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**International
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Court**

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TRIAL CHAMBER I

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

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO
*AND CHARLES BLÉ GOUDÉ***

Public Document

Response of the Common Legal Representative 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)"

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 19 January 2015, the Single Judge of Trial Chamber I (the “Chamber”) issued the “Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record” (the “Case Record Decision”).¹

2. On 11 March 2015, the Single Judge of the Chamber rejected the Defence request seeking leave to appeal the Case Record Decision (the “Leave to Appeal Decision”).²

3. On the same date, the Chamber issued the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (the “Joinder Decision”),³ pursuant to which the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* were joined.

4. On 17 March 2015, the Defence of Mr. Gbagbo requested leave to appeal the Joinder Decision (the “Leave to Appeal Request”).⁴

5. On 23 March 2015, the Principal Counsel of the Office of Public Counsel for Victims, acting as common legal representative of the victims admitted to participate in both cases (the “Common Legal Representative”),⁵ filed a response to the Leave to

¹ See the “Decision on the Legal Representative of Victims’ access to certain confidential filings and to the case record” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-749, 19 January 2015 (the “Case Record Decision”).

² See the “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.” (Trial Chamber I, Single Judge), No. ICC-02/11-01/11-809, 11 March 2015 (the “Leave to Appeal Decision”).

³ See the “Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (Trial Chamber I), No. ICC-02/11-01/11-810, 11 March 2015 (the “Joinder Decision”).

⁴ See the “Demande d’autorisation d’interjeter appel 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’”, No. ICC-02/11-01/15-6, 17 March 2015 (the “Leave to Appeal Request”).

⁵ See the “Decision on victim participation” (Trial Chamber I), No. ICC-02/11-01/11-800, 6 March 2015, para. 61.

Appeal Request.⁶ The Prosecution filed its response to the Leave to Appeal Request on the same day.⁷

6. On 27 March 2015, the Defence filed a request for clarification of the Joinder Decision (the “Request”).⁸

7. On 31 March 2015, the Chamber shortened the deadline for any responses to the Request to 2 April 2015 at 12:00h.⁹

8. Pursuant to regulation 34(a) of the Regulations of the Court, the Common Legal Representative submits the following response to the Request.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

9. The Defence seeks from the Chamber (i) the clarification of an expression used in the Joinder Decision,¹⁰ (ii) the determination of which classification must be applied pursuant to regulation 23 *bis* of the Regulations of the Court to documents that the Defence may not wish to disclose to the Common Legal Representative,¹¹ and (iii) alternatively, an extension of three weeks to indicate any objection to any party or participant being granted access to any confidential document or material in the *Gbagbo* case record.¹² In this regard, the Common Legal Representative respectfully submits that (i) the request for clarification is inadmissible and

⁶ See the “Consolidated Response of the Common Legal Representative to the Requests of the Defence of Mr. Gbagbo and the Defence of Mr. Blé Goudé for Leave to Appeal the Decision on the Joinder of the Cases (ICC-02/11-01/15-5 and ICC-02/11-01/15-6)”, No. ICC-02/11-01/15-9, 23 March 2015.

⁷ See the “Prosecution’s consolidated response to the Defence requests for leave to appeal the Decision on the Joinder of Charges”, No. ICC-02/11-01/15-11, 23 March 2015.

⁸ See 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)”, No. ICC-02/11-01/15-14, 27 March 2015 (the “Request”).

⁹ See the e-mail received from the Trial Chamber on 31 March 2015 at 16:36h.

¹⁰ See the Request, *supra* note 8, paras. 21-24, 29-35 and p. 13.

¹¹ *Idem*, paras. 27-28 and p. 13.

¹² *Ibid.*, paras. 25-26 and p. 13.

unfounded, (ii) the request for guidance on the classification to be applied to filings/material for which the Defence is of the view that the Common Legal Representative ought not to have access is unnecessary, and (iii) the request for extension of time is unjustified.

1. The request for clarification is inadmissible and unfounded

10. Chambers have ruled in many occasions that “[a] *procedure for a motion for clarification is not provided for in the Statute of the Court, the Rules of Procedure and Evidence or the Regulations*”,¹³ and that “[i]t is not an advisory body and does not deal with requests for clarification”.¹⁴ Accordingly, the request for clarification must be rejected *in limine* as inadmissible. In fact, it must be noted that the Request does not indicate any legal basis, contrary to the consistent practice of the Defence in the past.¹⁵

11. Furthermore, the Request contains submissions that were already considered by the Chamber when it rejected the Defence’s request for leave to appeal the Case Record Decision. The Defence reiterates its understanding of the classification of

¹³ See the “Decision on the Prosecutor’s Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155” (Pre-Trial Chamber II), No. ICC-02/04-01/05-18, 18 July 2005, p. 2. See also the “Decision on the request for clarification by the OPCD” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-403, 3 October 2007, p. 3.

¹⁴ See the “Decision further to the ‘Directions on the submissions of observations’ issued on 31 August 2012 and on the Clarification Request of Mr Gbagbo” (Appeals Chamber), No. ICC-02/11-01/11-268 OA2, 18 October 2012, para. 3. See also the “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007” (Appeals Chamber), No. ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 30.

¹⁵ See e.g. the “Requête de la Défense aux fins de rejet des «*Views and concerns of victims in relation to the ‘Order scheduling a hearing in relation to Mr. Gbagbo’s fitness to take part in the proceedings against him’ and on the Defence’s request for postponement* » (ICC-02/11-01/11-245; ICC-02/11-01/11-246)”, No. ICC-02/11-01/11-248, 18 September 2012, p. 9 (“*Vu la Norme 34 du Règlement de la Cour*”); and the “Requête urgente déposée par la Défense afin d’être autorisée à répondre à la demande de jonction des affaires Gbagbo et Blé Goudé formulée par le Procureur (ICC-02/11-01/11-738-tFRA) dans un document excédant le nombre de pages prévu à la Norme 37(1) du Règlement de la Cour”, No. ICC-02/11-01/11-763, 9 February 2015, p. 11 (“*Vu les Articles 64 et 67 du Statut, la Règle 136 du Règlement de procédure et de preuve et la Norme 37(2) du Règlement de la Cour*”).

documents as “confidential”,¹⁶ already considered and dismissed by the Chamber.¹⁷ Other critical remarks made by the Defence in its request for clarification, such as that eliminating the classification of “confidential” *vis-à-vis* the Common Legal Representative calls into question the difference between parties and participants,¹⁸ should have been raised before the Chamber rejected the Defence’s request for leave to appeal the Case Record Decision.¹⁹

12. The abovementioned submissions reveal an attempt to indirectly re-litigate the Case Record Decision or at least to submit further arguments for the consideration of the request filed by the Defence for leave to appeal the Joinder Decision. However, the Common Legal Representative submits that the request for clarification cannot be entertained by the Chamber because the Case Record Decision is now *res judicata*, and that the Defence’s application for leave to appeal the Joinder Decision cannot be substantively amended because it is already pending before the Chamber.

13. In these circumstances, the Request may at most be considered as a request for reconsideration of the Case Record Decision. In this regard, the Common Legal Representative contends that said decision does not meet the test for reconsideration because it cannot be said to be “manifestly unsound” and give rise to “manifestly unsatisfactory” consequences.²⁰ Although the Defence may not like the consequences of the Case Record Decision, it is evident that said decision is sensible and well-reasoned. So much so, that in its request for leave to appeal the Case Record

¹⁶ Cf. the Request, *supra* note 8, paras. 9-13 and the “Demande d’autorisation d’interjeter appel de la décision du Juge Unique « on the Legal Representative of Victims’ access to certain confidential filings and to the case record » (ICC-02/11-01/11-749) rendue le 19 Janvier 2015”, No. ICC-02/11-01/11-752, 26 January 2015, para. 26.

¹⁷ See the Case Record Decision, *supra* note 1, paras. 15 and 20; and the Leave to Appeal Decision, *supra* note 2, para. 22.

¹⁸ See the Request, *supra* note 8, para. 27.

¹⁹ See the Leave to Appeal Decision, *supra* note 2.

²⁰ See the “Decision on the defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010” (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, para. 18 (“[i]rregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory”). See also the “Decision on the request to present views and concerns of victims on their legal representation at the trial phase” (Trial Chamber V), No. ICC-01/09-01/11-511, 13 December 2012, para. 6.

Decision, the Defence did not make specific submissions as to why the issues it identified in the decision affected the fairness and expeditiousness or the outcome of the proceedings and why their immediate resolution could materially advance the proceedings.²¹

14. Finally, assuming *arguendo* that the request for clarification is found to be admissible, the Common Legal Representative contends that it must be rejected as unfounded because it does not refer to “[e]xceptional circumstances where clarification is necessary”.²² The Defence makes a selective reading of the Case Record Decision and fails to consider parts of the Joinder Decision relevant to answer the question brought before the Chamber. In other words, if read properly, within the context of the entire decision and within the context of the Chamber’s previous decisions, the expression used in the Joinder Decision is clear and does not require further clarification.

15. After the Presidency transmitted the record of the proceedings before the Pre-Trial Chamber to the Trial Chamber pursuant to rule 130 of the Rules of Procedure and Evidence,²³ the Single Judge in the Case Record Decision expressly “[r]ecall[ed] the general principle established above that, to ensure that victims’ participation is effective, the LRV must be notified in a timely manner of all documents filed in the record and that it shall therefore have access to the filings and material uploaded in Ringtail, both public and confidential”.²⁴ And subsequently, the Joinder Decision provided that “[p]ursuant to Rules 121(10) and 131 of the Rules and Regulations 21 and 22 of the Regulations of the Registry, the Chamber orders that all public documents and other material on both the Blé Goudé and Gbagbo case records be included on the joint case record”.²⁵

²¹ See the Leave to Appeal Decision, *supra* note 2, para. 15.

²² See e.g. the “Decision on the request for clarification by the OPCD” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-403, 3 October 2007, p. 3.

²³ See the “Decision re-constituting Trial Chamber I and referring to it the case of *The Prosecutor v. Laurent Gbagbo*” (Presidency), No. ICC-02/11-01/11-682, 17 September 2014, p. 3.

²⁴ See the Case Record Decision, *supra* note 1, para. 20 (emphasis added).

²⁵ See the Joinder Decision, *supra* note 3, para. 72 (emphasis added).

16. A mere reading of the abovementioned rulings in their context suffices to conclude without any doubt that the Common Legal Representative has been granted access to all documents and material filed in the record of the *Gbagbo* and *Blé Goudé* cases, regardless of when they were filed in said record.

17. The plain conclusion arising from a literal interpretation of the relevant part of both decisions is further supported by the instructions of the Chamber in the Joinder Decision to retain the confidential, *ex parte* and under seal classification of the documents and other information currently on the case record until the Chamber rules on possible objections to the access thereto by any participant.²⁶ This conclusion is also consistent with the extended period of time – almost 30 days – granted to the Defence in the Joinder Decision to make said observations about the confidential character of the documents currently filed in the record of the case.²⁷

18. Considering that the request for clarification is unfounded for the reasons provided in the preceding paragraphs, the Common Legal Representative submits that the Request is only an attempt by the Defence to re-litigate the Joinder Decision, on the eve of the abovementioned deadline for raising objections to the Common Legal Representative's access to the confidential documents contained in the record of the case.

19. For this purpose, the Defence refers to the alleged existence of a contradiction between the Joinder Decision and the decision issued by the Pre-Trial Chamber on the Common Legal Representative's access to documents filed in the record of the case.²⁸ However, the Defence fails to notice that the Chamber expressly took notice of

²⁶ *Idem*.

²⁷ *Ibid.*, para. 73.

²⁸ See the Request, *supra* note 8, para. 32.

the approach adopted by the Pre-Trial Chamber and decided to follow a different one in the Case Record Decision.²⁹

20. Similarly, the Defence argues that its understanding of the allegedly unclear reference to confidential documents in the Joinder Decision is the only one compatible with the Case Record Decision, on the basis that the Leave to Appeal Decision allegedly clarified that the latter “[d]oes not give the LRV access to any other previously filed documents”.³⁰ The Common Legal Representative disagrees with this contention and submits that it reveals an obvious misconception of the Leave to Appeal Decision. The Defence not only fails to quote in its entirety the finding relied upon,³¹ but more importantly it disregards the explanation provided in the same paragraph of the Leave to Appeal Decision, namely that “[t]he Single Judge reiterated [on 20 November 2014] that the LRV shall have access to all confidential documents filed in the record of the case before this Chamber”.³²

21. The Defence also contends that failing to adopt its interpretation of the Joinder Decision will imply calling into question *a posteriori* all that has been decided during the pre-trial phase.³³ However, the Common Legal Representative argues that the Chamber, which is bound only by the charges confirmed against the Accused,³⁴ has not ruled in the Joinder Decision on the status of the decisions adopted by the Pre-Trial Chamber. In fact, in the Joinder Decision, the Chamber requests submissions from the parties and participants only on “[t]he applicability of decisions and orders previously rendered by the Chamber”,³⁵ not of those adopted by the Pre-Trial Chamber.

²⁹ See the Case Record Decision, *supra* note 1, paras. 14-15. See also the transcript of the status conference held on 4 November 2014, No. ICC-02/11-01/11-T-25-CONF-ENG, p. 4, lines 24-25 (ruling issued in open session).

³⁰ See the Request, *supra* note 8, para. 34.

³¹ See the Leave to Appeal Decision, *supra* note 2, para. 18 (“Beyond the specific documents addressed in the Impugned Decision, the Single Judge clarifies that the Decision...”).

³² *Idem* (emphasis added).

³³ See the Request, *supra* note 8, para. 33.

³⁴ See the Rome Statute, articles 64(8)(a) and 74(2).

³⁵ See the “Annex A: Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters” (Trial Chamber I), No. ICC-02/11-01/11-810-AnxA, 11 March 2015, para. h).

22. Lastly, the Defence argues that its contention that the Joinder Decision does not foresee the Common Legal Representative having access to all confidential documents contained in the record of the case is supported by an oral decision issued in the *Blé Goudé* case.³⁶ Once again, the Common Legal Representative disagrees with the interpretation made by the Defence and submits that the Trial Chamber in said oral decision, like in the *Gbagbo* case, simply reminded the parties and participants that publicity is the rule, and that they should always notify all the parties and participants, including the Common Legal Representative, of their confidential filings unless they have a good reason not to do so.³⁷

23. In conclusion, the Common Legal Representative can see no contradiction between the Joinder Decision and the previous decisions issued by the Chamber on her access to documents and material in the record of the case. In these circumstances, the Defence's request for clarification contained in the Request must be seen as an attempt to re-litigate issues already decided upon by the Chamber and for which the Chamber is currently considering whether to grant leave to appeal. Chambers have already rejected this type of re-litigation strategies.³⁸

2. The request for guidance on the classification to be applied by the Defence is unnecessary

24. The Chamber has indicated in at least three occasions that “[i]f the party submitting filings/material is of the view that the LRV ought not to access them, then it must indicate the factual and legal basis for the chosen classification pursuant to Regulation 23 bis

³⁶ See the Request, *supra* note 8, para. 35.

³⁷ Cf. the transcript of the status conference held in the *Gbagbo* case on 4 November 2014, No. ICC-02/11-01/11-T-25-CONF-ENG, p. 5, lines 1-7 (ruling issued in open session) with the transcript of the status conference held in the *Blé Goudé* case on 13 February 2015, No. ICC-02/11-02/11-T-9-Red-ENG, p. 6, lines 3-8.

³⁸ See e.g. the “Decision on the ‘Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’” (Pre-Trial Chamber II, Single Judge), No. ICC-01/04-02/06-322, 7 July 2014, paras. 26-27.

of the Regulations and the relevant filing should be filed confidential and *ex parte*”.³⁹ The letter of this ruling is self-explanatory: if the Defence does not wish to disclose concrete documents to the Common Legal Representative,⁴⁰ it must file them as confidential and *ex parte* providing reasons for not granting access to the latter. In these circumstances, the Common Legal Representative submits that the request for guidance made by the Defence is redundant and must therefore be dismissed.

3. The request for extension of time is unjustified

25. The Common Legal Representative submits that, even if the Chamber finds the Defence’s request for clarification of the meaning of “case record” to be inadmissible and unfounded, the Chamber must in any event reject the Defence’s request for an extension of time.⁴¹ The Defence has not submitted any “good cause” for extending the deadline of 7 April 2015.

26. The Appeals Chamber has ruled that “[g]ood cause’ in this context [of granting an extension of time pursuant to regulation 35 of the Regulations of the Court] [...] imports the existence of valid reasons for non-compliance with the procedural obligations of a party to the litigation. [...] A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations”.⁴²

³⁹ See the Case Record Decision, *supra* note 1, para. 15. See also the Leave to Appeal Decision, *supra* note 2, para. 23; and the transcript of the status conference held on 4 November 2014, No. ICC-02/11-01/11-T-25-CONF-ENG, p. 5, lines 3-7 (ruling issued in open session).

⁴⁰ See the Request, *supra* note 8, paras. 27-28 and p. 13.

⁴¹ *Idem*, paras. 25-26 and p. 13.

⁴² See the “Reasons for the ‘Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007’ issued on the 16 February 2007” (Appeals Chamber), No. ICC-01/04-01/06-834 OA8, 21 February 2007, para. 7; and the “Reasons for the ‘Decision on the ‘Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor’s Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation’” (Appeals Chamber), No. ICC-01/04-01/07-653 OA7, 27 June 2008, para. 5.

27. In this regard, there are no objective reasons for the Defence to be prevented from complying with the deadline established by the Chamber on 11 March 2015. As argued above, the Joinder Decision is very clear in its reference to the confidential documents/material filed in the record.⁴³

28. Moreover, the deadline at hand was set up almost one month ago and the Defence has waited until the eleventh hour to raise its doubts to the Chamber and request an extension of time. In these circumstances, the principle of *ex turpi causa non oritur actio* (a participant cannot rely on its own negligence to seek a legal remedy) must be fully applicable. If the Defence had any doubts regarding its compliance with the Joinder Decision, it should have raised them before the Chamber as soon as possible and not when it is almost certain that it will delay the proceedings. In this case, the request for an extension of time has been filed on the basis of a straightforward order by the Chamber, after two thirds of the time afforded to the Defence to consider its eventual objections have elapsed, and with close to one week left for the expiration of the applicable time limit. Accordingly, the request for an extension of time must also be rejected.

29. Lastly, the Common Legal Representative submits that it is in the interest of the victims that the trial is conducted with due respect to the rights of the Accused, but also that it takes place as expeditiously as possible. In this regard, she feels compelled to share with the Chamber the displeasure and despair experienced by some of the victims as a consequence of the Request. Unfortunately, this is not the first time that the Defence uses delaying strategies,⁴⁴ in this instance challenging a decision with which it disagrees after exhausting all available legal remedies. The Defence's dilatory approach to the proceedings conveyed by the Request is unfair to

⁴³ See *supra* section II.1

⁴⁴ See e.g. the "Decision on the 'Demande d'autorisation d'interjeter appel de la décision de la Chambre Préliminaire I « on three applications for leave to appeal » (ICC-02/11-01/11-307) et plus précisément de la décision de refus d'autoriser la défense à interjeter appel de la « Decision on the fitness of Laurent Ghagbo to take part in the proceedings before this Court» (ICC-02/11-01/11-286-Conf)" (Pre-Trial Chamber I), No. ICC-02/11-01/11-389, 8 February 2013; and the Joinder Decision, *supra* note 3, paras. 37-38.

all the other participants, but especially to the victims who are waiting for the trial to start, and must therefore be considered by the Chamber pursuant to article 68 of the Rome Statute and rule 86 of the Rules of Procedure and Evidence.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Trial Chamber to reject the Request.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 2nd day of April 2015

At The Hague, The Netherlands