 7.

⁴⁵ Response, paragraph 9.

⁴⁶ Response, paragraph 9.

⁴⁷ Response, paragraph 10.

⁴⁸ Response, paragraph 1.

indeed the other Judges of the Chamber fell below the required standard of conduct.⁴⁹ Citing case law of the Plenary of Judges of the Court and the ICTY, the Prosecution argue that Judge Kaul is entitled to the strong presumption that he would have withdrawn from the proceedings or informed the other members of the Chamber if he were unable to meet his judicial obligations.⁵⁰ It is further submitted that “[t]o 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” and the absence of any measures or discussion on the matter, in the Decision Confirming the Charges or the Decision on the Application for Leave to Appeal, assumes that the other members of the Chamber acquiesced to Judge Kaul’s involvement in the case.⁵¹

24. The Prosecution argue, by analogy with article 74(4) and rule 142(1), that the Application “imperils the secrecy of judicial deliberations” without the requisite evidence to establish improprieties in the deliberation process and further that it gives little consideration to the privacy to which Judge Kaul and his family remain entitled.⁵² Finally, it is argued that Mr Gbagbo’s interests may be properly defended at trial, which requires a higher standard of proof than the confirmation proceedings.⁵³

IV. Determination of the Presidency

25. The instant Application requests *inter alia*: (i) that the resignation letter of Judge Kaul be provided to the parties and (ii) the appointment of an independent expert to assess whether the Judge was capable of fulfilling his judicial functions up to 30 June 2014.
26. The Presidency notes that the memorandum informing of Judge Kaul’s resignation, wherein he requests to be relieved from his duties at the Court and to be replaced in Pre-Trial Chambers I and II and as President of the Pre-Trial Division on the grounds of ill-health, contains personal information relating to the Judge and as such shall not be transmitted to the parties.
27. In relation to the second request, the Presidency notes that the Decision Confirming the Charges was filed on 12 June 2014. Whereas the Application for Leave to Appeal the Decision Confirming the Charges was filed by the Defence on 29 July 2014, after

⁴⁹ Response, paragraph 14.

⁵⁰ Response, paragraphs 11-13.

⁵¹ Response, paragraph 13.

⁵² Response, paragraphs 1 and 16-18.

⁵³ Response, paragraph 20.

both the resignation of Judge Kaul, notice of which was published on 30 June 2014,⁵⁴ and the news of his subsequent death, notice of which was published on 22 July 2014,⁵⁵ the Application for Leave to Appeal did not make any challenge to the capacity of Judge Kaul to hear the case at the pre-trial level. Further, the present Application to the Presidency was filed only on 23 September 2014, and after the Presidency had assigned the case, and transferred the record of proceedings thereof, to Trial Chamber I on 11 September 2014. It was incumbent on the Defence to make any challenge against the Judge: (i) before the Chamber, (ii) within the Application for Leave to Appeal submitted to the Chamber or (iii) before the Presidency prior to the conclusion of the pre-trial proceedings before the Chamber.

28. Nonetheless, the Presidency was at all relevant times kept abreast of the medical condition of Judge Kaul up to his resignation from the Court. The Judge contributed actively to the work of both pre-trial chambers as well as in his role as President of the Pre-Trial Division up to the time of his resignation. It was absolutely clear to all concerned that the mental capacity of the judge was unimpaired up to the time of his resignation from the Court.

29. In light of the above, the second request is dismissed.

The Application is dismissed.

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


Judge Sang-Hyun Song
President

Dated this 7 October 2014

At The Hague, The Netherlands

⁵⁴ ICC-CPI-20140630-PR1023.

⁵⁵ ICC-CPI-20140722-PR1032.