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No.: ICC-02/11-02/11
Date: 23 September 2014

PRE-TRIAL CHAMBER I

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Ekaterina Trendafilova
Judge Christine Van de Wyngaert

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
THE PROSECUTOR *v.* CHARLES BLÉ GOUDÉ**

Public Document

Request for leave to respond to the “*Demande d’intervention en vertu de la Règle 103 du Règlement de Procédure et de Preuve, portant sur la préservation du caractère confidentiel d’éléments de preuve émanant de la Défense du Président Gbagbo*”

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 22 March 2014, Mr. Blé Goudé was surrendered to the Court.
2. On 11 June 2014, the Single Judge of Pre-Trial Chamber I (the “Chamber”) decided to admit 199 applicants as victims at the confirmation of charges hearing and in the related proceedings, appointed the Office of Public Counsel for Victims (the “OPCV” or the “Office”) as the Common Legal Representative of said victims, and specified the manner of their participation in the proceedings.¹
3. On 1 August 2014, the Chamber decided to admit further 271 applicants as victims at the confirmation of charges hearing and in the related proceedings, confirmed the appointment of the OPCV as the Common Legal Representative of said victims, and specified the manner of their participation in the proceedings.²
4. On 1 September 2014, the Chamber decided to postpone the confirmation of charges hearing to 29 September 2014.³
5. On 15 September 2014, the Common Legal Representative filed her “Submissions of the Common Legal Representative of Victims on the Notice of Alibi (ICC-02/11-02/11-146) and the Defence Communication of Evidence (ICC-02/11-02/11-152 and ICC-02/11-02/11-153)” (the “Common Legal Representative’s Submissions”),⁴ requesting *inter alia* access to certain documents filed in the record of the case by the Defence of Mr. Blé Goudé.

¹ See the “Decision on victims’ participation in the pre-trial proceedings and related issues” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-83, 11 June 2014, pp. 19-21.

² See the “Second Decision on victims’ participation in the pre-trial proceedings and related issues” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-111, 1 August 2014, pp. 13-15.

³ See the “Decision on the “Defence request for a variation of a time limit”” (Pre-Trial Chamber I, Single Judge), No. ICC-02/11-02/11-139, 1 September 2014.

⁴ See the “Submissions of the Common Legal Representative of Victims on the Notice of Alibi (ICC-02/11-02/11-146) and the Defence Communication of Evidence (ICC-02/11-02/11-152 and ICC-02/11-02/11-153)”, No. ICC-02/11-02/11-155, 18 September 2014 (the “Common Legal Representative’s Submissions”).

6. On 22 September 2014, the Defence for Mr. Laurent Gbagbo (the “Applicant”) filed a request to appear *as amicus curiae* in relation to the issue of access by the Common Legal Representative to confidential documents filed by said Defence (the “Request”).⁵

7. The Common Legal Representatives considers that no confidential information is contained in the present submission and therefore she files it as public document.

II. REQUEST FOR LEAVE TO RESPOND TO THE REQUEST FILED BY THE GBAGBO DEFENCE

8. Pursuant to rule 103 of the Rules of Procedure and Evidence,⁶ and unless the Chamber decides to reject the Request without the need for further consideration, the Common Legal Representative hereby requests leave to respond to the Request.

9. The victims authorised to participate in the proceedings have an interest in expressing their views and concerns on the relevance of the Request because of the potential effect thereof on the expeditiousness of the proceedings in the case concerning Mr. Blé Goudé. Moreover, the Request touches upon a submission made by the Common Legal Representative and elaborates on the communication between the latter and Mr. Blé Goudé’s Defence team.

⁵ See the “Demande d’intervention en vertu de la Règle 103 du Règlement de Procédure et de Preuve, portant sur la préservation du caractère confidentiel d’éléments de preuve émanant de la Défense du Président Gbagbo”, No. ICC-02/11-02/11-163-Red, 22 September 2014 (the “Request”).

⁶ See the “Reasons for ‘Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply’” (Appeals Chamber), No. ICC-02/05-01/09-51 OA, 9 November 2009, par. 8; the “Decision on the application of 14 September 2009 for participation as an *amicus curiae*” (Appeals Chamber), No. ICC-01/05-01/08-602 OA2, 9 November 2009, par. 7; the “Decision on the Application to Appear as *Amicus Curiae* and Related Requests” (Pre-Trial Chamber II), No. ICC-01/09-14, 3 February 2010, par. 9; and the “Decision on ‘Request for leave to submit amicus curiae observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence’” (Pre-Trial Chamber I), No. ICC-02/11-01/12-25, 17 December 2013, par. 11.

10. Should the Chamber grant her leave to respond, the Common Legal Representative will oppose the Request on the basis that it does not fulfil the requirements set in rule 103 of the Rules of Procedure and Evidence. Moreover, the Applicant has no knowledge of the disclosure in the case against Mr. Blé Goudé and therefore it is not in the position of providing any observations on the matter. Finally, the Applicant having an interest in the issue at stake, he cannot provide independent observations on the matter, as required from an *amicus curiae*.

11. The Common Legal Representative understands the Applicant's interest in ensuring the confidentiality of the Defence's evidence in the case against Mr. Gbagbo. However, the Common Legal Representative contends that said interest alone is irrelevant and insufficient to grant a request under rule 103 of the Rules of Procedure and Evidence to submit *amicus curiae* observations in the case against Mr. Blé Goudé.

12. In particular, the Common Legal Representative wishes to note that the Applicant has directly submitted its views as *amicus curiae* without previously obtaining leave to do so pursuant to rule 103 of the Rules of Procedure and Evidence, and does not justify the need to submit his views together with the Request. The Appeals Chamber has dismissed submissions *in limine* of this type under rule 103 of the Rules of Procedure and Evidence, noting that "*requests for leave pursuant to rule 103 of the Rules of Procedure and Evidence should not include the substance of the proposed observations and that the submission of observations is only permissible after a Chamber has either invited or granted leave to an individual, organisation, or state to make such a submission*".⁷

⁷ See "Decision on the application by Child Soldiers International for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence" (Appeals Chamber), No. ICC-01/04-01/06-3044 A4 A5 A6, 16 August 2013, par. 9. See also the "Decision on the application of 14 September 2009 for participation as an *amicus curiae*" (Appeals Chamber), No. ICC-01/05-01/08-602 OA2, 9 November 2009, par. 9.

13. Moreover, the different Chambers of the Court have consistently considered whether those applying for leave to submit observations as *amici curiae* under rule 103 of the Rules of Procedure and Evidence satisfy the relevant Chamber that they have expertise on the topic(s) they seek to address as *amici curiae*.⁸

14. Otherwise, it would be impossible to determine to what extent their submissions will assist the Court regarding the specific matter(s) on which a Chamber must rule. This requirement stems from the *rationale* for admitting *amici curiae* in the proceedings, namely “to have the opportunity to get experts’ information on relevant issues of legal interest for the proceedings”.⁹

15. Specific expertise from those requesting leave to submit observations as *amici curiae* has not only been consistently required by the Court,¹⁰ but also by other international tribunals dealing with requests to submit *amicus curiae* observations.¹¹

⁸ See the “Decision on the ‘Request by Ms. Moraa Gesicho to Appear as Amicus Curiae’” (Pre-Trial Chamber II), No. ICC-01/09-02/11-54, 12 April 2011, par. 15; the “Decision on the ‘Request for leave to submit *Amicus Curiae* Observations on behalf of the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence’” (Pre-Trial Chamber II), No. ICC-01/09-02/11-87, 11 May 2011, par. 8; the “Decision on the ‘Request for leave to submit *Amicus Curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence’” (Pre-Trial Chamber II), No. ICC-01/09-02/11-118, 13 June 2011, par. 7; the “Decision on the ‘Application by Redress Trust for Leave to Submit Observations to Pre-Trial Chamber III of the International Criminal Court Pursuant to Rule 103 of the Rules of Procedure and Evidence’” (Pre-Trial Chamber III), No. ICC-02/11-01/11-50, 8 March 2012, paras. 5 and 7; and the “Decision on the application by Child Soldiers International for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence” (Appeals Chamber), No. ICC-01/04-01/06-3044 A4 A5 A6, 16 August 2013, par. 11. See also the “Decision on responses to observations submitted under Rule 103” (Pre-Trial Chamber II), No. ICC-02/04-01/05-357, 21 November 2008 (notified on 24 November 2008), paras. 16-18.

⁹ See the “Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence” (Pre-Trial Chamber I), No. ICC-01/04-373, 17 August 2007 (notified on 20 August 2007), par. 4.

¹⁰ See *supra* note 8.

¹¹ See ICTR, *The Prosecutor v. Gatete*, Case No. ICTR-2001-61-11bis, “Decision on *Amicus Curiae* Requests (IBUKA, AVEGA and ICDA)”, 30 June 2008, par. 4; and ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-01-67-R11bis, “Decision on the International Criminal Defence Attorneys Association for Leave to Appear as *Amicus Curiae* and Invitation to the Republic of Rwanda to File Submissions”, 18 February 2011, par. 5. See also International Centre for Settlement of Investment Disputes, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Case No. ARB/05/22, “Procedural Order No. 5”, 2 February 2007, par. 50(a). This document is available at the following address:
https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1584_En&caseId=C67.

16. In this regard, the Common Legal Representative notes that the Request identifies as reasons for intervention *“une question qui touche à la sécurité des témoins de la Défense du Président Gbagbo”*,¹² and because arguably *“prendre en compte les arguments présentés par la Défense du Président Gbagbo permettra à la Chambre préliminaire de mettre en conformité sa décision avec sa propre jurisprudence et donc d’assurer le respect de l’autorité de la chose jugée”*.¹³

17. However, the Request does not elaborate on how the disclosure of the information addressed in the Common Legal Representative’s Submissions would jeopardise the security of any witness. The Common Legal Representative submits that it is on the Applicant to explain and justify this contention.

18. Similarly, the Request does not elaborate on how a positive answer to the Common Legal Representative’s Submissions would be contrary to the *“chose jugée”* or *“adjudicated facts”*. In this regard, the Common Legal Representative submits that the notion of *“adjudicated facts”* is only applicable *“if the fact is determined in a final judgment”*,¹⁴ and said facts would be binding only on the Chamber that issued the decision at hand,¹⁵ which is not the case here. In fact, there is no provision in the Rome Statute or the Rules of Procedure and Evidence limiting the discretion of a Chamber in the management of its proceedings,¹⁶ and even reconsideration of their substantive decisions has been found to be possible in certain circumstances.¹⁷

¹² See the Request, *supra* note 5, par. 26.

¹³ *Idem*, par. 28.

¹⁴ See ICTR, *Setako v. The Prosecutor*, Case No. ICTR-04-81-A, “Judgement”, 28 September 2011, par. 200.

¹⁵ See ICTY, *The Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-A, “Judgement”, 4 December 2012, par. 261.

¹⁶ Cf. ICTY, *The Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, “Judgement”, 23 January 2014, par. 29 (*“Trial chambers enjoy considerable discretion in relation to the management of the proceedings before them”*).

¹⁷ 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, par. 15; and 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, par. 6.

19. In short, the Common Legal Representative is of the view that none of the arguments referred to in the Request is relevant to rule on whether the Applicant has the required expertise to serve as *amicus curiae* in the proceedings concerning Mr. Blé Goudé, and whether said expertise is necessary to resolve any particular topic in said proceedings.

20. Finally, the Common Legal Representative further submits that accepting for the sake of argument that no “impartiality” is required from an *amicus curiae*,¹⁸ it is obvious that the Applicant cannot be a “friend of the court” if he cannot be perceived as independent from the parties and participants in the case.

21. The *ad hoc* tribunals have clarified that *amici curiae* must not be “linked” or “affiliated” with any party to the case,¹⁹ and are required not to “repeat[s] the task undertaken by the [...] Chamber and the parties in their submissions”.²⁰ The only exception to this approach concerns accused persons exercising their right to self-representation. In those cases, the *ad hoc* tribunals have allowed the *amicus curiae* to argue in favour of the interests of a particular party,²¹ turning the *amicus* in those

¹⁸ See ICTY, *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, “Decision on Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, Separate Opinion of Judge Shahabuddeen”, par. 15 (“an *amicus curiae* is limited to his essential function as a friend of the court, as distinguished from being a friend of the accused”); and ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-2005-87-I, “Decision on the *Amicus Curiae* Request of the Defence of Gaspard Kanyarukiga”, 14 September 2007, par. 6 (“the role of an *amicus curiae* is not to defend any interests other than to assist the Chamber for the proper determination of a case. This implies that the *amicus curiae* is not a party to the trial and should therefore remain impartial”). See also ICTR, *The Prosecutor v. Munyazaki*, Case No. ICTR-1997-36-I, “Decision on the Motion by ADAD (The Organization of ICTR Defence Counsel) for Leave to Appear as *Amicus Curiae*”, 13 December 2007, par. 16.

¹⁹ See ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-2001-67-I, “Decision on the Request for Permission to File an *Amicus Curiae* Brief, International Criminal Defence Attorneys Association (ICDAA) Concerning the Prosecutor’s Request for Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 *Bis* of the Rules”, 6 December 2007, par. 14; ICTR, *The Prosecutor v. Gatete*, *supra* note 11, par. 6; and ICTR, *The Prosecutor v. Kayishema*, *supra* note 11, par. 5.

²⁰ See ICTY, *The Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, “Decision on Application and Proposed *Amicus Curiae* Brief”, 14 February 2012, par. 11. See also ICTY, *The Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, “Decision on Application for Leave to Submit an *Amicus Curiae* Brief”, 21 September 2012, p. 3.

²¹ See ICTY, *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, “Order for Further Instruction to the *Amici Curiae*”, 6 October 2003; ICTY, *The Prosecutor v. Krajišnik*, Case No. IT-00-39-A, “Decision on

cases into an “*uninstructed de facto defence counsel*”.²² However, even in these cases, the *ad hoc* tribunals have clarified that “[t]he amici do not act as representatives of the Accused at trial, but solely as assistants to the Trial Chamber”.²³

22. Other international institutions have similarly ruled that *amici curiae* must be truly independent from the parties in the case at hand.²⁴

23. Most importantly, the independence of the *amicus curiae* has also been taken into account by the Court. Chambers have consistently considered whether those applying for leave to submit *amicus curiae* observations are independent from the parties and/or participants in the relevant proceedings.²⁵

24. By contrast, the Request expressly and impliedly indicates that the Applicant’s interests in the resolution of the alleged issues at stake relate to Mr. Gbagbo’s interests. Indeed, the Request refers to the Applicant’s close interests in the case against Mr. Blé Goudé, noting for instance that “[i]l est donc possible que la

Momčilo Krajišnik’s Request to Self-Represent, on Counsel’s Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007”, 11 May 2007, paras. 17-19.

²² See BOAS (G.), *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*, Cambridge, 2007, p. 254.

²³ See ICTY, *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, “Decision on Interlocutory Appeal by the *Amici Curiae* against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case”, 20 January 2004, par. 4. See also ICTY, *The Prosecutor v. Krajišnik*, Case No. IT-00-39-A, “Decision on Motion of *Amicus Curiae* Regarding Appellate Ground of Ineffective Assistance of Counsel”, 20 July 2007, par. 8.

²⁴ See International Centre for Settlement of Investment Disputes, Case No. ARB/03/17, *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, “Order in Response to a Petition for Participation as *Amicus Curiae*”, 17 March 2006, paras. 23 and 32. This document is available at the following address: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC512_En&caseId=C18. See also International Centre for Settlement of Investment Disputes, Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentina*, “Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission”, 12 February 2007, paras. 13, 15 and 16. This document is available at the following address: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC519_En&caseId=C19.

²⁵ See the “Decision on the Applications of Mishana Hosseinioun and Aisha Gaddafi to submit *Amicus Curiae* observations to the Chamber” (Pre-Trial Chamber I), No. ICC-01/11-01/11-49, 2 February 2012, p. 5; and the “Decision on the ‘Application by Lawyers for Justice in Libya and the Redress Trust for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-153, 18 May 2012 (notified on 21 May 2012), paras. 4 and 6.

Représentante, ayant accès aux divulgations du Procureur, considère que, puisque des éléments confidentiels émanant de la Défense du Président Gbagbo ont été divulgués par le Procureur dans l'affaire Blé Goudé, elle y aurait accès",²⁶ and that "[l]e problème est le suivant : [...] une pièce classée confidentielle par la Défense du Président Gbagbo peut-elle se trouver dans la catégorie PEXO ou Règle 77 des pièces divulguées par le Procureur à la Défense de Blé Goudé".²⁷

25. As a consequence, the Applicant cannot be said to be an "*independent and impartial intervener*" in Mr. Blé Goudé's proceedings, as required by the jurisprudence of the Court.²⁸

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber to grant her leave to respond to the Request filed by the Defence of Mr. Laurent Gbagbo, in case the Chamber will not dismiss said Request *in limine*.



Paolina Massidda
Principal Counsel

Dated this 23rd of September 2014

At The Hague, The Netherlands

²⁶ See the Request, *supra* note 5, par. 13.

²⁷ *Idem*, par. 14.3.

²⁸ See the "Decision on Application for Leave to Submit Amicus Curiae Observations" (Pre-Trial Chamber II), No. ICC-01/09-35, 18 January 2011, par. 6.