

**Cour
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**International
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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

Prosecution's response to Laurent Gbagbo's application for leave to appeal the "Decision granting the request of the Gbagbo Defence and re-scheduling opening statements" and the "Order on the classification of the Expert Reports and other related documents"

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 latest Application filed by the Defence for Laurent Gbagbo,¹ under article 82(1)(d) of the Statute, again fails to recognise the exceptional nature of this remedy. Although it seeks to appeal two Decisions—both relating to the Parties' and the Participant's presence at the hearing to discuss issues related to Mr Gbagbo's fitness for trial, and to question the Appointed Experts,²—it fails to raise any appealable issues.³ The Defence does no more than speculate and disagree with the two Decisions. As with the Defence's previous article 82(1)(d) applications, this Application represents no more than "a tool for expressing [the Defence's] disagreement with the decision[s] taken by the Chamber",⁴ or "an automatic reflex" against the Decision.⁵
2. Further, the Application fails to meet any of the remaining criteria under article 82(1)(d). It does not demonstrate any impact on the fairness and expedition of the proceedings, or the outcome of the trial. Nor does it show that the Appeals Chamber's immediate intervention is necessary.

¹ ICC-02/11-01/15-330-Conf ("Application").

² ICC-02/11-01/15-322 ("Decision rescheduling opening statements"); ICC-02/11-01/15-329-Conf ("Order classifying the expert reports"). Also, "Decisions".

³ Here, "Issues".

⁴ 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."

⁵ 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."

Level of Confidentiality

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

Submissions

4. The two Issues raised by the Defence are not appealable. They fail to identify “[a]n identifiable subject or topic requiring a decision for its resolution.”⁶ Rather, the Defence merely disagrees with the Decisions, and expresses conflicting opinions. Moreover, it impermissibly litigates issues that have been previously settled, and thus lie beyond the scope of the Decisions.

i. The First Issue is not appealable

5. The First Issue—whether the Chamber erred in allowing the Legal Representative for Victims⁷ and the Defence for Charles Blé Goudé to participate in the hearing to discuss Mr Gbagbo’s medical issues and to question the Appointed Experts⁸—is not appealable. The Defence’s submissions are speculative, and merely disagree with the Chamber’s findings and its conduct of the hearing.

6. First, the Defence raises issues beyond the remit of the two Decisions. Although the Chamber has previously found that Mr Gbagbo’s right to confidentiality of his medical information is not absolute,⁹ the Defence continues to dispute this finding.¹⁰

⁶ 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.

⁷ LRV.

⁸ Application, paras. 16-24.

⁹ See e.g., ICC-02/11-01/15-302-Conf (“Order of 20 October 2015”), para. 17.

That matter is, however, settled: Mr Gbagbo's right to privacy of his medical information is not absolute, and can indeed be limited. And no matter the Defence's continuing discontent—claiming “*la Chambre a procédé une inversion de la logique*”¹¹—it cannot give rise to an appealable issue at this stage.

7. Second, the Defence's submissions are inaccurate. In claiming that the Chamber failed to properly consider the issue,¹² the Defence misreads the Decisions. Indeed, in the Order classifying the expert reports, the Single Judge first recalled that the Appointed Experts were retained “in order to facilitate the adjudication of any issues concerning Mr Gbagbo's fitness to stand trial *as well as any practical modalities needed to facilitate his attendance at trial.*”¹³ Both the LRV and the Blé Goudé Defence were invited to attend the hearing on this basis.¹⁴ The Single Judge further recognised that Mr Gbagbo's privacy rights should be balanced with Mr Blé Goudé's right to be tried without undue delay (article 67(1)(c)) and the interests of the victims (article 68(3)). Accordingly, the Single Judge allowed the LRV and the Blé Goudé Defence to receive confidential redacted versions of the Expert Reports, so that they may make oral submissions at the hearing. Yet, the Single Judge limited the LRV's and the Blé Goudé Defence's roles (questioning the Experts and making oral submissions) to “issues specifically pertaining to their respective interests under Article 67(1)(c) and 68(3) of the Statute.”¹⁵ The Defence's submissions fail to properly reflect any of these findings. They also merely disagree with the Chamber's assessment and balancing of the various competing interests at stake. Likewise, the Defence also disputes the Chamber's conduct of the hearing: a routine trial management matter on which the Defence's submissions cannot assist.

¹⁰ Application, paras. 16-17.

¹¹ Application, para. 17.

¹² Application, paras. 17, 19-24.

¹³ Order classifying the expert reports, para. 7. (emphasis added).

¹⁴ Order classifying the expert reports, para. 7.

¹⁵ Order classifying the expert reports, paras. 7, 10, 11.

8. Third, the Defence's arguments contesting the participation of the LRV and the Blé Goudé Defence in the hearing are premature and speculative.¹⁶ In claiming that *"il n'existe aucune raison pour que la Défense de Charles Blé Goudé soit autorisée à interroger les experts et à donner un avis fondé sur leurs rapports"*,¹⁷ the Defence prejudices the Blé Goudé Defence's intended line of questioning and the outcome of the hearing even before the Experts are questioned. Nor can the Gbagbo Defence conclude definitively at this stage—as it does— that *"[l]a discussion sur l'état de santé de Laurent Gbagbo ne peut pas, en tant que telle, porter atteinte aux droits de Charles Blé Goudé à ce stade."*¹⁸ These submissions remain the Defence's subjective opinion.

9. Likewise, the Defence's claims disputing the LRV's role at the hearing are mere conjecture. Once again, in claiming that *"[l]'intérêt des victimes ne peut donc jamais constituer une raison valable pour justifier une atteinte aux droits fondamentaux des Accusés"*,¹⁹ the Defence puts the cart before the horse. It prematurely posits the outcome of the questioning of the Experts before such has even taken place. Nor, contrary to the Application,²⁰ could the Chamber predict which particular interests of the victims would be affected in advance of the hearing. Moreover, the Defence hypothesises on the LRV's intended line of questioning at the hearing without properly acknowledging that any such questioning would be limited to issues concerning the victims' interests.²¹

10. Nor is the Application assisted by referring to earlier proceedings before the Pre-Trial Chamber on the extent of the LRV's role in determining the suspect's fitness to participate in proceedings against him.²² Different Judges are entitled to decide differently based on the circumstances before them, including the stage of proceedings and particular procedural step in question. The Trial Chamber's

¹⁶ Application, para. 15.

¹⁷ Application, para. 21.

¹⁸ Application, para. 21.

¹⁹ Application, para. 22.

²⁰ Application, para. 23.

²¹ Application, paras. 22-23.

²² Application, para. 24.

decision at a later stage of the proceedings need not mirror that of the Single Judge during the pre-trial phase.

11. Fourth, the Defence fails to take responsibility for its own failure to make substantiated and persuasive submissions. As the Chamber noted, “[t]he Gbagbo Defence only makes general reference to the confidentiality of medical information, but it does not in any way identify specific information that in its view needs to be withheld from the Blé Goudé Defence or the LRV or the reasons why withholding this access is necessary.”²³ Therefore, the Defence’s arguments to limit participation by the LRV and the Blé Goudé Defence were unsuccessful because they were unsupported. At this stage, by unduly criticising the Chamber,²⁴ the Defence attempts to obfuscate its own failure. However, an application for leave to appeal is not the proper channel to remedy a Party’s past failures to properly substantiate claims.

12. Because the First Issue advances unsupported claims and merely disagrees with the Decisions and the Chamber’s conduct of the hearing, it is not appealable. It should accordingly be dismissed.

ii. The Second Issue is not appealable

13. The Second Issue—whether the Chamber failed to provide a reasoned opinion²⁵—is equally not appealable. Yet again, the Defence merely disagrees with the Chamber’s conduct of the hearing and its decision allowing the LRV and the Blé Goudé Defence to participate in the hearing. The Defence also misapprehends the Court’s jurisprudence on reasoned opinion.

²³ Order classifying the expert reports, para. 7.

²⁴ Application, paras. 18-19.

²⁵ Application, paras. 25-30.

14. Contrary to the Application,²⁶ the Decisions are properly reasoned. As the Appeals Chamber has stated, 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. The extent of the reasoning will depend on the circumstances of each case.²⁷ Accordingly, the Chamber appropriately reasoned its Decisions, and limited the LRV's and the Blé Goudé Defence's participation at the hearing to "issues specifically pertaining to their respective interests under Article 67(1)(c) and 68(3) of the Statute."²⁸ The Defence fails to show that the Chamber did not substantiate its Decisions with adequate reasoning.

15. Rather, the Defence merely speculates that "*[l]es fluctuations dans l'approche de la Chambre dans les décisions successives*" "*sembler montrer les hésitations des Juges[...]*."²⁹ Equally, the Defence hypothesises that "*[c]es décisions successives donnent à voir une forme d'incertitude.*"³⁰ These submissions fail to show that the Chamber erred in any manner.

16. Further, the Defence's position is illogical. Merely because the discussion of Mr Gbagbo's medical issues was earlier limited to the Gbagbo Defence, the Prosecution and the Registry, the Chamber cannot now be precluded from having a fuller discussion of the same issue with all the Parties and the LRV at this stage of the proceedings.³¹ Based on the different competing interests at hand, the Chamber was entitled to regulate the conduct of the hearing as the proceedings advanced and as was required.

17. Because the Second Issue merely disagrees with the Decisions and the conduct of the hearing, it is not appealable. It should therefore be dismissed.

²⁶ Application, paras. 25-30.

²⁷ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

²⁸ Order classifying the expert reports, para. 7.

²⁹ Application, para. 26.

³⁰ Application, para. 30.

³¹ *Contra* Application, paras. 25-30.

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

18. The article 82(1)(d) criteria are cumulative. A failure to fulfil any one of these criteria is fatal to the Application.³² Because the Application fails to demonstrate that any of the Issues are appealable, it stands to be dismissed on this basis alone.

19. Nevertheless, the Defence fails to meet the remaining article 82(1)(d) criteria. As with the Defence's earlier applications, this Application remains unpersuasive.

20. First, the Application fails to demonstrate any impact on the fairness of the proceedings. Contrary to the Application,³³ when the Chamber is still to decide on Mr Gbagbo's fitness to stand trial, the Defence's claims of unfairness are premature and abstract. Moreover, if and when the issue may arise, the Defence may raise any concerns it may have in the appropriate way.

21. Although the Defence attempts to challenge the procedure followed,³⁴ it fails to acknowledge the ample safeguards that the Chamber has built into the process. The Defence is still afforded a further opportunity to submit observations on the Appointed Experts' reports prior to trial.³⁵ It may also question the Appointed Experts concerning their reports.³⁶ Likewise, the Chamber recalled that the examination of the experts would be confined to "the methodology for their examinations and the contents of their reports" and would be "tightly managed by the Chamber."³⁷ Significantly, the LRV and the Blé Goudé Defence may participate only to the extent that the issues "specifically pertain to their interests."³⁸ Moreover, the hearing will be conducted in private session, limited only to the Gbagbo Defence,

³² 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."

³³ Application, paras. 31-37.

³⁴ Application, para. 37.

³⁵ ICC-02/11-01/15-253-Conf ("Order of 30 September 2015"), para. 20.

³⁶ Decision rescheduling opening statements, para. 9, p. 7.

³⁷ Order classifying the expert reports, para. 9.

³⁸ Order classifying the expert reports, paras. 7, 10, 11.

the Blé Goudé Defence, the Prosecution, the LRV, and the Registry.³⁹ Like the Parties, the LRV is equally bound by the Code of Professional Conduct for counsel *vis-à-vis* confidential information.⁴⁰ In these circumstances, there is no impact on the fairness of the proceedings.

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

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

24. Finally, contrary to the Application,⁴¹ the Appeals Chamber's immediate resolution of the matter will not materially advance the proceedings. Indeed, the Appeals Chamber's intervention is not required to address the Defence's mere disagreement. Nor is it needed to address the Defence's abstract and hypothetical claims.

³⁹ Decision rescheduling opening statements, p. 7.

⁴⁰ Code of Professional Conduct for counsel, articles 1,8.

⁴¹ Application, paras. 38-40.

Conclusion

25. 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 6th day of November 2015

At The Hague, The Netherlands