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No.: ICC-02/11-01/11
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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Single Judge

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO***

Public Document

Response to 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*"

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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 20 November 2014, the Single Judge of Trial Chamber I (the “Single Judge”) issued the “Order on the notification of confidential filings to the Legal Representative of victims” (the “Notification Order”).¹ The Single Judge instructed the Registry to notify the Common Legal Representative of victims authorised to participate in the case (the “Legal Representative”) – unless the parties provided reasons pursuant to regulation 23*bis* of the Regulations of the Court for their respective filings not to be notified to her – with the following nine documents: ICC-02/11-01/11-683-Conf-AnxA, ICC-02/11-01/11-683-Conf-AnxB, ICC-02/11-01/11-683-Conf-AnxC, ICC-02/11-01/11-694-Conf-AnxA, ICC-02/11-01/11-697-Conf, ICC-02/11-01/11-697-Conf-Anx, ICC-02/11-01/11-707-Conf, ICC-02/11-01/11-709-Conf-Red, ICC-02/11-01/11-710-Conf.

2. On 20 November 2014, the Prosecution informed the Trial Chamber (the “Chamber”) that it had no objection to the Legal Representative having access to its own documents,² namely documents ICC-02/11-01/11-683-Conf-AnxA, ICC-02/11-01/11-683-Conf-AnxB, ICC-02/11-01/11-683-Conf-AnxC, and ICC-02/11-01/11-694-Conf-AnxA.

3. On 21 November 2014, the Defence filed its observations (the “Defence’s Observations”),³ objecting to the notification to the Legal Representative of i) three Prosecution’s documents, namely ICC-02/11-01/11-683-Conf-AnxB, ICC-02/11-01/11-683-Conf-AnxC and ICC-02/11-01/11-694-Conf-AnxA, and ii) three Defence filings or annexes, namely ICC-02/11-01/11-697-Conf, ICC-02/11-01/11-697-Conf-Anx and ICC-02/11-01/11-709-Conf-Red.

¹ See the “Order on the notification of confidential filings to the Legal Representative of victims” (Pre-Trial Chamber I), No. ICC-02/11-01/11-724, 20 November 2014.

² See the e-mail sent by the Prosecution to the Chamber on 20 November 2014 at 10h28.

³ See the “*Observations de la Défense quant à la nécessité de préserver le niveau de classification de certains des documents mentionnés par le Juge unique comme devant être transmis au Représentant légal des victimes*”, No. ICC-02/11-01/11-725-Conf, 21 November 2014 (the “Defence’s Observations”).

4. On 24 November 2014, the Legal Representative filed a response,⁴ arguing that the Single Judge should reject the Defence's objection and maintain his order to notify the said documents to her.

5. On 19 January 2015, the Single Judge issued the "Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record" (the "Decision"),⁵ granting the Legal Representative access to the confidential record of the case, and instructing the Registry to give her access to i) Prosecution's documents ICC-02/11-01/11-683-Conf-AnxB, ICC-02/11-01/11-683-Conf-AnxC and ICC-02/11-01/11-694-Conf-AnxA, and ii) Defence's documents ICC-02/11-01/11-697-Conf, ICC-02/11-01/11-697-Conf-Anx and ICC-02/11-01/11-709-Conf-Red.

6. On 20 January 2015, pursuant to the Decision, the Legal Representative was granted access to the six documents stipulated in the Decision.⁶

7. On 26 January 2015, the Defence requested leave to appeal the Decision (the "Request").⁷

8. Pursuant to regulation 65(3) of the Regulations of the Court, the Principal Counsel of the Office of Public Counsel for Victims, acting as the Legal Representative,⁸ submits the following response to the Request.

⁴ See the "Response of the Common Legal Representative of victims to the 'Observations de la Défense quant à la nécessité de préserver le niveau de classification de certains des documents mentionnés par le Juge unique comme devant être transmis au Représentant légal des victimes'", No. ICC-02/11-01/11-728-Conf, 24 November 2014.

⁵ 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 "Decision").

⁶ See the e-mail sent by the Court Management Section to the LRV on 20 January 2015 at 12h59.

⁷ See 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 (the "Request").

⁸ See the "Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-138, 4 June 2012, pp. 25-26; and the "Second decision on victims'

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

1. The criteria contained in article 82(1)(d) of the Rome Statute

9. Article 82(1)(d) of the Rome Statute limits the possibility to file an appeal against *“a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”*.

10. The jurisprudence of the Court established the complementary character of the two components mentioned in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.⁹

11. In this regard, the Appeals Chamber determined that *“[e]vidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”*.¹⁰ The Appeals Chamber also stated that *“[o]nly an ‘issue’ may form the subject-matter of an appealable decision”*,¹¹ and defined the term “issue” as *“an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”*.¹² Accordingly, the mere dispute over the correctness of a

participation at the confirmation of charges hearing and in the related proceedings” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-384-Corr, 6 February 2013, pp. 22-23.

⁹ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20, 19 August 2005, par. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

¹⁰ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 9, par. 8.

¹¹ *Idem*, par. 9.

¹² *Ibid.*

Chamber's reasoning does not constitute sufficient reason to be granted leave to appeal an interlocutory decision.¹³

12. The Appeals Chamber has considered that "[n]ot every issue may constitute the subject of an appeal. It must be one apt to 'significantly affect', i.e. in a material way, either a) 'the fair and expeditious conduct of the proceedings' or b) 'the outcome of the trial'".¹⁴

13. Moreover, pursuant to the constant jurisprudence of the Court, "the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal",¹⁵ and "[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances".¹⁶

14. In this regard, since the Appeals Chamber will interfere with a discretionary decision only under limited conditions, a difference of opinion as to a Chamber's exercise of its discretion is an appealable issue only if the Chamber improperly exercised its discretion.¹⁷

¹³ See the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, par. 6; and the "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'" (Trial Chamber V(a)), No. ICC-01/09-01/11-817, 18 July 2013, par. 12.

¹⁴ See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 9, par. 10.

¹⁵ See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'" (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, par. 4. See also the "Decision on Ruto Defence's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses'" (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, par. 20.

¹⁶ See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", *supra* note 15, par. 4. See also the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, par. 7.

¹⁷ See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009" (Appeals Chamber), No. ICC-02/04-01/05-408 OA3, 16 September 2009, par. 80. See also the "Decision on 'Defence Request for Leave to Appeal the 'Decision on issues related to the conclusion of the defence's presentation of oral evidence at trial and on the 'Defence Request for an Order for Cooperation'" (Trial Chamber III), No. ICC-01/05-01/08-2925-Red, 20 December 2013, par. 30.

15. Moreover, the Chamber presented with an application for leave to appeal must not enter into examining or considering “*arguments on the merits or the substance of the appeal*” because said arguments are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal is granted.¹⁸

16. Consistent with this jurisprudence, applications for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s) “*by way of indicating a specific factual and/or legal error*”.¹⁹

17. According to established jurisprudence, in analysing whether an appealable issue would “significantly affect” the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of “fairness” must be understood as making reference to situations “*when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision*”.²⁰ In turn, “expeditiousness” must be read as “*closely linked to the concept of proceedings ‘within a reasonable time’, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned*”.²¹

18. The Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a

¹⁸ See the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, *supra* note 9, par. 22.

¹⁹ See the “the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), par. 70.

²⁰ See *e.g.* the “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure” (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, par. 14.

²¹ *Idem*, par. 18.

*given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.*²²

2. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Request

19. The Defence seeks leave to appeal the Decision regarding the following eight “issues”:

- i. Whether the Single Judge ruled on a matter which should have been dealt with by the Trial Chamber in its full composition (the “First Issue”)²³
- ii. Whether the Single Judge could allow the Legal Representative to have access to confidential documents while the Rules of Procedure and Evidence explicitly provide for such access to be limited by the notion of confidentiality (the “Second Issue”)²⁴
- iii. Whether the Decision of the Single Judge to grant the Legal Representative with unconditional access to the confidential documents disclosed between the Prosecution and the Defence pursuant to rule 77 and not available in e-Court has no legal basis (the “Third Issue”)²⁵
- iv. Whether the Single Judge could grant the Legal Representative access to documents without having previously verified whether said documents affect the victims’ personal interests (the “Fourth Issue”)²⁶

²² See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 9, par. 13.

²³ See the Request, *supra* note 7, paras. 14-17 (the “First Issue”).

²⁴ *Idem*, paras. 18-25 (the “Second Issue”).

²⁵ *Ibid.*, paras. 26-29 (the “Third Issue”).

²⁶ *Ibid.*, paras. 30-33 (the “Fourth Issue”).

- v. Whether the Single Judge was entitled to distinguish between the Legal Representative and the victims participating in the proceedings and whether he has not wrongly interpreted the role of the Legal Representative under the Statute (the “Fifth Issue”)²⁷
- vi. Whether the Single Judge has not artificially distinguished between the Legal Representative and other legal representatives of victims (the “Sixth Issue”)²⁸
- vii. Whether the Single Judge has not deprived of meaning the letter and the intent of the Statute in removing *de facto* the distinction between the parties and the Legal Representative (the “Seventh Issue”),²⁹ and
- viii. Whether the Single Judge could grant the Legal Representative access to documents covered by medical secret and related to the protection of privacy without the consent of the person concerned (the “Eighth Issue”).³⁰

20. The Legal Representative submits that the Request does not satisfy the requirements of article 82(1)(d) of the Rome Statute. The Defence fails to demonstrate the existence of an “issue” which could arise from the Decision and could be the subject of an interlocutory appeal, and how any of the alleged “issues” would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that their immediate resolution by the Appeals Chamber may materially advance the proceedings.

21. In particular, the Legal Representative contends that some of the alleged “issues” identified by the Defence arise from past decisions and most arguments

²⁷ *Ibid.*, paras. 34-36 (the “Fifth Issue”).

²⁸ *Ibid.*, para. 37 (the “Sixth Issue”).

²⁹ *Ibid.*, paras. 38-40 (the “Seventh Issue”).

³⁰ *Ibid.*, paras. 41-47 (the “Eighth Issue”).

contained in the Request were already submitted to the Chamber in the Defence's Observations.³¹ Therefore, the Request reflects a mere disagreement of the Defence with the conclusions of the Single Judge, which as such does not suffice for leave to appeal to be granted under article 82(1)(d) of the Rome Statute.³² The Request cannot be seen as the proper course for submissions regarding a mere dispute over the correctness of the Single Judge's reasoning, and must therefore be dismissed.³³

22. Furthermore, the Legal Representative notes that, assuming *arguendo* that any of the "issues" identified by the Defence arises from the Decision, none of them significantly affects the fairness and expeditiousness of the proceedings or the outcome of the trial, and an immediate resolution of said "issues" by the Appeals Chamber would not materially advance the proceedings.

a. The First Issue

23. Regarding the First Issue identified by the Defence, the Legal Representative contends that it does not arise from the Decision, but from the Notification Order issued on 20 November 2014. It was in the latter document where the Single Judge considered that the instructions concerning notification of confidential filings in the current proceedings, set out during the status conference of 4 November 2014, should apply not only to upcoming documents but also to all documents already filed in the record.³⁴ As a consequence, access to all confidential documents in the record, except for nine documents identified in the Notification Order, was granted to the Legal Representative by the Notification Order. Any request for leave to appeal against the decision in the Notification Order granting the Legal Representative access to confidential documents should have been filed by 26 November 2014, pursuant to rule 155(1) of the Rules of Procedure and Evidence and regulation 33(1)(d) of the

³¹ Cf. *e.g.* the Defence's Observations, *supra* note 3, paras. 13-14, and the Request, *supra* note 7, para. 9.

³² In this sense, see *supra* note 12.

³³ In this sense, see *supra* note 13.

³⁴ See the Notification Order, *supra* note 1, para. 4.

Regulations of the Court. As a result, the Request, filed on 26 January 2015, is inadmissible concerning the First Issue.

24. Assuming *arguendo* that the First Issue does arise from the Decision, the Legal Representative submits that it cannot be considered as an issue affecting the fair conduct of the proceedings.³⁵ Indeed, her access to the confidential part of the record cannot *as such* affect the rights of the Accused, since the victims are not a second prosecutor and may only move before the Chamber where their personal interests are affected, pursuant to article 68(3) of the Rome Statute.³⁶

25. In these circumstances, the First Issue is not an appealable issue.

b. The Second Issue

26. Regarding the Second Issue, the Legal Representative contends that the Request only shows the Defence's disagreement with the Single Judge's reading of rules 131(2) and 92(5) of the Rules of Procedure and Evidence. As pointed out by the Defence,³⁷ other Chambers have ruled differently in other cases. However, the Single Judge's interpretation of said provisions cannot be said to amount to an improper exercise of his discretion, granting the intervention by the Appeals Chamber.³⁸

27. The argument put forward by the Defence regarding rule 131(2) of the Rules of Procedure and Evidence must be dismissed for the same reasons as the First Issue, namely that the Single Judge's decision lifting confidentiality restrictions *vis-à-vis* the Legal Representative is already *res judicata*.³⁹ As a result, currently there are no confidentiality restrictions applicable to the Legal Representative pursuant to said rule.

³⁵ See *supra* note 20.

³⁶ See *e.g.* the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (Appeals Chamber), No. ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55.

³⁷ See the Request, *supra* note 7, para. 18.

³⁸ See *supra* note 17.

³⁹ See *supra* para. 23.

28. As for rule 92(5) of the Rules of Procedure and Evidence, the Legal Representative disagrees with the Defence's contention that it cannot reasonably be read to provide for the notification to her of the documents of the parties.⁴⁰ The literal tenor of this rule cannot be more straightforward in this regard where it provides that "[v]ictims or their legal representatives participating in proceedings shall, in respect of those proceedings, be notified by the Registrar in a timely manner of: [...] (b) Requests, submissions, motions and other documents relating to such requests, submissions or motions".⁴¹

29. In fact, the Defence wrongly states that the Decision has no precedent.⁴² In the *Katanga and Ngudjolo* case, for instance, Trial Chamber II granted access to the confidential case record to the legal representative of the victims.⁴³ This finding was expressly relied upon by the Single Judge in the Decision.⁴⁴ Against this background, the Legal Representative submits that the Second Issue does not arise from the Decision, but it is a mere disagreement by the Defence with the Single Judge's findings.

30. Assuming *arguendo* that the Second Issues does arise from the Decision, the Legal Representative submits that it is not an appealable issue under article 82(1)(d) of the Rome Statute because an immediate resolution by the Appeals Chamber will not materially advance the proceedings. Contrary to the Defence's argument that there is no harmonisation in the approach adopted by different Chambers to this Second Issue and that "[u]ne décision de principe de la part de la Chambre d'appel semble donc être nécessaire",⁴⁵ the Appeals Chamber has made it clear that the mere fact that

⁴⁰ See the Request, *supra* note 7, para. 22.

⁴¹ Rule 92(5)(b) of the Rules of Procedure and Evidence (emphasis added).

⁴² See the Request, *supra* note 7, para. 19.

⁴³ See the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paras. 121-122.

⁴⁴ See the Decision, *supra* note 5, para. 15, footnote 14.

⁴⁵ See the Request, *supra* note 7, paras. 55-56.

an issue is of general interest does not suffice to warrant the granting of leave to appeal.⁴⁶

31. In these circumstances, the Second Issue is not an appealable issue.

c. The Third Issue

32. Regarding the Third Issue, the Legal Representative contends that it does not arise from the Decision but it is again a disagreement by the Defence with the Single Judge's ruling. The Legal Representative submits that the Decision has granted her "*a general right to access the case record*" comprising i) confidential filings and ii) material uploaded to Ringtail, such as rule 77 and article 67(2) documents,⁴⁷ on the basis of rule 92(5) of the Rules of Procedure and Evidence. Indeed, contrary to the Defence's contention,⁴⁸ the language of rule 92(5)(b) of the Rules of Procedure and Evidence is paraphrased by the Single Judge as the basis of this right ("*[victims] are participants who are expressly entitled to be notified by the Registrar in a timely manner of, among other things, requests, submissions, motions and documents that form part of the proceedings*").⁴⁹ This finding is also expressly based on the need to ensure that victims' participation is effective.⁵⁰

33. Moreover, the Legal Representative notes the arguments raised by the Defence on a possible confusion by the Single Judge regarding the Ringtail and E-Court systems.⁵¹ However, the Legal Representative does not address them in this response because it is already settled in the jurisprudence of the Court that an application for leave to appeal filed before a Pre-Trial or Trial Chamber must not enter into examining or considering arguments on the merits or the substance of an eventual

⁴⁶ See *supra* note 15.

⁴⁷ See the Decision, *supra* note 5, para. 15.

⁴⁸ See the Request, *supra* note 7, para. 27.

⁴⁹ See the Decision, *supra* note 5, para. 15.

⁵⁰ *Idem*, para. 20.

⁵¹ See the Request, *supra* note 7, paras. 28-29.

appeal.⁵² In any case, the Legal Representative notes that other Trial Chambers have similarly granted to the legal representatives of victims access to confidential documents in Ringtail.⁵³

34. Finally, assuming *arguendo* that the Third Issue does arise from the Decision, the Legal Representative submits that it is not an appealable issue under article 82(1)(d) of the Rome Statute because it may not “*significantly affect*” the expeditious conduct of the proceedings.⁵⁴ The Decision only grants the Legal Representative with access to documents filed in the record, but does not deal with the participatory rights of victims, which are to be ruled upon by the Chamber pursuant to article 68(3) of the Rome Statute and regulation 54(o) of the Regulations of the Court. Thus, the Defence’s contention that the Appeals Chamber must intervene immediately because “[u]ne des conséquences de la décision du Juge unique pourrait donc être de permettre au Représentant de multiplier les demandes d’intervention et de participation [...] ralentissant ainsi la procédure”⁵⁵ is unfounded.

35. In these circumstances, the Third Issue is not an appealable issue.

d. The Fourth Issue

36. Regarding the Fourth Issue, the Legal Representative contends that it is a mere disagreement by the Defence with the Single Judge’s reading of rules 131(2) and 92(5) of the Rules of Procedure and Evidence similar to the one presented in the Second Issue. As pointed out by the Defence,⁵⁶ one Trial Chamber has ruled differently in another case. In these circumstances the Single Judge’s interpretation of said provisions cannot be said to amount to an improper exercise of his discretion,

⁵² See *supra* paras. 15-16.

⁵³ See the “Decision on the Modalities of Victim Participation at Trial”, *supra* note 43, para. 122; and the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012, para. 69.

⁵⁴ See *supra* note 14.

⁵⁵ See the Request, *supra* note 7, para. 52 and 50.

⁵⁶ *Idem* para. 30.

granting the intervention by the Appeals Chamber under article 82(1)(d) of the Rome Statute.⁵⁷

37. In this regard, the Legal Representative disagrees with the Defence's contention that rules 131(2) and 92(5) of the Rules of Procedure cannot reasonably be read to provide for the notification of confidential documents to the legal representative of victims without verifying first whether each of said documents affects the victims' personal interests.⁵⁸ These rules provide literally for access to the "victims or their legal representatives" of *all* documents filed in the record and the Single Judge has already lifted any confidentiality restrictions.⁵⁹

38. Moreover, the Defence argues that "[m]ême lorsque des Chambres ont accordé au Représentant un certain accès à des documents confidentiels du dossier, elles ne l'ont fait qu'au regard de l'intérêt personnel des victimes".⁶⁰ However, in the *Katanga and Ngudjolo* case Trial Chamber II granted the legal representative of victims access to the confidential case record without addressing the personal interests of the victims.

39. Trial Chamber II's approach was subsequently upheld by the Appeals Chamber who found that there was no reason to depart from the approach adopted at the trial stage. It therefore ruled that the legal representatives of victims shall continue to have access to all confidential documents in the appeal proceedings, with the exclusion of all those documents classified *ex parte*.⁶¹

40. Moreover, the Defence fails to demonstrate how and to which extent providing the Legal Representative with a general access to all confidential materials in the record could affect the rights of the Accused and/or the fairness and the

⁵⁷ See *supra* note 17.

⁵⁸ See the Request, *supra* note 7, para. 31-32.

⁵⁹ See *supra* paras. 23 and 28.

⁶⁰ See the Request, *supra* note 7, para. 30.

⁶¹ See the "Decision on the participation of victims in the appeal against Trial Chamber II's 'Jugement rendu en application de l'article 74 du Statut'" (Appeals Chamber), No. ICC-01/04-02/12-30 A, 6 March 2013, para. 7.

integrity of the proceedings. In this regard, the Legal Representative recalls that preventing her from having access to material of relevance for the proceedings, although confidential, could markedly undermine her ability to properly discharge her professional obligations⁶² under article 9(3) of the Code of Professional Conduct for Counsel.⁶³ Furthermore, the Legal Representative recalls, once again, that she is bound by confidentiality obligations under article 8(4) of said Code.

41. Finally, assuming *arguendo* that the Fourth Issue arises from the Decision, the Legal Representative submits that it is not an appealable issue under article 82(1)(d) of the Rome Statute because it may not “*significantly affect*” the fair and expeditious conduct of the proceedings.⁶⁴ Contrary to the Defence’s contention, the Decision only grants the Legal Representative with access to filings and materials in the case record according to the Defence’s classification thereof,⁶⁵ and not to “[t]ous les documents à la disposition des parties” and to “[l]’ensemble des éléments dont disposent les parties”.⁶⁶

42. In these circumstances, the Fourth Issue is not an appealable issue.

e. The Fifth Issue

43. Regarding the Fifth Issue, the Legal Representative contends that it is a mere disagreement by the Defence with the Single Judge’s ruling granting her access to the record and allowing access for individual victims on a case-by-case basis.⁶⁷ These findings cannot be said to amount to an improper exercise of discretion by the Single

⁶² See *mutatis mutandis* the “Decision on the defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest -and- Decision on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses” (Trial Chamber I), No. ICC-01/04-01/06-2340, 11 March 2010, paras. 38-40.

⁶³ See article 9(3) of the Code of Professional Conduct for Counsel, according to which “*counsel shall take steps necessary to ensure proper legal representation of the client according to the Statute and the Rules of Procedure and Evidence*”.

⁶⁴ See *supra* note 14.

⁶⁵ See the Decision, *supra* note 5, paras. 15 and 20.

⁶⁶ See the Request, *supra* note 7, paras. 49-50.

⁶⁷ *Idem*, para. 34.

Judge, justifying the intervention by the Appeals Chamber under article 82(1)(d) of the Rome Statute.⁶⁸

44. In this regard, the Legal Representative notes that other Trial Chambers already endorsed this distinction between legal representatives of victims and their clients when granting the former access to the documents in the record. In the *Bemba* case and in the *Ruto and Sang* case, the Trial Chambers adopted exactly the same approach as the one in the Decision, namely that the legal representatives of victims would have access to the documents filed in the record and would not communicate confidential information to their clients or anyone else not authorised to receive it without the permission of the Chamber.⁶⁹ Some Trial Chambers justified this approach in stating that, unlike the Defence's apparent confusion between the legal representatives and their clients,⁷⁰ the legal representatives are bound by confidentiality obligations which do not exist for participating victims.⁷¹ Against this background, the Defence's contention that "[l]es victimes auront eu accès à toutes les informations confidentielles dont dispose les parties pendant tout le procès"⁷² is totally unfounded.

f. The Sixth Issue

45. Regarding the Sixth Issue, the Legal Representative contends that it does not arise from the Decision. The Single Judge makes no reference at all to the fact the Legal Representative in this case is a Counsel from the Office of Public Counsel from Victims instead of "other" – as put by the Defence –⁷³ legal representative of victims. In these circumstances, it cannot even reach the level of speculation to argue that this

⁶⁸ See *supra* note 17.

⁶⁹ See the "Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings" (Trial Chamber III), No. ICC-01/05-01/08-807-Corr, 12 July 2010, para. 47; and the "Decision on victims' representation and participation", *supra* note 53, para. 69.

⁷⁰ See the Request, *supra* note 7, paras. 35-36.

⁷¹ See the "Decision on the Modalities of Victim Participation at Trial", *supra* note 43, para. 123.

⁷² See the Request, *supra* note 7, para. 57.

⁷³ *Idem*, para. 37.

eventuality constitutes a factor relevant to the Single Judge's findings. Accordingly, the Legal Representative submits that the Sixth Issue is not an appealable issue.

g. The Seventh Issue

46. Regarding the Seventh Issue, the Legal Representative contends that it does not arise from the Decision but from a misreading thereof by the Defence. The Single Judge does not grant the Legal Representative access to "*les documents que les parties désirent conserver par devers elles et ne pas divulguer*",⁷⁴ but only to those filed in the record.⁷⁵ Similarly, the Decision does not characterise the participating victims as "*parties à la procédure*",⁷⁶ but on the contrary notes that "*victims are not parties to the proceedings*".⁷⁷ Accordingly, the Legal Representative submits that the Seventh Issue is not an appealable issue.

h. The Eighth Issue

47. Regarding the Eighth Issue, the Legal Representative contends that it does not arise from the Decision but from a misreading thereof by the Defence. The Single Judge does not grant the Legal Representative an "*accès général et automatique*" to documents of the Accused without his consent.⁷⁸ The Decision expressly provides 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 of the Regulations and the relevant filing should be filed confidential and *ex parte*".⁷⁹

⁷⁴ *Ibid.*, para. 38.

⁷⁵ See the Decision, *supra* note 5, paras. 15 and 20.

⁷⁶ See the Request, *supra* note 7, paras. 38-39 and 48.

⁷⁷ See the Decision, *supra* note 5, para. 15.

⁷⁸ See the Request, *supra* note 7, para. 41.

⁷⁹ See the Decision, *supra* note 5, para. 15.

48. Moreover, the Legal Representative notes the arguments raised by the Defence against the disclosure to her of filing ICC-02/11-01/11-697-Conf,⁸⁰ and reiterates that an application for leave to appeal filed before a Pre-Trial or Trial Chamber must not enter into examining or considering arguments on the merits or the substance of an eventual appeal.⁸¹ In this regard, even assuming *arguendo* that the Eighth Issue arises from the Decision, the Legal Representative submits that it is not an appealable issue under article 82(1)(d) of the Rome Statute because it may not “*significantly affect*” the fair and expeditious conduct of the proceedings or the outcome of the trial.⁸² As noted in the Decision, much of the redacted medical information contained in filing ICC-02/11-01/11-697-Conf was already mentioned in public documents and the Legal Representative is bound by a duty of professional secrecy and confidentiality.⁸³ Consequently, the Legal Representative’s access to this document will not affect in a material way the development or the outcome of the proceedings.

49. In these circumstances, the Eighth Issue is not an appealable issue.

50. Finally, the Legal Representative wishes to recall her submissions in relation to the Defence’s request for suspensive effect of the Decision, filed on 28 January 2015.⁸⁴

⁸⁰ See the Request, *supra* note 7, paras. 45-47.

⁸¹ See *supra* paras. 15-16.

⁸² See *supra* note 14.

⁸³ See the Decision, *supra* note 5, paras. 21-22.

⁸⁴ See the “Réponse de la Représentante légale commun à la « Requête en suspension, à titre conservatoire, des effets de la décision du Juge unique du 19 janvier 2015 (ICC-02/11-01/11-749) autorisant le Greffe à transmettre au Représentant légal des victimes l’ensemble des documents portés au dossier de l’affaire ainsi que les documents Règle 77 non portés au dossier de l’affaire, le temps que la Chambre se prononce sur la demande d’autorisation d’interjeter appel de cette décision formulée par la Défense et, en cas d’autorisation, le temps de la procédure d’appel », No. ICC-02/11-01/11-754, 28 January 2015 (dated 27 January 2015).

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Trial Chamber to reject the Request *in limine*, or, in the alternative, to reject the Request as unfounded.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 30th day of January 2015

At The Hague, The Netherlands