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No.: ICC-02/11-01/11
Date: 8 December 2014

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Single Judge

SITUATION IN CÔTE D'IVOIRE

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

**Public Redacted Version of filing
ICC-02/11-01/11-728-Conf**

**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"***

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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Ms. Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
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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 “Order”).¹ The Single Judge ordered the Registry to notify the Common Legal Representative - by 21 November 2014 and unless the parties provide 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 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 the same day by e-mail, the Prosecution indicated that it does not oppose the Common Legal Representative’s access to documents emanating from the Prosecution and 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.²

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 (the “Order”).

² See the e-mail sent to the Chamber by the Senior Trial Lawyer on 20 November 2014 at 10.28 a.m..

3. On 5 December 2014, the Defence filed its public redacted version of 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” (the « Observations »), indicating that it agrees to the Common Legal Representative’s access only to documents ICC-02/11-01/11-683-Conf-AnxA, ICC-02/11-01/11-707-Conf and ICC-02/11-01/11-710-Conf.³

4. In accordance with regulation 24(2) of the Regulations of the Court, the Common Legal Representative hereby files her response to the Observations.

II. RESPONSE OF THE COMMON LEGAL REPRESENTATIVE

5. As a preliminary remark, the Common Legal Representative wishes to underline that the Defence cannot oppose the notification to her of documents emanating from the Office of the Prosecutor.⁴ Indeed, in accordance with regulation 23*bis* (1) of the Regulations of the Court it is for the relevant party or participant to choose the level of confidentiality of any document filed in the record of the situation/case and it is also for said party or participant to decide who should have access to said document. This principle has been upheld constantly in the practice of the Court.

6. In particular in the present case, the Single Judge of Pre-Trial Chamber I, in her decision on the participation of victims in the proceedings, already indicated that if the parties wish to notify the Common Legal Representative of their confidential

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”, 5 December 2014, No. ICC-02/11-01/11-725-Red (the “Observations”), pp. 10-11.

⁴ See the Pre-inspection report – Rule 77 Package 28, No. ICC-02/11-01/11-683-Conf-AnxB, 17 September 2014; the Disclosure note – PEXO Package 19, No. ICC-02/11-01/11-683-Conf-AnxC, 17 September 2014; and the Pre-inspection report – Rule 77 Package 29, No. ICC-02/11-01/11-694-Conf-AnxA, 10 October 2014.

documents they are free to do so.⁵ In this specific instance the Prosecution has indicated that it does not oppose the access of the Common Legal Representative to the documents emanating from it.⁶ Moreover, the Single Judge has already further assessed that said documents can be notified to the Common Legal Representative.

7. This is consistent with the past practice of the Court in the *Lubanga, Bemba, Ruto and Sang* and *Kenyatta* cases, where the Prosecution has made available to the Legal Representative of Victims potentially exonerating material disclosed to the Defence pursuant to article 67(2) of the Rome Statute and Prosecution evidence allowed for inspection by the Defence pursuant to rule 77 of the Rules of Procedure and Evidence.⁷

8. In the present case, the Single Judge of the Pre-Trial Chamber found that it could grant victims access to confidential material filed by the parties *proprio motu* or upon a request by the Common Legal Representative.⁸ On the basis of this finding, the Single Judge subsequently rejected the arguments of the Defence and ordered

⁵ 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, para. 56.

⁶ See *supra* note 2.

⁷ See for instance in the *Kenyatta* case, the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, para. 68; the “Prosecution’s Communication of the Disclosure of Incriminatory Evidence, of Potentially Exculpatory Evidence pursuant to Article 67(2) and of Rule 77 Materials to the Defence”, No. ICC-01/09-02/11-453, 18 July 2012; and the annexes to the “Prosecution’s Communication of the Disclosure of Potentially Exculpatory Evidence pursuant to Article 67(2) of the Rome Statute and Rule 77 Materials to the Defence”, No. ICC-01/09-02/11-435, 15 June 2012; in the *Ruto and Sang* case, “Prosecution’s Communication of the Disclosure of Potentially Exculpatory Evidence pursuant to Article 67(2) of the Rome Statute and Rule 77 Materials to the Defence”, No. ICC-01/09-01/11-431, 26 June 2012; the “Prosecution’s Communication of the Disclosure of Potentially Exculpatory Evidence pursuant to Article 67(2) and Rule 77 Materials to the Defence”, No. ICC-01/09-01/11-459, 2 October 2012; and in the *Bemba* case, “Prosecution’s Communication of Rule 77 Evidence”, No. ICC-01/05-01/08-3108, 22 July 2014. Moreover, in the *Lubanga* case, the Legal Representatives have been systematically notified of PEXO and Rule 77 material at trial. Said material is available to the relevant Common Legal Representatives (including the OPCV) via Ringtail in all the above mentioned cases.

⁸ See the “Decision on Victims’ Participation and Victims’ Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings”, *supra* note 5, para. 57.

that the redacted list of evidence filed by the Defence in the record of the case be communicated to the Common Legal Representative.⁹

9. The basis of the abovementioned decisions was that the lists of evidence and/or the evidence at hand could be of assistance to the Common Legal Representative in following the discussions during the hearings,¹⁰ and that the *inter partes* nature of the disclosure between the parties was, as such, an insufficient reason not to make available said material to the Common Legal Representative.¹¹

10. In fact, contrary to the Defence's arguments,¹² the victims participating in this case are not "third parties" ("*des tiers*"), but individuals entitled to present their views and concerns during the proceedings,¹³ with the authorisation of the Chamber and subject to the conditions laid down in the legal texts of the Court.

11. Accordingly, the Common Legal Representative sees no reason why she may not have access to the information on witness [REDACTED] collected by the Defence and contained in the "Observations de la Défense concernant l'ordre du jour de la conférence de mise en état prévue le 4 novembre 2014".¹⁴ The Defence's argument that sharing said material with her "*pourrait mettre en péril les enquêtes de la Défense en*

⁹ See the "Decision on the OPCV's 'Requests to receive information and access documents for the effective participation of victims at the confirmation of charges hearing'" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-01/11-400, 13 February 2013, paras. 15 and 19. See also the "Second decision on OPCV requests in relation to the Defence disclosure and list of evidence" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-170, 25 September 2014, p. 5.

¹⁰ See the "Decision on the OPCV's 'Requests to receive information and access documents for the effective participation of victims at the confirmation of charges hearing'", *supra* note 9, para. 20.

¹¹ See the "Decision on OPCV requests in relation to the Defence disclosure and list of evidence" (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-167, 24 September 2014, para. 11.

¹² See the Observations, *supra* note 3, paras. 6, 10, 17 and 27.

¹³ See the "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings" (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA21, 14 December 2012, para. 67.

¹⁴ See the "Observations de la Défense concernant l'ordre du jour de la conférence de mise en état prévue le 4 novembre 2014", No. ICC-02/11-01/11-709-Red2, 27 October 2014.

cours”¹⁵ lacks any basis. The Prosecution has already shared with the Common Legal Representative its confidential material related to witness [REDACTED],¹⁶ and the Common Legal Representative is bound by the duty of professional secrecy and confidentiality in accordance with the Code of Professional Conduct for Counsel.¹⁷

12. As regards the confidential version of the “Requête urgente, fondée sur des circonstances humanitaires exceptionnelles, déposée afin que le Président Gbagbo soit autorisé à se recueillir devant la dépouille de sa mère et à assister à son enterrement” and its Annex,¹⁸ the Common Legal Representative submits that the Defence does not provide any factual and legal basis pursuant to regulation 23*bis* of the Regulations of the Court, as requested by the Single Judge in his Order, to justify the maintain of the confidentiality of said documents *vis-à-vis* her.

13. In relation to the abovementioned filing, the Defence only mentions that some redactions contained therein refer to information on [REDACTED]¹⁹ [REDACTED], and argues that such information is to be withheld from the participants without providing further reasons and despite the fact that [REDACTED] is an issue relevant to the interests of victims participating in these proceedings.

14. Furthermore, the Defence’s arguments that access by the Common Legal Representative to [REDACTED] is in theory of “no interest” for her²⁰ equally lacks any factual or legal basis pursuant to regulation 23*bis* which would justify the withheld of said information *vis-à-vis* the Common Legal Representative.

¹⁵ See the Observations, *supra* note 3, para. 27.

¹⁶ See [REDACTED].

¹⁷ See Code of Professional Conduct for Counsel, articles 1 and 8.

¹⁸ See the “Requête urgente, fondée sur des circonstances humanitaires exceptionnelles, déposée afin que le Président Gbagbo soit autorisé à se recueillir devant la dépouille de sa mère et à assister à son enterrement”, Nos. ICC-02/11-01/11-697-Red-Conf and ICC-02/11-01/11-697-Red-Conf-Anx, 22 October 2014.

¹⁹ See the Observations, *supra* note 3, [REDACTED].

²⁰ *Idem*, para. 23.

15. Moreover, the Common Legal Representative submits that the Defence's opposition to the notification of the abovementioned filing is apparently inconsistent with its agreement to grant access to the related "Demande d'autorisation aux fins de pouvoir répliquer aux « observations de la République de la Côte d'Ivoire sur la requête urgente, fondée sur des circonstances humanitaires exceptionnelles, déposée afin que le Président Gbagbo soit autorisé à se recueillir devant la dépouille de sa mère et à assister à son enterrement » (ICC-02/11-01/11-704-Conf-Anx3)". Again, the Defence fails to indicate the reasons why the classification of the former document should be different from that of the latter. As such, the Defence fails to meet the requirements of paragraph 2 of regulation 23*bis* of the Regulations of the Court.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Single Judge to

- reject the Defence's Observations and to maintain his Order.



Paolina Massidda
Principal Counsel

Dated this 8th day of December 2014

At The Hague, The Netherlands