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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

**Confidential, *EX PARTE*, only available to the Chamber, the Registry, the
Prosecution and the Defence for Laurent Gbagbo**

**Prosecution's response to Laurent Gbagbo's application for leave to appeal the
"Order to provide Appointed Expert with access to Mr Gbagbo's medical record"**

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. Laurent Gbagbo Defence's request for leave to appeal the Trial Chamber's decision ordering Dr Lamothe's access to Mr Gbagbo's medical records without delay¹ should be dismissed. Yet again, the Gbagbo Defence reverts—indiscriminately—to an application under article 82(1)(d) of the Statute, without any effort to meet the stringent test for leave to appeal. And again, the Application represents no more than “a tool for expressing [the Defence's] disagreement with the decision taken by the Chamber”,² or “an automatic reflex” against the Decision.³
2. The Defence's continuing disagreement with this Decision, and the Chamber's prior decisions, cannot, and indeed do not, result in any appealable issues.⁴ 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.
3. As with its previous applications, the Defence continues to make several gratuitous and inappropriate comments.⁵ Indeed, although the Defence alleges that

¹ ICC-02/11-01/15-315-Conf-Exp-Red (“Application”); ICC-02/11-01/15-302-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 See *e.g.*, ICC-02/11-01/15-274-Conf-Exp, paras. 30-31.

“la Chambre a révélé un biais contre l’intéressé”,⁶ it does so without any foundation or basis whatsoever. Such conduct—making blanket allegations against the Chamber based on nothing but conjecture and speculation—is neither responsible nor appropriate. The Chamber was entitled to question Mr Gbagbo’s good faith in making unsubstantiated submissions.⁷ Equally, the Chamber is entitled to control the proceedings before it,⁸ including when a Party persists in making unsubstantiated submissions which do not assist the Chamber and refuses to comply with its directions. Moreover, in these circumstances, even though the Chamber could have resorted to far stronger measures, potentially under article 71 of the Statute and the Code of Professional Conduct for counsel,⁹ it did not. The Chamber limited itself to questioning “[Mr Gbagbo’s] good faith” in raising unsubstantiated concerns regarding Dr Lamothe. Moreover, the Chamber’s comment questioning Mr Gbagbo’s good faith relates to procedural matters, and does not in any event prejudice the merits of the case. The Defence’s allegations are without merit. The Application should be dismissed on this basis alone.

⁶ Application, paras. 19-23.

⁷ Decision, para. 14.

⁸ See e.g., article 64(6)(f), article 64(9)(b), rule 134(3), and regulation 29 of the Regulations of the Court.

⁹ See e.g., article 71(1), Statute: The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions [...]; See also article 7(1), Code of Professional Conduct for counsel: Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Office of the Prosecutor, the Registrar and the members of the Registry, the client, opposing counsel, accused persons, victims, witnesses and any other person involved in the proceedings; article 24 (1), Code of Professional Conduct for counsel: Counsel shall take all necessary steps to ensure that his or her actions or those of counsel’s assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute; article 24(3), Code of Professional Conduct for counsel: Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous. article 31, Code of Professional Conduct for counsel: Counsel commits misconduct when he or she: (a) Violates or attempts to violates any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her. See also ICC-01/04-01/06-2433, para. 53, where the Chamber expressed “the strongest disapproval” against a Party’s actions; ICC-01/09-42, para. 22, where the Chamber expressed “its deprecation” regarding a Party’s course of action in the case. See generally ICC-01/11-01/11-175 OA3, para. 35.

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. The two Issues raised by the Defence are not appealable. Both result from the Defence’s misapprehension or selective reading of the Decision. Equally, they both merely disagree with the Decision, and express conflicting opinions. Neither identifies “[a]n identifiable subject or topic requiring a decision for its resolution.”¹⁰

i. The First Issue is not appealable

6. The First Issue—whether the Chamber showed bias in calling into question Mr Gbagbo’s good faith in making submissions¹¹—is not appealable. The Defence’s submissions are mere conjecture, and significantly, they misread the Decision and the record.

7. The Defence is simply wrong to claim that “[...] *la Chambre qui a volontairement ignoré ces réserves, n’en faisant pas mention dans la décision.*”¹² To the contrary, the Chamber—as it stated—“consistently sought the views of Mr Gbagbo[...]”.¹³ Indeed, the Chamber noted specifically the very submissions of 15 September 2015 the

¹⁰ 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.

¹¹ Application, paras. 19-23.

¹² Application, para. 21.

¹³ Decision, para. 14.

Defence now claims it ignored.¹⁴ The Chamber further noted, among others, the Defence's submissions raised in its First Notification.¹⁵ Because the Defence's arguments misread the Decision, they cannot persuade.

8. Further, the Defence merely disagrees with the Chamber's findings. The Defence's continuing discontent with Dr Lamothe's appointment as one of the medical experts¹⁶ cannot transform this Issue into an appealable one. To the extent that such disagreement relates to earlier submissions made and decisions rendered,¹⁷ this lies beyond the Decision's remit. It does not even arise from this Decision.

9. Moreover, the Defence's submissions alleging bias are speculative. The Defence offers no foundation for its sweeping assertions, including "[l]es Juges semblent lui reprocher d'avoir refusé d'avaliser le choix d'un expert proposé par le Procureur [...]".¹⁸ Nor is it clear how "[l]'approche retenue par les Juges, fondée sur ce biais, questionne l'impartialité des Juges [...]".¹⁹ Not only are such claims unfounded; they are also inappropriate. As noted above, the Chamber was entitled to regulate the proceedings before it, by cautioning the Defence from making unsubstantiated submissions. The Defence's disagreement with the Chamber should not permit the Defence to attack the Chamber's propriety.

¹⁴ See Decision, para. 14, fn. 30, noting Defence Supplemental Submissions, ICC-02/11-01/15-221-Conf-Exp, para. 38, in which the Defence raised a concern about whether information had been leaked to the media, without substantiating this assertion: "*Concernant le Docteur Lamothe, il n'a pas vu Laurent Gbagbo depuis trois ans. Dans ces conditions, une relation de confiance peut être longue à reconstruire, d'autant que des éléments du précédent rapport du Docteur Lamothe ont été reproduits dans les médias.*" Contra Application, para. 20, citing this very same text.

¹⁵ Decision, para. 14, fn. 30, noting First Notification, ICC-02/11-01/15-266-Conf-Exp, para. 3, "*En effet, Laurent Gbagbo considère que Monsieur Lamothe n'a pas eu un comportement professionnel lors de la première expertise, privilégiant une approche prétendument de connivence à une approche professionnelle et trahissant dans ses rapports le sens de leurs échanges, sortant par exemple des déclarations de Laurent Gbagbo de leur contexte. Par conséquent, du point de vue de Laurent Gbagbo il n'existe pas de relation de confiance, pourtant indispensable à la bonne menée d'une expertise de ce type, entre l'intéressé et l'expert désigné.*"

¹⁶ Application, paras. 19-23.

¹⁷ See e.g., Application, paras. 21-22.

¹⁸ Application, para. 22.

¹⁹ Application, para. 23.

10. For these reasons, since the First Issue merely disagrees with the Chamber's findings, misreads the Decision, and advances wholly unsubstantiated claims, it is plainly not appealable. It should accordingly be dismissed.

ii. The Second Issue is not appealable

11. The Second Issue—whether the Decision lacked a legal basis²⁰—is equally not appealable. It misreads the Decision and does not arise from it. It merely disagrees with the Chamber's findings. Finally, it also misapprehends this Court's statutory regime.

12. The Defence wrongly claims regulation 156(2) of the Regulations of the Registry ("RoR") as its primary legal basis to deny Dr Lamothe access to Mr Gbagbo's medical records.²¹ In doing so, the Defence reads the provision selectively, disregarding other sub-rules contained in the same provision.²² Regulation 156(5) mandates the Registrar to inform the Chamber, should a detained person refuse consent to access his medical record.²³ Further, regulation 156(3) accounts for certain situations where medical records may be disclosed without the detained person's consent.²⁴ Thus, the Defence's suggestion that the accused's consent to disclosure of his medical records²⁵ trumps everything else is not only wrong, but illogical. Such argument would entitle the accused to be the only person capable of determining his fitness for trial, and deprive the Chamber of its role as decision-maker. This cannot be. For the same reasons, the Defence is not assisted by referring to the decision of the Single Judge of the Pre-Trial Chamber rejecting the Prosecution's request for disclosure of certain

²⁰ Application, paras. 16-24.

²¹ Application, paras. 27-29, 33.

²² See Decision, para. 16.

²³ Regulation 156(5), RoR.

²⁴ Regulation 156(3), RoR.

²⁵ Application, para. 29.

medical records at an earlier stage.²⁶ Different Judges are entitled to decide differently based on the circumstances before them including the stage of proceedings and particular procedural step in question.

13. Significantly, in relying on one sub-rule of the RoR (regulation 156(2)), the Defence fails to acknowledge the primacy of the Statute, the Rules and the Regulations of the Court over these Regulations.²⁷ Indeed, as regulation 1(1) of the RoR clarifies, the Regulations [of the Registry] “shall be read subject to the Statute, the Rules and the Regulations of the Court.”²⁸ And as rule 14 states, these Regulations “govern the operation of the Registry.”²⁹ They cannot supplant the Chamber’s own powers to conduct the proceedings as required as contained in the Statute and the Rules. And indeed, this is what the Chamber did.

14. The Chamber first correctly determined that an accused’s right to privacy is not absolute.³⁰ It then found that “in situations where an accused does not consent to the consultation of his medical records, but the information is essential to central issues bearing on the trial”, “disclosure may be ordered pursuant to Article 64(8)(a) of the Statute and Rules 113 and 135 of the Rules if it is necessary and proportionate to the legitimate aim pursued, including the Chamber’s obligation to ensure that the accused is able to exercise his fair trial rights pursuant to, *inter alia*, Article 67(1) of the Statute.”³¹

15. Moreover, the Defence merely disagrees with the Chamber’s finding on the [non] applicability of regulation 156 of the RoR. The Chamber expressly considered the Defence’s reliance on this provision and rejected it.³² Re-litigating a lost point

²⁶ Application, para. 28, referring to ICC-02/11-01/11-208-Conf, paras. 9-11.

²⁷ See *e.g.*, article 21(1), Statute: The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.

²⁸ Regulation 1, RoR.

²⁹ Rule 14.

³⁰ Decision, para. 17.

³¹ Decision, para. 17.

³² Decision, para. 16.

through this Application cannot assist the Defence. Nor is the Defence persuasive when it relies on generic references on "*le secret médical*"³³ at this stage.

16. Neither, contrary to the Application,³⁴ did the Chamber err in its reasoning. The Defence's misunderstanding of the Decision pervades its Application.

17. First, the Defence speculates by claiming that the Chamber examined the issues from the point of view of "*un observateur hypothétique*", and not "*l'intéressé*".³⁵ The relevance of this submission is not apparent. Nor is it founded. Further, although the Defence claims "*un renversement complet de la logique juridique*" and "*aucun lien logique*",³⁶ its submissions remain its subjective opinion. They are unsupported.

18. Second, as noted above, the Defence's piecemeal reliance on regulation 156(2) is inapposite.³⁷ Nor—given the express statutory provisions conferring the Chamber with the power to rule on such matters³⁸—is it clear how the Chamber supposedly "*inventer de nouvelles [exceptions explicites] pour obtenir la solution qu'elle souhaite [...]*".³⁹

19. Third, although the Defence claims that the Statute and Rules do not specifically permit the Chamber to disclose medical records without the accused's consent,⁴⁰ it fails to show error. As the Chamber correctly noted, it cannot be prevented "from fully exercising its obligations under the Statute and the Rules on the basis of a regulation of the Registry, an outcome incompatible with Article 21(1) of the Statute, as duly reflected in Regulation 1(1) of the Regulations of the Registry."⁴¹ At this stage, the Defence's mere disagreement with the Chamber's findings and the Court's statutory framework cannot persuade.

³³ Application, paras. 24-26.

³⁴ Application, paras. 30-43.

³⁵ Application, para. 31.

³⁶ Application, paras. 31-32.

³⁷ *Contra* Application, para. 33.

³⁸ Decision, para. 17.

³⁹ Application, paras. 35-36.

⁴⁰ Application, paras. 37-38.

⁴¹ Decision, para. 16.

20. Fourth, the Defence expresses its discontent with the Chamber's reliance on the law of the European Court of Human Rights (ECtHR).⁴² But the Application shows no error. Merely because the Defence advances a different—although unsubstantiated—view of the law does not make the Issue appealable. Nor is the Application the avenue to re-litigate the Defence's earlier submissions.

21. Lastly, the Defence's submissions in paragraph 34 (and the heading 1.2.2.2) remain redacted.⁴³ The Prosecution is therefore unable to specifically respond to them. However, to the extent that these submissions may reiterate the Defence's earlier misapprehension, the Prosecution relies on its submissions already advanced.

22. Because the Second Issue misreads the Decision and merely disagrees with it, it is not appealable. It should therefore be dismissed.

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

23. The article 82(1)(d) criteria are cumulative. A failure to fulfil any one of these criteria is fatal to the Application.⁴⁴ Because the Application fails to demonstrate that any of the Issues are appealable, it should be dismissed without further consideration.

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

25. The Defence raises arguments largely similar to its earlier application of 6 October 2015, seeking leave to appeal on a related issue.⁴⁵ They remain unpersuasive.

26. First, the Application fails to demonstrate any impact on the fairness of the proceedings. Contrary to the Defence's submissions,⁴⁶ there is little doubt that the

⁴² Application, paras. 39-43.

⁴³ Application, para. 34, heading 1.2.2.2.

⁴⁴ 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 are cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

⁴⁵ *See* ICC-02/11-01/15-274-Conf-Exp, paras. 33-44.

⁴⁶ Application, paras. 44-50.

issue of an accused's fitness to stand trial is crucially important. However, the Chamber has not yet decided if Mr Gbagbo is fit to stand trial. The issue, therefore, in the present case is still not ripe for determination. This renders the Defence's claims of unfairness premature and abstract. Moreover, if and when the issue may arise, the Defence may raise the concerns it may have in the appropriate way. It is still afforded a further opportunity to submit observations on the Appointed Experts' reports prior to trial.⁴⁷ It may also question the Appointed Experts concerning their reports.⁴⁸ In these circumstances, there cannot be any impact on the fairness of the proceedings.

27. Second, the Defence does not argue an impact on the expedition of the proceedings. Nor does the Application show any such impact.

28. Third, the Application does not argue or show that the outcome of the trial will be affected in any way.

29. Finally, contrary to the Application,⁴⁹ 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.

⁴⁷ ICC-02/11-01/15-253-Conf, para. 20.

⁴⁸ ICC-02/11-01/15-322, para. 9, p.8.

⁴⁹ Application, paras. 51-53.

Conclusion

30. As shown above, both Issues are not 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 30th day of October 2015

At The Hague, The Netherlands