

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: *English*

No: ICC-02/11-01/15

Date: 02 April 2015

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Bertram Schmitt

SITUATION IN COTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLE GOUDE***

Public

Defence response to the “Demande aux fins de clarification de la “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” rendue par la Chambre de première instance I le 11 mars 2015 (ICC-02/11-01/11-810)” and Request for clarification of the same decision

Source: Defence of Mr Charles Blé Goudé

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

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Introduction

1. On 27 March 2015, the Defence of Laurent Gbagbo filed a “Demande aux fins de clarification de la “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” rendue par la Chambre de première instance I le 11 mars 2015 (ICC-02/11-01/11-810)” (“the Request for clarification”).¹
2. Substantially, the Defence of Laurent Gbagbo requested Trial Chamber I (“the Chamber”) to clarify the meaning of the expression “*case record*” as used in paragraphs 72 and 73 of the “Decision on Prosecution request to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (“the Joinder Decision”).²
3. Given the consequences entailed by the meaning of the expression “case record” on the *Blé Goudé* case, in the context of the above mentioned decision issued by the Chamber on 11 March 2015, the Defence of Charles Blé Goudé (“the Defence”) hereby intends to join the Request for clarification submitted by the Defence of Mr. Gbagbo.

¹ ICC-02/11-01/15-14.

² ICC-02/11-02/11-222.

I. Procedural history

4. On 11 June 2014, Pre-Trial Chamber I issued a “Decision on victims’ participation in the pre-trial proceedings and related issues” (“the Decision on victims’ participation”).³
5. On 11 December 2014, Pre-Trial Chamber I confirmed the charges against Mr. Blé Goudé⁴ while on 20 December 2014, the Presidency referred the case to the Chamber.⁵
6. On 22 December 2014, the Prosecutor requested the Chamber to join the *Gbagbo* and the *Blé Goudé* cases,⁶ which has been accepted on 11 March 2015 with the Joinder Decision.⁷
7. On 16 March 2015, the Defence of Mr. Blé Goudé filed a request for leave to appeal the Joinder Decision⁸ which is still pending before the Chamber.
8. In the Joinder Decision, the Chamber ordered “the parties, LRV and Registry to indicate by 7 April 2015 any objection to any party or participant being granted access to any confidential document or material on the *Blé Goudé* and *Gbagbo* case records”.⁹

³ ICC-02/11-02/11-83.

⁴ Pre-Trial Chamber I, Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186. See also Partly Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-02/1102/11-186-Anx.

⁵ Corrigendum to the “Decision referring the case of *The Prosecutor v. Charles Blé Goudé* to Trial Chamber I”, ICC-02/11-02/11-193, 20 December 2014 (registered on 22 December 2014), 20 December 2014, ICC-02/1102/11-193-Corr.

⁶ ICC-02/11-02/11-194.

⁷ ICC-02/11-02/11-222.

⁸ ICC-02/11-01/15-5.

⁹ ICC-02/11-02/11-222: “**ORDERS** the parties, LRV and Registry to indicate by 7 April 2015 any objection to any party or participant being granted access to any confidential document or material on the Blé Goudé and Gbagbo case records”.

9. On 27 March 2015, the Defence of Mr. Gbagbo filed the Request for clarification related to the Joinder Decision and, depending upon the clarification given, sought an extension of the 7 April above mentioned deadline by three weeks.¹⁰
10. On 31 March 2015, the Chamber shortened the deadline for any response to the Request for clarification to 2 April 2015.¹¹
11. On 1st April 2015, the Office of The Prosecutor (“the O.T.P.”) filed its response to the Request for clarification according to which no comments were to be made on the issue of clarification. However, on the issue of the deadline, the O.T.P. requested that any extension of time that would be granted to one party would also be granted to the other parties and participants.¹²

II. Submissions

12. In light of the Rome Statute (“the Statute”), the Rules of Procedure and Evidence (“the R.P.E.”), the Regulations of the Court (“the Regulations”), the jurisprudence of the Court on one part, and the decisions issued in the *Blé Goudé* case on the other part, the Defence faces issues of comprehension related to paragraphs 72 and 73 of the Joinder Decision.
13. The Defence therefore submits that a clarification is essential to the comprehension of the rules governing confidential materials in the conduct of the trial case. For this reason, the Defence hereby joins the Request for clarification filed by the Defence of Mr. Gbagbo on 27 March 2015.

¹⁰ ICC-02/11-01/15-14, para. 25-26.

¹¹ Email from Trial Chamber I to the parties and participants, 31 March 2015, 4:36 pm.

¹² ICC-02/11-01/15-18.

II.1 Victims' participation in the proceedings

14. Article 68(3) of the Statute sets the legal framework in which the victims may participate to the proceedings in very precise terms:

“Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”¹³

15. On this specific matter, the jurisprudence of the Court is well-established. Notably, the Appeals Chamber ruled in the *Situation in the Democratic Republic of Congo*¹⁴ that: “Participation pursuant to article 68(3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests. This does not equate them as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial”¹⁵

16. Concretely, article 68(3) of the Statute guarantees the victims' participation to the trial in a way that is appropriate to the conduct of the proceedings and

¹³ Emphasis added.

¹⁴ ICC-01/04-556.

¹⁵ *Ibid.*, para. 55. Emphasis added. See also: ICC-01/04-01/06-824; ICC-01/04-503; ICC-02/05-138; ICC-01/04-01/06-1432.

that respects the rights of the Defence. This way to victims' participation is found through the control of the Chamber. However, the Appeals Chamber has always been clear on the point that victims does not equate to parties. They are participants, which is a specific status that opens rights which are different from those granted by the Statute and the R.P.E. to the parties. The difference is not only semantic; it is fundamental as it determines the roles to be played during the trial.

17. As a consequence, the Court has attached different levels of access to filings and materials depending on the status of party and participant.

II.2 The access to confidential materials

18. In accordance with rule 131(2) of the R.P.E.:

"Subject to any restrictions concerning confidentiality and the protection of national security information, the record may be consulted by the Prosecutor, the defence, the representatives of States when they participate in the proceedings, and the victims or their legal representatives participating in the proceedings pursuant to rules 89 to 91."

19. From this primary rule, Trial Chamber I elaborated a legal presumption in the *Lubanga* case:

"Due to the fact that confidential filings within the record often contain sensitive information related to national security, protection of witnesses and victims, and the prosecution's investigations, the presumption will be that the legal representatives of victims shall have access only to public filings."¹⁶

¹⁶ ICC-01/04-01/06-1119, para. 106. Emphasis added.

20. During the Pre-Trial stage of the *Blé Goudé* case, the Single Judge subscribed to this legal reasoning in the Decision on victims' participation issued on 11 June 2014.¹⁷ Indeed, the Single Judge circumscribed the rights of the Common Legal Representative of the victims to as follows:

"i) have access to all public filings and public decisions contained in the record of the case;

ii) be notified on the same basis as the Prosecutor and the Defence of all public requests, submissions, motions, responses and other procedural documents which are filed as public in the record of the case;

iii) be notified of the decisions of the Chamber in the proceedings;

iv) have access to the transcripts of hearings held in public sessions;

v) be notified on the same basis as the Prosecutor and the Defence of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; and

vi) have access to the public evidence filed by the Prosecutor and the Defence pursuant to rule 121 of the Rules and contained in the record of the case. Such right is, however, subject to the format (i.e. unredacted versions, redacted versions or summaries, as well as electronic versions with the metadata required by the e-Court Protocol) in which such evidence has been made available to either party."¹⁸

21. However, the Single Judge has not precluded the victims from acceding the confidential filings:

"[i]n relation to those filings that are marked confidential and are not notified to the victims' Common Legal Representative under the conditions set forth in the previous paragraph, the Chamber retains the option to decide on a case-by-case basis, either

¹⁷ ICC-02/11-02/11-83.

¹⁸ *Ibid.*, para. 33. Emphasis added.

proprio motu or upon receipt of a specific and motivated request, whether to grant the Common Legal Representative of victims access thereto.”¹⁹

22. Thus, so far, the Common Legal Representative of the victims had an unlimited access to every public filing in the case. By principle, the victims did not have access to the confidential filings. By exception, the Chamber could allow this access on a case-by-case basis. This pattern appears as relevant and in accordance with article 68(3) of the Statute and rule 131(2) of the R.P.E.

II.3. The access to confidential materials as instructed during the Status Conference of 13 February 2015

23. On 13 February 2015, the Chamber held a Status Conference in the *Blé Goudé* case during which the Chamber reversed the position of Pre-Trial Chamber I:

“The Chamber is also aware of the approach of the Pre-Trial Chamber I as set out in its decision 83. However, in case of filing of confidential documents, the Chamber instructs the parties and participants that from today they should always notify the parties and participants, including the legal representative of victims of their filings.”²⁰

24. Therefore, the Chamber reversed the pattern adopted by Pre-Trial Chamber I by granting to the Legal Representative of the victims (“the L.R.V.”) an automatic access to every filing submitted by the parties. However, this decision has been made “*from today*”, which means that it has had binding legal effects from 13 February 2015.

¹⁹ *Ibid.*, para. 35.

²⁰ ICC-02/11-02/11-T-9-CONF-ENG ET 13-02-2015 6/75 NB T, p.6, line 3-8. Emphasis added.

25. Concretely, the L.R.V. has been granted access to every material in the case, whether public or confidential, filed from 13 February 2015 but not to the confidential materials filed before 13 February 2015 as these filings are still ruled by the Decision on victims' participation issued on 11 June 2014.
26. On 11 March 2015, the Chamber decided to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé*, ordering that "all public documents and other material on both the *Blé Goudé* and the *Gbagbo* case records be included on the joint case record."²¹ The Chamber also set a deadline to 7 April 2015 for the parties to indicate "any objection, and reasons therefore, to any party or participant being granted access to any confidential document or material on either the *Blé Goudé* or *Gbagbo* case records."²²

II.4. Reasons supporting a request for clarification

27. During the Status Conference of 13 February 2015, the Chamber granted access to every filing of the case to the L.R.V. "from today". The field of application of such access seemed clear and concise: every document filed from 13 February 2015. The decision did not apply to the documents filed before 13 February 2015. In other words, the L.R.V. could not accede the confidential documents filed during the pre-trial phase and the documents filed from the Decision on confirmation of charges to the Status Conference of 13 February 2015. However, in the Joinder Decision, the Chamber seemed to grant access to "all public documents and other material on both the *Blé Goudé* and *Gbagbo* case records"²³ to the L.R.V., which would suggest that even the

²¹ ICC-02/11-02/11-222, para. 72.

²² *Ibid.*, para. 73.

²³ *Ibid.*, para. 71-72.

confidential documents filed during the pre-trial stage and before 13 February 2015 would be of unconditional and unlimited access to the L.R.V.

28. Hence, the clarification is justified on the meaning and scope of paragraph 72 of the Joinder Decision: does the case record of the *Blé Goudé* case to which the L.R.V. has been granted access include the documents filed before 13 February 2015 or is the case record limited to documents filed as of 13 February 2015?
29. Because of the above mentioned need for clarification, it is difficult for the Defence to “indicate by 7 April 2015 objection, and the reasons therefore, to any party or participant being granted access to any confidential document or material on either the *Blé Goudé* or *Gbagbo* case records.”²⁴ Indeed, the objections that the Defence could raise on the access to confidential materials depends upon the requested clarification. If the case record were to include every confidential document filed from the beginning of the pre-trial stage of the proceedings, the amount of documents that shall not be transmitted to the L.R.V. would be too important to be determined by 7 April 2015. Besides, it would also oblige the Defence to consider which documents should not be disclosed to the Defence team of Mr. Gbagbo.
30. Beyond a clarification on the documents that have already been filed, the Defence also needs clarification on the status of the future filings. If the L.R.V. is granted automatic access to every confidential document, the Defence seeks a clarification on which the procedure would apply when a document should be transmitted to the other parties but not to the participants. A confidential filing would not prevent the L.R.V. from acceding the document whereas a filing *ex parte* would exclude the other parties. Thus, the Defence respectfully

²⁴ *Ibid.*, para. 73.

requests the Chamber to clarify the procedure that would apply to filings which are to be communicated to the other parties but not the participants.

31. For the foregoing reasons, the Defence considers that the case record to which the participants have been granted access should be limited to the position adopted by the Chamber during the Status Conference of 13 February 2015, i.e. every document filed by the parties and participants from 13 February 2015, except for confidential Defence materials in the *Blé Goudé* case.
32. The Defence is mindful of the earlier ruling of the Chamber in this regard in the *Gbagbo* case²⁵ but holds the opinion that the Chamber should make a separate assessment in the *Blé Goudé* case.
33. The Defence finally emphasizes the fact that any other interpretation would deprive the Decision on victims' participation of 11 June 2014 of any legal binding effect and that it would *de facto* abolish the distinction set by the Statute between parties and participants.

RELIEF SOUGHT

The Defence respectfully requests Trial Chamber I to:

- **Clarify and specify** what the Chamber meant by using the notion of "case record" in Paragraphs 72 and 73 of the "Decision on Prosecution requests to

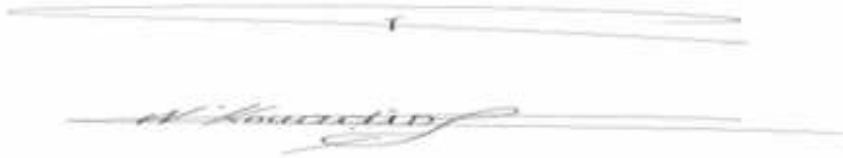
²⁵ Trial Chamber I, Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record, 19 January 2015, ICC-02/11-01/11-749 and Trial Chamber I, Single Judge, Decision on Defence's requests seeking leave to appeal the 'Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record' and seeking suspensive effect of it, 11 March 2015, ICC-02/11-01/11-809.

join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters (ICC-02/11-02/11-222)”;

- **Clarify** the classification that the Defence shall use when it intends to communicate a document to the parties, or to one party only, but not to the participants;

In the event that the notion of case record would be interpreted as including the documents filed during the pre-trial stage and before 13 February 2015, the Defence would respectfully request Trial Chamber I to:

- **Be granted** a three-week extension of time from 7 April 2015 to review and analyze the documents filed during the pre-trial stage and before 13 February 2015, including the evidence and the filings of the Defence, in order to determine what documents should be transmitted to the parties and participants and what document should remain confidential.



A handwritten signature in dark ink, appearing to read 'Mr. Knoop', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Mr. Knoop, Lead Counsel and Mr. N'Dry, Co-Counsel

Dated this 2 April 2015

At The Hague, the Netherlands